GILBERT
+TOBIN

DOING BUSINESS IN AUSTRALIA

2020

GTLAW.COM.AU

CONTENTS

Doing Business in Australia answers some of the most common questions an overseas investor may ask when establishing a business presence in Australia. It aims to provide an introduction to the laws of Australia for overseas legal practitioners.

This guide is current as at May 2020.

GILBERT +TOBIN

GILBERT +TOBIN

ABOUT GILBERT + TOBIN

Gilbert + Tobin is a tier one Australian corporate law firm. Since our inception in 1988, the firm has expanded to provide a full service legal offering to corporates and governments throughout Australia, and around the world. We are renowned for our top talent, progressive approach to legal issues and client service.

- **2021 Best Lawyers Australia:** Gilbert + Tobin was named 'Law Firm of the Year' for Corporate Law in the 2021 edition of Best Lawyers. This follows on from Gilbert + Tobin being named 'Law Firm of the Year' for Corporate Law and for Private Equity Law in the 2020 edition of Best Lawyers.

  75 partners are recognised by Best Lawyers, representing over 88% of the partnership acknowledged as leading in their areas of expertise. Among these, eight partners are named as Best Lawyers '2020 Lawyer of the Year', including three M&A/Corporate Advisory partners.

- **2020 Chambers & Partners:** 38 partners are recognised by Chambers in 21 areas of law. We are ranked Band 1 in Corporate/M&A, Equity Capital Markets, Private Equity, Competition & Antitrust, Acquisition Finance, Charities, TMT and Fintech.

- **2020 Beaton Client Choice Awards:** Gilbert + Tobin was named:
  - Most Innovative Firm
  - Best Law & Related Services Firm
  - Best provider to Mining, Oil & Gas

- **2019 Australasian Law Awards:** Gilbert + Tobin was named 'Law Firm of the Year' (101-500 lawyers).

- **2019 Mergermarket Australia M&A Awards:**
  - Private Equity Legal Adviser of the Year
  - M&A Legal Adviser of the Year (Business Services)
  - M&A Legal Adviser of the Year (Consumer)

- **2019 Client Choice Awards:** Gilbert + Tobin was named Most Innovative Firm at the AFR Client Choice Awards 2019.

Our principal areas of practice are: Corporate Advisory (Funds, M&A, Private Equity, Capital Markets, Income Tax, GST and Stamp Duty), Banking + Finance, Technology + Digital, Energy + Resources, IP, Disputes + Investigations, Real Estate + Projects and Competition + Regulation.

ABOUT THIS GUIDE

This guide is divided into three main areas:

+ Section 1 provides an overview of Australia's government, legal system and important regulatory bodies.
+ Sections 2, 3 and 4 answer some of the threshold questions an investor faces in considering how to enter the Australian market, such as:
  - whether foreign investment approval is required or recommended for the particular investment;
  - if the investment relates to the establishment of a new business, whether that business should be set up as a branch office or a subsidiary of the parent company; and
  - if the investment relates to the acquisition of an existing business, whether takeover laws will apply.
+ Sections 5-20 provide a summary of some of the important rules and regulations governing an investor's day-to-day business activities in Australia.

PLEASE NOTE

Unless otherwise indicated, a reference to a "section" is a reference to a section of this guide.

A glossary at the end of this guide sets out a list of all regulatory authorities and legislation referred to in this guide.

All dollar amounts are in Australian dollars.

As with other guides of this type, the information provided is of a general nature and is meant to aid the reader in identifying issues for which additional expertise must be sought. It is not a substitute for obtaining more detailed advice and it does not take into account the particular circumstances of the reader.

1. OVERVIEW OF AUSTRALIA'S GOVERNMENTS, LEGAL SYSTEM AND REGULATORY BODIES

1.1 AUSTRALIA'S GOVERNMENTS AND LEGAL SYSTEM

Australia (also known as the Commonwealth of Australia) is a federation formed in 1901 with six states (New South Wales, Victoria, Queensland, South Australia, Western Australia and Tasmania), two territories (Northern Territory and Australian Capital Territory) and a number of small external territories. Australia inherited its system of government from England, based on the Westminster parliamentary model.

Australia has three levels of government – federal, state or territory and local (shown in the diagram below). Foreign companies doing business in Australia must comply with laws made by all three levels of government. A business operating in a number of states and territories also needs to be aware that applicable state/territory laws can be different from each other, so the business may have to comply with different arrangements in different states or territories.

The three levels of government and their responsibilities

FEDERAL

The Commonwealth Parliament derives its powers from the Australian Constitution. Its responsibilities are limited to specific subject areas (although these are still very broad).

Federal laws prevail over state and local laws to the extent of any inconsistency.

The Commonwealth Parliament also has the power to make laws (or override territory laws) in respect of the Northern Territory and the Australian Capital Territory.

- Corporations Act
- Antitrust / Competition
- Income Tax
- Banking
- Employment
- Climate / Environment
- Insurance
- Foreign Investment Approvals
- Immigration
- Infrastructure
- Goods and Services Tax
- Education
- Financial Services
- Health
- Intellectual Property

STATE

State and territory parliaments have the power to pass laws for any purpose, except for certain purposes that have been specifically reserved for the Commonwealth Parliament under the Australian Constitution or referred by each of the states to the Commonwealth Parliament.

Although there is broad similarity among some state and territory laws covering the same subject matter, there can be important differences which affect the ease and cost of doing business across many states and territories.

- Stamp Duty
- Payroll Tax
- Land Tax
- Energy
- Mining
- Competitions
- Planning
- Health
- Education
- Infrastructure
- Transfer of Land
- Employment / OH&S

LOCAL

Local governments are in charge of "local" issues. Their powers are usually limited and are primarily focused on providing services for local residents and businesses.

- Building Approvals
- Planning
- Local Roads
- Local Services (parks, libraries)

1.2 IMPORTANT REGULATORY BODIES

Some of the important regulatory bodies in Australia are:

- the Australian Securities and Investments Commission (**ASIC**) which administers the *Corporations Act 2001* (Cth) (**Corporations Act**) and its regulations;
- the Australian Competition and Consumer Commission (**ACCC**) which monitors competition, fair trading and consumer protection issues. It principally administers the *Competition and Consumer Act 2010* (Cth) (**CCA**) which covers, among other things, anti-competitive practices, merger clearances, consumer protection and product safety and liability;
- the Australian Taxation Office (**ATO**) which is the statutory authority responsible for administering the Australian federal tax system. It administers the process of annual self-assessment of income tax and GST and conducts reviews and audits. It is also responsible for the tax aspects and regulation of Australia's superannuation system;
- the Australian Securities Exchange (**ASX**) supports equities, derivatives and enterprise trading markets. It applies the ASX Listing Rules and ensures companies comply with certain disclosure and market awareness obligations; and
- the Australian Prudential Regulation Authority (**APRA**) is a statutory authority to promote prudent management of financial institutions. It regulates banks, life insurance companies, building societies, credit unions, friendly societies and superannuation funds.

CONTRIBUTOR

DEBORAH JOHNS
PARTNER
CORPORATE ADVISORY
T +61 2 9263 4120
E djohns@gtlaw.com.au

2. FOREIGN INVESTMENT REVIEW

2.1 INTRODUCTION

Australia generally welcomes foreign investment. The Australian Government screens foreign investment proposals on a case-by-case basis to determine whether a particular proposal is contrary to the national interest. The kinds of proposals examined include both business investment proposals across all sectors of the economy and investment in land, in each case subject to materiality thresholds. Offshore proposals can be captured, so it is important to consider Australian regulatory requirements whenever a target has an Australian connection.

2.2 WHO IS REGULATED

The legislation regulates foreign investment proposals by a 'foreign person'. A foreign person means:

+ an individual not ordinarily resident in Australia;
+ a corporation in which:
  - an individual not ordinarily resident in Australia, a foreign corporation or a foreign government holds an aggregate substantial interest; or
  - 2 or more persons, each of whom is an individual not ordinarily resident in Australia, a foreign corporation or a foreign government, hold an aggregate substantial interest;
+ the trustee of a trust in which:
  - an individual not ordinarily resident in Australia, a foreign corporation or a foreign government holds a substantial interest;
  - 2 or more persons, each of whom is an individual not ordinarily resident in Australia, a foreign corporation or a foreign government, hold an aggregate substantial interest;
+ the general partner of a limited partnership in which:
  - an individual not ordinarily resident in Australia, a foreign corporation or a foreign government holds an interest of 20% or more; or
  - 2 or more persons, each of whom is an individual not ordinarily resident in Australia, a foreign corporation or a foreign government, hold an interest of 40% or more; or
+ a foreign government or foreign government investor.

A substantial interest is generally an interest of 20% or more, and an aggregate substantial interest is generally an interest of 40% or more. An interest of a specified percentage looks at ownership of shares, control of voting power and ownership or control that would exist if rights like options were exercised - there are also financing roles which apply to deem a person to hold an interest of a specified percentage.

2.3 KEY LEGISLATION

The main laws that regulate foreign investment in Australia are:

+ the *Foreign Acquisitions and Takeovers Act 1975* (Cth) (**FATA**) and the *Foreign Acquisition and Takeovers Regulation 2015* (Cth) (**FATR**) – together these give the Australian Treasurer the power to review foreign investment proposals that meet certain criteria and to block such proposals, or apply conditions to the way such proposals are implemented, to ensure they are not contrary to the national interest; and
+ the *Foreign Acquisitions and Takeovers Fees Imposition Act 2015* (Cth) and its associated regulations – these set the fees for the various kinds of applications that may be made.

Separate legislation imposes other requirements in respect of foreign ownership in certain industries– for example:

+ the *Register of Foreign Ownership of Agricultural Land Act 2015* (Cth) requires foreign persons to register their ownership of agricultural land;
+ the *Banking Act 1959* (Cth), the *Financial Sector (Shareholdings) Act 1998* (Cth) and banking policy regulate foreign ownership in the banking sector;
+ the *Air Navigation Act 1920* (Cth) and *Qantas Sale Act 1992* (Cth) limit aggregate foreign ownership in an Australian international airline (including Qantas) to 49%;
+ the *Airports Act 1996* (Cth) limits foreign ownership of some airports to 49%, airline ownership in airports to 5% and cross ownership between Sydney airport (together with Sydney West) and any of 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
+ aggregate foreign ownership of Telstra is limited to 35% and individual foreign investors are only allowed to own up to 5%.

2.4 TYPES OF TRANSACTIONS THAT ARE REGULATED

Under FATA, a "significant action" is the universe of transactions over which the Treasurer has power to make orders if she or he determines the action is contrary to the national interest. Notifying a significant action and obtaining a notice of no objection cuts off this power.

A notifiable action is a subset of significant actions which must be notified to the Treasurer. Failure to notify is an offence under the law. Notifiable actions include:

+ the acquisition by a foreign person of a substantial interest an Australian company or unit trust valued above the then current monetary thresholds;
+ the acquisition by a foreign person of an interest in Australian land valued above the then current monetary thresholds;
+ the acquisition by a foreign person of an interest of 10% or more (and in some cases interests below 10%) in an Australian company or unit trust or Australian business that is an agribusiness, where the value of the acquirer's past and current investments in the target exceed the then current monetary thresholds;
+ the acquisition by a foreign person of an interest of 5% or more in a company, unit trust or business that wholly or partly carries on an Australian media business, regardless of value; and
+ certain acquisitions by foreign government investors, as described below.

Aside from the notifiable actions described above, significant actions include change of control transactions in relation to Australian entities and businesses valued above the then current monetary thresholds, where the relevant Australian assets are offshore transactions.

From a practical perspective, the most important transactions that are captured as significant (but not notifiable) actions are asset deals and many offshore transactions (not involving foreign government investors) where the value of the Australian business is in excess of relevant monetary thresholds.

2.5 THRESHOLDS

As a result of temporary measures enacted on 29 March 2020, all monetary thresholds have been reduced to $0. These measures are expected to remain in place until at least January 2021.

2.6 SPECIAL RULES FOR FOREIGN GOVERNMENT INVESTORS

Australia scrutinises a broader range of investments by "foreign government investors" than it does investments by other foreign persons.

A "foreign government investor" includes:

+ a foreign government;
+ an individual, corporation or corporation sole that is an agency or instrumentality of a foreign country but is not part of the body politic of that foreign country (referred to below as a "separate government entity");
+ a corporation, trustee of a trust or general partner of a limited partnership in which (1) a foreign government, separate government entities or foreign government investors from one country hold a 20% or more interest, or (2) foreign governments, separate government entities or foreign government investors from multiple countries hold a 40% or more interest.

The definition of foreign government investor captures not only state-owned enterprises and sovereign wealth funds, but also things like public sector pension funds, the investment funds into which state-owned enterprises, sovereign wealth funds and public sector pension funds invest and, due to tracing rules, portfolio companies for such investment funds.

The following transactions by foreign government investors are "notifiable actions":

+ the acquisition of an interest of 10% or more (and in some cases interests below 10%) in any Australian company, unit trust or business (including offshore businesses that have an Australian nexus);
+ the acquisition of an interest in Australian land, regardless of value;
+ the starting of an Australian business; and
+ acquiring a legal or equitable interest in a tenement (including tenements that would not be classified as land) or an interest of at least 10% in securities in an entity where the value of the tenements exceeds 50% of the total asset value of the entity.

These are subject to very limited exemptions.

2.7 NATIONAL INTEREST TEST

In determining whether a foreign investment proposal is contrary to the national interest, the Australian Government is able to examine any factors that it considers appropriate. Typically, these factors include the impact of the foreign investment proposal on: national security, competition (noting that this is a different test to the test applied by the Australian Competition and Consumer Commission in examining merger clearances), the economy and the community (such as the investor's plans to restructure the business in Australia after the acquisition) and other government policies such as tax and the environment, as well as the character of the investor.

Some kinds of foreign investment proposals give rise to more specific concerns, which the Australian Government takes into consideration (in addition to those described above) when examining those proposals:

- for agricultural investment proposals, the Australian Government typically considers the effect of the proposal on the quality and availability of Australia's agricultural resources, including water; land access and use; agricultural production and productivity; Australia's capacity to remain a reliable supplier of agricultural production, both to the Australian community and Australia's trading partners; biodiversity; and employment and prosperity in Australia's local and regional communities;
- for residential real estate investment proposals, the overarching principle is that the proposal should increase Australia's housing stock (by creating at least one new additional dwelling); and
- where a foreign investment proposal involves a foreign government investor (defined above), the Australian Government considers if the proposed investment is commercial in nature or if the investor may be pursuing broader political or strategic objectives that may be contrary to Australia's national interest.

2.8 PROCEDURE

Applications are made online. The online application requires basic information about the transaction – names and addresses of the parties, the kind of transaction and information relevant to calculating the monetary threshold for the transaction and the application fee. The applicant is expected to attach a cover letter which explains the transaction in detail, including reasons for the transaction and the acquirer's intentions for the target.

Each application attracts filing fees. The filing fees vary depending on the kind of application. For business applications, most transactions attract a $26,700 filing fee, except that transactions valued over $1 billion attract a $107,200 filing fee.

The review process consists of a 30 calendar day examination period and a 10 calendar day notification period. The examination period can be extended by agreement or by the Treasurer issuing an interim stop order, which gives the Treasurer an additional period of up to 90 calendar days to examine the application. In practice extensions are common.

2.9 PENALTIES

For any notifiable action, it is an offence to fail to notify the foreign investment proposal. For a significant action (including a notifiable action) that is notified, it is an offence to proceed with the foreign investment proposal until a statement of no objection is received or the Treasurer's power to make a decision in relation to the proposal expires. The penalties for failing to comply are:

- for individuals, up to 3 years imprisonment or $157,500 fine or both; and
- for companies, a fine of up to $787,500.

Civil penalties for less serious breaches include:

- for individuals, a fine of up to $52,500; and
- for companies, a fine of up to $262,500.

Officers of companies commit an offence or may be liable for civil penalties if the corporation is convicted of the offence or is the subject of a civil penalty order and the person authorised or permitted the commission of the offence or the contravention of the civil penalty provision by the corporation.

Third parties who knowingly assist a breach may also be subject to civil and/or criminal penalties.

2.10 TAX CONDITIONS

In the event of a no objection notification, the Treasurer has the power to impose standard tax conditions (which are generally ordinary tax compliance obligations) and / or specific tax conditions on the foreign person. Specific tax conditions vary depending on the transaction and the attributes of the foreign person. It is now common practice for the standard tax conditions to be imposed in connection with most notifiable actions

CONTRIBUTOR

DEBORAH JOHNS

PARTNER
CORPORATE ADVISORY

T +61 2 9263 4120
E djohns@gtlaw.com.au

3. ESTABLISHING A BUSINESS PRESENCE IN AUSTRALIA

3.1 BRANCH OFFICES VERSUS SUBSIDIARIES

The main ways in which a foreign company may conduct business in Australia are by:

+ establishing a branch office by registering the foreign company in Australia; or
+ establishing a subsidiary.

Some differences between branch offices and subsidiaries are summarised in the following table.

Issue	Branch office	Subsidiary
Corporate law issues	+ Not a separate legal entity (liabilities are those of the foreign company). + Foreign company must be registered with ASIC. + Assigned Australian Registered Body Number. + Annual lodgement of financial reports with ASIC, including financial accounts of foreign company unless relieved by ASIC (note: ASIC usually accepts reports prepared in accordance with laws of the foreign company's origin).	+ Separate legal entity where liabilities remain with subsidiary unless parent / foreign company gives guarantees or subsidiary trades while insolvent. + Company is registered with ASIC (third parties in Australia are more likely to deal with an Australian company). + Assigned Australian Company Number. + Annual lodgement of financial reports with ASIC unless relieved by ASIC (note: small proprietary companies may be relieved but control by a foreign company may exclude such relief).
Foreign investment review	+ Approval may be required before assets/land are acquired.	+ Approval may be required before assets/land are acquired.
Taxation	+ May be taxed as a separate entity in Australia. + May be taxed on all income sourced from Australia at the applicable tax rate. + May be subject to Goods and Services Tax (GST) obligations and obliged to obtain Australian Business Number (ABN).	+ Generally a resident for tax purposes. + Taxed on all income regardless of source at the applicable tax rate. + May be subject to GST obligations and obliged to obtain ABN.

3.2 BRANCH OFFICES

(a) When is opening a branch office required

A foreign company is required to be registered with ASIC (which has the effect of establishing a branch office) if it "carries on business" in Australia.

For registration purposes, a foreign company "carries on business" in Australia if it:

+ has a place of business in Australia;
+ establishes or uses a share transfer office or share registration office in Australia;
+ administers, manages or otherwise deals with property situated in Australia as an agent, legal personal representative or trustee, whether by employees or agents or otherwise; or
+ offers debentures or is a guarantor body for debentures in Australia.

The Corporations Act contains a number of exceptions which generally only apply to passive or isolated transactions. For example, a foreign company is likely to be carrying on business in Australia if it made investments in Australia that required repeated administration or management, or if it repeatedly made contracts in Australia.

Failure to register a foreign company carrying on business in Australia is a strict liability offence and could result in fines by ASIC and the courts.

(b) Reporting obligations

The registered foreign company must lodge the following financial statements (which ASIC may require to be audited) with ASIC once a year:

+ balance sheet;
+ profit and loss statement;
+ cash flow statement; and
+ any other document the company is required to prepare by the law of its place of origin.

(c) Branches and tax

For Australian income tax purposes, the mere registration of a foreign company with ASIC does not create a taxable presence in Australia. The jurisdiction of that foreign entity and the extent and nature of the operations in Australia need to be considered in determining whether the foreign company will be taxed in Australia.

3.3 ESTABLISHING A SUBSIDIARY

The following types of companies can be registered with ASIC:

+ a proprietary company either limited by shares or with unlimited share capital; or
+ a public company limited by shares, limited by guarantee, unlimited with share capital or with no liability (only if a mining company).

The most common type of company is a proprietary company limited by shares, followed by a public company limited by shares.

A company must have at least one member (shareholder). A proprietary company cannot have more than 50 non-employee shareholders.

A proprietary company must also have at least one director, and at least one of its directors must ordinarily reside in Australia. A public company must have at least three directors, and at least two of its directors must ordinarily reside in Australia. The Corporations Act and case law impose specific duties on directors and secretaries.

A company can generally be set up in Australia within one business day, provided all the relevant information regarding directors, shareholders, company type and share capital is known.

A company must appoint an Australian resident individual as its public officer within three months of commencing business in Australia and notify the ATO of the appointment. The public officer of a company is answerable for doing all things required to be done by the company under Australia's federal tax law.

Section 5 examines regulation of companies in more detail.

3.4 OTHER STRUCTURES

Alternative options such as trusts and partnerships are available and should be considered in determining the most appropriate structure for the business.

CONTRIBUTOR

DEBORAH JOHNS

PARTNER
CORPORATE ADVISORY

T +61 2 9263 4120
E djohns@gtlaw.com.au

4. ACQUISITIONS

As part of its entry into Australia, or to expand its Australian operations, a foreign company may choose to acquire an existing business. Some significant acquisitions of Australian companies or trusts will be regulated by the Corporations Act.

AVOID THE PITFALLS

Some significant acquisitions, particularly involving ASX-listed companies, will be regulated by the Corporations Act. An acquirer can be prevented from completing a transaction, or be delayed in doing so, if the requirements of the Corporations Act are not strictly followed. You need expert legal advice at the start of a potential deal, to make sure your deal can proceed as planned.

4.1 SIGNIFICANT THRESHOLDS

There are a number of thresholds which are relevant to any foreign entity that wishes to acquire a substantial stake in a company listed on the ASX, or an unlisted company that has more than 50 shareholders. Some of these thresholds also apply to other companies. You will also need to consider whether foreign investment approval, or any other approval, is required.

Threshold	Description
5%	A person with an interest of 5% or more (which has a broader meaning than simply being a registered shareholder) must file a substantial shareholder notice with the ASX. This notice is available to the public through the ASX website. Each change of 1% or more in the holding must also be notified, until the holding has fallen below 5%.
>10%	A person with a greater than 10% interest can prevent a bidder from satisfying the tests to compulsorily acquire any remaining shares.
>20%	There are limited methods by which an interest (which again has a broader meaning than simply being a registered shareholder) of more than 20% can be obtained. The two primary methods are by a takeover bid or a scheme of arrangement (see section 4.2).
>50%	Voting control is achieved for ordinary resolutions (e.g. appointment and removal of directors).
75%	A shareholder can ensure a special resolution is passed.
90%	Compulsory acquisition (squeeze out) of minority shareholders is generally permitted.
100%	Complete control of the target is achieved.

DID YOU KNOW?

The Takeovers Panel can make orders requiring the sale of shares or preventing the completion of a deal where "unacceptable circumstances" exist, relating to the acquisition of a 5%+ interest or the control of a company. If you are considering any substantial transaction involving a listed company or trust, get advice on how to manage the risk of involvement by the Takeovers Panel.

4.2 PERMITTED MEANS OF ACQUIRING MORE THAN 20%

The two primary ways in which an investor can acquire a holding of more than 20% in a listed company are by a takeover bid and a scheme of arrangement. The key features are described in the following table.

Takeover bid	Issue	Scheme of arrangement
A takeover bid can be used for either agreed acquisitions or acquisitions which are contested / hostile.	Agreed or contested?	A scheme of arrangement requires the cooperation of the target company, so can only be used in an agreed transaction.
The acquirer can offer cash, shares in itself (or a related company), a combination of cash and shares, or a choice between various forms of payment.	Offer price	The acquirer can offer cash, shares in itself (or a related company), a combination of cash and shares, or a choice between various forms of payment.
The acquirer sends a bidder's statement to all target company shareholders, providing details of the offer, source of funds, intentions in relation to the target and the formal offer terms. The target company sends a target's statement to all shareholders, containing the directors' recommendation whether to accept or reject the bid. The shareholders must be given at least one month to accept the offer (although it usually takes more than one month to satisfy all conditions of the offer). The offer can be for up to 12 months to allow conditions to be satisfied. Payments to shareholders are made when all conditions are satisfied or waived.	Process	The target company prepares a notice of meeting and explanatory statement, including the directors' recommendation, for a meeting to approve the proposed scheme of arrangement. The bidder will provide information required for the notice of meeting. ASIC is given at least two weeks to review the draft, before the target company seeks court approval to convene the meeting. The meeting documents are sent to shareholders, at least 28 days before the meeting. If shareholders approve the transaction, a final court approval is obtained. Payments to shareholders are then made.
An offer will typically be subject to conditions such as: + minimum acceptances; + regulatory approvals (e.g. foreign investment and/or merger clearance); and + no material adverse change in the target's business.	Conditions	An offer will typically be subject to conditions such as: + regulatory approvals (e.g. foreign investment and/or merger clearance); + no material adverse change in the target's business; and + a favourable expert's report.
Approval by shareholders at a general meeting is not required. However, to compulsorily acquire any dissenting minorities, the acquirer must have at least 90% of all shares at the end of the bid.	Shareholder approval requirements	The proposal must be approved by 75% of the votes cast (by number of shares) and 50% of the number of members who vote (by headcount).
A minimum of three months from announcement of the deal to completion.	Timing	Approximately three months from announcement of the deal to completion.
The acquirer must have at least 90% of the shares at the end of the bid, to be able to compulsorily acquire any dissenter's shares on the same terms as the bid.	Squeeze out of dissenters	Not required as the scheme binds all shareholders, whether or not they voted in favour of the scheme.

AVOID THE PITFALLS

There are a number of other permitted ways to exceed the 20% limit, such as by obtaining shareholder approval to acquire shares. There are strict requirements to take advantage of these exceptions, so obtain legal advice before you get near the 20% limit, to make sure you comply.

CONTRIBUTORS

DAVID CLEE

PARTNER
CORPORATE ADVISORY

T +61 2 9263 4368
E dclee@gtlaw.com.au

ELIZABETH HILL

PARTNER
CORPORATE ADVISORY

T +61 2 9263 4470
E ehill@gtlaw.com.au

5. ASIC AND THE LAWS AND REGULATIONS GOVERNING CORPORATIONS

The Corporations Act, and regulations made under the Corporations Act, are the core of regulation of companies in Australia. The Corporations Act and regulations are administered by ASIC. ASIC has issued a large number of policies, or regulatory guides, to help companies, directors and their advisers interpret and comply with the Corporations Act and regulations. These are available on the ASIC website (www.asic.gov.au).

The Corporations Act governs:

+ the structures by which a foreign company can conduct business in Australia (see section 3);
+ the procedure for acquiring public companies (see section 4);
+ director duties, shareholder protections, reporting and other corporate governance matters (discussed in the remainder of this section);
+ fundraising (see section 6) and the conduct of the financial services industry (see section 7); and
+ insolvency.

5.1 DIRECTOR DUTIES

Directors (and other statutory officers) in Australia have duties imposed upon them by the Corporations Act, the common law and particular statutes. Although there is overlap among these duties in some cases, the consequences of breaching a duty under the common law may be different to the consequences for breaching a statutory duty. Directors should always seek advice prior to joining the board of an Australian corporation, or any time when they are unsure as to their duties.

The table below provides a snapshot of these duties:

Source	Duty
Common law	+ to act in good faith; + to act in the best interests of the company; + to act for a proper purpose; + to give adequate consideration; + to not fetter discretions; and + to avoid conflicts of interest.
Corporations Act	+ to act with the care and diligence of a reasonable person; + to act in good faith and for a proper purpose; + to disclose any material personal interest; + to not improperly use position; + to not improperly use information; + to prevent insolvent trading; and + duties around financial reporting and disclosure.
Other statutes	Other statutes may impose personal liability on directors, notably laws governing tax, competition, occupational health and safety and protection of the environment.

5.2 PROTECTION OF MINORITY SHAREHOLDERS

The Corporations Act contains some provisions to protect minority shareholders. These statutory rights include:

+ being able to bring legal proceedings in the name of the company (e.g. against directors) with the court's permission;
+ being able to inspect the company's books, with the court's permission;
+ being able to seek court orders (including orders to wind up the company or for a sale of a shareholder's shares) where the company has been run in a way which is unfairly prejudicial to a member or not in the interest of all members as a whole;
+ the right to approve some transactions between public companies and their related parties (such as majority shareholders and directors); and
+ being able to call shareholder meetings or require the company to put a resolution (e.g. to appoint or remove a director) to shareholders for approval.

DID YOU KNOW?

A minority shareholder in an Australian company may have rights to require the directors to call a meeting of shareholders. These rights need to be exercised in accordance with strict legal requirements, so if you wish to use these rights, make sure you understand the steps required.

5.3 FINANCIAL REPORTING AND ACCESS TO INFORMATION

DID YOU KNOW?

ASIC stores information about all Australian registered companies. This can be accessed (for a fee) to get basic information about companies, including details of shareholders and directors and the share structure, and copies of documents lodged with ASIC.

Reporting obligations differ depending on whether a company is a small proprietary company, a large proprietary company or a public company. A large proprietary company and a public company will be subject to reporting obligations. A small proprietary company may also be subject to reporting obligations. A company will be a small proprietary company if it is a proprietary company (i.e. its name includes "Pty Ltd") and satisfies two of the following tests:

- its consolidated revenue for the financial year is less than $50 million;
- its consolidated gross assets are less than $25 million at the end of the financial year; and
- it and its controlled entities have less than 100 employees at the end of the financial year.

If a company is a "small proprietary company", it does not have to lodge accounts unless:

- the company is directed by shareholders with 5% or more of the voting shares to prepare and lodge accounts;
- ASIC directs the company to prepare and lodge accounts; or
- the company is controlled by a foreign company and its financial results are not consolidated into financial statements that another company or a registered foreign company has lodged with ASIC.

Once a company has lodged accounts, the accounts are available to the public through ASIC information brokers (for a fee). ASIC also makes available basic information about the shareholders, share structure, directors and company secretary. This can provide a way of getting information about counterparties to contracts or potential investors as part of a due diligence exercise.

5.4 DIVIDENDS AND CAPITAL MANAGEMENT

Australian companies are not limited by law to paying dividends from the profits of the company – they can pay any amount as a dividend, provided the company has a sufficient surplus of assets over liabilities, the payment is fair and reasonable to the shareholders as a whole and the payment does not prejudice the company's ability to pay its creditors.

Even though this provides substantial flexibility around the amount of permitted dividend payments, a company may also wish to return capital to its shareholders, which may result in a different tax outcome. Franking credits (which broadly represent corporate tax paid by the company) may be able to be passed to shareholders in certain circumstances.

AVOID THE PITFALLS

The Corporations Act allows a company to return capital to its shareholders in a variety of ways. Different approval, filing and timing requirements and tax treatments apply to the different methods, so you should get advice to make sure the Australian company is returning capital in the most tax efficient and compliant way.

5.5 MARKET OFFENCES

The Corporations Act creates a number of offences which are relevant to anyone offering financial products, trading in financial products or advising others on financial products (formally or informally). These include prohibitions on:

- insider trading (which includes dealing, arranging for someone else to deal or providing price-sensitive, non-public information to a third party who could be expected to deal in the relevant financial products);
- carrying out transactions which create an artificial trading price or maintain the price at an artificial level;
- causing a false or misleading appearance of active trading of financial products on a financial market or of the trading price of financial products;
- undertaking fictitious or artificial transactions which manipulate the trading price;
- making statements that are false or misleading and which may induce someone to trade or have the effect of increasing, reducing or stabilising the market price;
- inducing someone to trade by making statements that are misleading, false or deceptive; and
- engaging in dishonest conduct in relation to financial products or services.

There can be criminal and civil consequences of breaching these provisions.

ASIC has extensive powers to compel companies and individuals to provide information to ASIC, for the purposes of an investigation into any of these (or other) offences. Any such requests from ASIC need to be responded to carefully and thoroughly after seeking legal advice.

5.6 ASIC EXEMPTIONS

ASIC has powers to grant waivers from some obligations under the Corporations Act, or modify the operation of the Corporations Act, where there are compelling reasons to do so, or to correct an anomaly in the law. Waivers or modifications can be conditional or unconditional. Waivers and modifications can be granted in respect of:

- the obligations relating to fundraising and disclosure documents;
- the provisions relating to takeovers of listed companies and trusts;
- the obligation to prepare and lodge audited accounts; and
- the regulation of the financial services industry.

If an application for a waiver or modification raises novel issues, it may take some weeks for ASIC to consider and respond to the application. This needs to be taken into account in undertaking any transaction which needs an ASIC waiver or modification to be effected.

CONTRIBUTORS

DAVID CLEE

PARTNER
CORPORATE ADVISORY

T +61 2 9263 4368
E dclee@gtlaw.com.au

ELIZABETH HILL

PARTNER
CORPORATE ADVISORY

T +61 2 9263 4470
E ehill@gtlaw.com.au

GILBERT +TOBIN

6. RAISING CAPITAL

Under the Corporations Act, companies – whether Australian or not – are required to provide prospective investors with a disclosure document, such as a prospectus, to allow them to make an informed decision about their investment, unless an exception to this requirement applies. The content of such documents is heavily regulated by the Corporations Act.

Common exceptions include:

+ small-scale offerings (offers that result in less than 20 investors in a 12-month period, raising less than $2 million);
+ offers to sophisticated, professional or experienced investors (each term as defined in the Corporations Act);
+ offers with a minimum subscription of $500,000;
+ offers to existing shareholders under a dividend reinvestment plan or bonus share plan;
+ some rights issues/entitlement issues made to existing shareholders in listed companies;
+ offers to employees under some employee share plans;
+ some offers of listed foreign securities as part of the consideration for a takeover bid; and
+ some offers of listed foreign securities, to existing shareholders, under a rights issue.

Even where one of these exceptions applies, the issuer will still have obligations with which it must comply, including that any documents or other information provided must not be misleading or deceptive or contain any false statements. The issuer may also be required to lodge documents with ASIC in connection with the offer before making any offers in Australia.

There are both criminal and civil consequences of breaching the disclosure obligations in the Corporations Act.

DID YOU KNOW?

In late 2017, a regulatory framework was introduced for crowd-sourced equity funding (CSEF) by public companies from retail investors. The framework reduces the regulatory barriers to crowd-funded investments in small and start-up businesses, and creates certain licensing and disclosure obligations for CSEF intermediaries. On 19 October 2018, the Corporations Amendment (Crowd-sourced Funding for Proprietary Companies) Act 2018 came into effect, which further extended the CSEF regime to also apply to proprietary companies.

DID YOU KNOW?

The Australian Securities and Investments Commission (ASIC), Australia's corporate regulator, has also released Regulatory Guides 261 and 262 to assist companies seeking to raise funds through CSEF and intermediaries seeking to provide CSEF services respectively.

Under the framework, eligible companies can raise up to $5 million from investors in any 12 month period.

For further information **click here** to visit our website.

CONTRIBUTORS

PETER REEVES

PARTNER
CORPORATE ADVISORY
T +61 2 9263 4290
E preeves@gtlaw.com.au

GEORGINA WILLCOCK

LAWYER
CORPORATE ADVISORY
T +61 2 9263 4202
E gwillcock@gtlaw.com.au

CATHERINE COLLINS

LAWYER
CORPORATE ADVISORY
T +61 2 9263 4008
E clcollins@gtlaw.com.au

7. FINANCIAL SERVICES

7.1 LICENSING REQUIREMENT

Generally, an entity carrying on a financial services business in Australia must hold an Australian financial services licence (AFSL), unless an exemption applies.

Statutory and common law tests are applied in order to determine whether a financial services business is being carried on in Australia and an entity may be required to hold an AFSL even though it has no physical presence in Australia.

AFSLs are issued by ASIC and licence holders are subject to a range of obligations, including in relation to capital adequacy, organisational competence, reporting and holding client assets.

Licence holders providing personal advice to retail clients are subject to a duty to act in a client's best interest, and fee disclosure requirements. Licence holders providing personal or general advice to retail clients are subject to a ban on conflicted remuneration.

7.2 FINANCIAL SERVICES AND FINANCIAL PRODUCTS

Broadly speaking, "financial services" include:

+ provision of financial product advice;
+ dealing in a financial product;
+ making a market for a financial product;
+ operating a registered scheme under the Corporations Act;
+ providing a custodial or depository service; or
+ providing a crowd-funding service

A "financial product" is broadly defined and includes a facility through which, or through the acquisition of which, a person makes a financial investment, manages financial risk or makes non-cash payments.

Both the definitions of "financial service" and "financial product" are complex and subject to express inclusions, qualifications and exceptions. Examples of transactions which may be affected by the Australian financial services regulatory regime include:

+ issuing securities, shares, stocks, deposits, debentures, bonds, managed investment scheme interests (typically interests in collective vehicles structured as a unit trust or partnership), or insurance to persons in Australia;
+ entering into derivative transactions (such as swaps, options or forward transactions in currency) with persons in Australia through either the over the counter markets or through automated dealing systems;
+ effecting secondary market trades in securities, shares, stocks, debentures, bonds or managed investment scheme interests as an agent or trustee of a person in Australia; and
+ holding or managing investments in securities, shares, stocks, debentures, bonds, managed investment scheme interests, or interests in such products, on behalf of persons in Australia.

7.3 RETAIL VS WHOLESALE

The Australian financial services regulatory regime differentiates between wholesale and retail clients. Numerous exemptions from the requirement to hold an AFSL, some of which are available to providers of financial services to wholesale clients only. There are additional conduct and disclosure requirements that apply where financial services are provided to retail clients (regardless of whether an AFSL is also required to be held).

7.4 FOREIGN FINANCIAL SERVICES PROVIDERS

A foreign financial services provider (**FFSP**) that intends to provide financial services in Australia must hold an AFSL, a Foreign Australian Financial Services Licence (**FAFSL**) or be entitled to rely on an exemption. The FAFSL regime became effective on 1 April 2020, replacing the previous "passport" relief, and is designed to be more streamlined than the AFSL application process. FFSPs must be regulated overseas by specified sufficiently equivalent regulatory regimes to be eligible to apply for a FAFSL to provide certain financial services to wholesale clients in Australia. The FAFSL regime recognises Denmark, Germany, Hong Kong, France, Luxembourg, Ontario in Canada, Singapore, Sweden, the United Kingdom and the United States as having sufficiently equivalent regulatory regimes. FFSPs from another jurisdiction are entitled to apply to extend the FAFSL regime to other regulatory regimes.

Entities currently relying on "passport" relief will have until 31 March 2022 to apply for a FAFSL, AFSL, cease carrying on a financial services business in Australia or rely on another form of exemption. FFSPs currently relying on "limited connection" relief can continue relying on such relief until 31 March 2022. Funds management licensing relief will replace limited connection relief and will commence on 1 April 2022. Under the proposed relief, FFSPs inducing certain Australian professional investors to use certain funds management financial services do not require an AFSL or FAFSL.

Australia is also a participating economy to the Asia Region Funds Passport (ARFP), which is an initiative designed to facilitate the offer of interests in eligible funds to investors across other participating economies in the region, with reduced regulatory requirements. Broadly, the ARFP requires an eligible fund to apply to its home regulator for a passport and comply with home economy requirements in order to be registered (for Australian funds, this effectively requires registration as a managed investment scheme with ASIC). Once registered, the fund must notify the host regulator and meet host economy requirements relating to disclosure, distribution and complaints handling (for offshore funds wishing to be offered in Australia, this effectively requires compliance with the corresponding obligations for registered managed investment schemes).

CONTRIBUTORS

PETER REEVES

PARTNER
CORPORATE ADVISORY

T +61 2 9263 4290
E preeves@gtlaw.com.au

GEORGINA WILLCOCK

LAWYER
CORPORATE ADVISORY

T +61 2 9263 4202
E gwillcock@gtlaw.com.au

CATHERINE COLLINS

LAWYER
CORPORATE ADVISORY

T +61 2 9263 4008
E clcollins@gtlaw.com.au

8. BANKING

8.1 AUSTRALIA'S BANKING SYSTEM

The key lending institutions in the Australian financial system consist of commercial banks, retail banks and investment banks (including branches and subsidiaries of foreign banks). Non-bank financial institutions also operate within the system.

The key regulator of the banking system is APRA which ensures that organisations in the Australian financial services industry manage their risk appropriately and that the stability of the financial system is not jeopardised.

APRA is also the body which determines whether to authorise an entity to conduct banking business and grants authorities under the *Banking Act 1959* (Cth) for authorised deposit-taking institutions. Once authorised, it is possible for a foreign bank to conduct business in Australia either through an authorised branch or an authorised locally incorporated subsidiary which can engage in the full spectrum of banking activities. However, authorised foreign bank branches in Australia are prohibited from engaging in retail banking (taking deposits of less than $250,000 from the public).

8.2 DIRECT LENDING IN AUSTRALIA

There are a number of issues that may impact on a foreign company engaged in direct lending in Australia.

(a) Australian financial services licences (AFSLs)

As noted in section 7, all persons who carry on a financial services business in Australia are required to have an AFSL or have the benefit of an exemption from this requirement. Lenders are, generally speaking, not covered by this licensing regime, but most other types of financial services are covered.

(b) Financial Sector (Collection of Data) Act 2001 (Cth)

This act requires a corporation to register and provide periodic reports if, among other things, 50% or more of its assets in Australia consist of debts owed to the corporation as a result of transactions entered into in the course of providing finance. A debt owed by an Australian borrower is likely to be regarded as situated in Australia.

(c) Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (Cth)

As noted in section 17, this act regulates designated services carried on through a permanent establishment in Australia, which includes a place in Australia where the entity carries on business through an agent.

(d) Foreign investments

As outlined in section 2, foreign investment in Australia is regulated. The restrictions on foreign investment extend to the acquisition of interests in securities, businesses and land and so can, in theory, capture the taking and enforcement of security interests. Recent legislative amendments have broadened the exemptions available to both bank and non-bank lenders and domestic security trustees so that in practice, most of these activities will now no longer be caught within Australia's foreign investment net, so long as the assets acquired on enforcement are disposed of within the prescribed period of time.

(e) Business conduct

Australian legislation sets out prohibitions on misleading and deceptive conduct in respect of a broad range of financial services and unconscionable conduct in respect of business transactions. There is also specific legislation in each state and territory which deals with the review of unjust contracts.

A range of legislation exists in respect of lending to consumers and this is discussed in section 11.

(f) Security

Security can be taken over most assets such as land, shares, bank accounts, receivables, insurances, goods and equipment. In addition, the *Personal Property Securities Act 2009 (Cth)* (PPSA) provides that a grantor of a security interest may in some circumstances grant security over assets that it does not have title to. These include assets in which the grantor has an interest as lessee or bailee under a "PPS Lease" (as described below).

The PPSA sets out a single national system for the creation, priority and enforcement of security interests in personal property (being, in general, all property other than land). The PPSA adopts a "substance over form" approach to determining whether a security interest arises in a particular context – that is, the PPSA looks to see whether a particular transaction, in substance, creates an interest in personal property that secures payment of performance of an obligation (without regard to the form of the transaction). The effect of this is that the concept of security interest under Australian law is considerably broader than just "orthodox" security interests (such as charges and mortgages). Arrangements not traditionally thought of as security interests but which may constitute a security interest under the definition in the PPSA include step-in rights (under a construction contract, for example) and flawed-asset arrangements. In addition, the PPSA has introduced the concept of the "PPS Lease". PPS Leases are leases or bailments of goods which have a term of more than 1 year (if entered before 27 May 2017) or 2 years (if entered after 27 May 2017).

The PPSA also provides for the establishment of a single national register for the registration of these security interests in personal property. There are strict time limits within which a secured party is required to register their security interest on the PPSA register. A failure to register within these time limits may mean that the security interest is void as against a liquidator. In addition, a failure to register a security interest correctly or at all may cause the relevant security interest to be unperfected. An unperfected security interest will "vest" in the grantor on its winding-up, which means that the relevant secured party will lose any interest they have in the relevant collateral the subject of the unperfected security interest.

CONTRIBUTOR

GAIL CHRISTOPHER

PARTNER
BANKING + INFRASTRUCTURE

T +61 2 9263 4766
E gchristopher@gtlaw.com.au

9. TAXATION

The Australian tax system is known to be one of the most complex in the world. We have set out a basic description of the more significant taxes that may affect your business. These are not detailed accounts of each tax law and you should seek professional advice taking account of your specific circumstances.

9.1 INCOME TAX

(a) Taxable entities

Income tax is imposed on the taxable income of "taxable entities". Taxable entities generally include individuals, companies, and limited partnerships (except certain venture capital limited partnerships). "Look-through" entities that are not taxable entities generally include trusts and general-law partnerships. Despite its name, taxable income is broadly accounting profits of the taxpayer that are subject to various modifications required by the tax law.

(b) Tax Year

The standard tax year is 1 July to 30 June (which may be substituted with the approval of the Commissioner of Taxation).

(c) Income taxrate

Companies: The current rate (i.e. for the 2019-2020 income year) for companies is 30%, except companies that have less than AU$ 50 million of "aggregated turnover" (which includes the turnover of affiliated and connected entities) and derive no more than 80% of their income in passive forms are taxed at 27.5%.

Individuals: Individuals are taxed on a scale of marginal rates. The maximum rate in Australia is currently 45% plus additional levies (such as the Medicare Levy, if applicable) for individuals who earn more than AU$180,000. Employers must withhold income tax on wages paid to employees.

(d) Grouping

Groups of qualifying entities may, in certain circumstances, choose to consolidate (i.e. to be grouped) for income tax purposes. Entities often elect to form a consolidated group as:

+ only one income tax return is required each year for each consolidated group;
+ intragroup transactions are generally ignored for income tax purposes; and
+ tax losses from one group member can offset income from another.

Careful consideration needs to be given to the pros and cons of any consolidation decision, as it will usually result in a resetting of the tax cost bases in the underlying assets of the group, and can in certain circumstances result in taxable gains arising.

(e) Capital gains tax

Capital gains tax (CGT) is not a separate tax but is broadly the income tax that applies to gains or losses calculated under the CGT rules in respect of "CGT events" (being broadly disposals and certain other events).

A sale of corporate groups acquired in a leveraged buyout or by a private equity entity will generally be on revenue account (and not be subject to CGT concessions).

Individuals and superannuation: Resident individuals and superannuation funds are typically entitled to a discount of capital gains of 50% for individuals and trusts, and ⅓ for complying superannuation entities.

Non-residents: Non-residents are generally not subject to CGT except where the gain related to Australian land, interests in Australian land or shares or rights in Australian land-rich entities. Purchasers of Australian land, interests in Australian land or shares or rights to acquire right in Australian land-rich entities, are required to pay 12.5% of the consideration payable to foreign resident sellers to the ATO (subject to certain exclusions and exemptions). This amount is usually collected by way of a deduction from the consideration otherwise payable.

(f) Double Tax Agreements (DTAs)

Generally, resident entities are assessed on their worldwide income, while non-resident entities are only taxed on income derived from Australian sources. Australia has a highly developed network of DTAs, the main function of which is to avoid the double taxation of income for enterprises.

(g) Non-resident withholding taxes

Australia imposes dividend (30%), royalty (30%) and interest (10%) withholding taxes on payments to non- residents. The withholding tax rates may be reduced under a DTA or as a consequence of exceptions under the domestic law..

In the case of dividends, distributions that are "franked" (i.e. paid from after tax profits) or represent income derived from foreign business operations ("i.e. conduit foreign income") are generally not subject to withholding.

A reduced withholding tax rate of 15% applies to certain trust distributions ("i.e. fund payments") made by qualifying managed investment trusts or attribution managed investment trusts (**withholding MITs**) to residents of information exchange countries. This rate is reduced to 10% where the withholding MIT holds interests in certain energy efficient buildings. Fund payments exclude distributions of dividends, interest and royalties (which are subject to the standard withholding regime).

An interest withholding tax exemption also applies to interest paid in respect of certain publicly offered debt.

9.2 INDIRECT TAXES

(a) Goods and services tax (GST)

GST is a federal value-added tax on the supply of goods, services and any other things, and the importation of goods. In general, an entity must be registered for GST if it carries on an enterprise in Australia and the value of its annual turnover is or exceeds $75,000. In general, registered entities must pay GST of 10% on the consideration received for its taxable supplies and importations (but it is usual commercial practice to contractually pass on the GST liability to recipients), and can claim input tax credits (i.e. refunds of GST) for the GST cost of its business acquisitions.

In addition, foreign entities may be liable to pay GST on supplies of digital products and other services to Australian private consumers.

(b) Stamp duty

Stamp duty, levied by each state and territory government, applies to a wide range of transactions. The party liable to pay the duty depends on the type of duty.

Duty may be applied upon the following transactions:

a. Transfers and other transactions concerning "dutiable property"

b. transactions involving 'land holder' entities

c. lease instruments

d. insurance

Additional stamp duty applies to 'foreign persons' (defined broadly to include foreign corporations and trusts) that purchase residential land either directly or indirectly through a land holder entity, in New South Wales, Victoria, Queensland, South Australia, Tasmania and Western Australia.

(c) Land tax

Land tax, like stamp duty, is a state and territory-based tax which imposes a tax on investment land ownership.

Increased land tax rates apply to non-residents who own land in certain jurisdictions.

9.3 OTHER TAXES/CHARGES

Some other taxes and charges include:

(a) Fringe benefits tax

There is a fringe benefits tax (**FBT**), which is levied by the Commonwealth Government on the taxable value of "fringe benefits" provided to employees. This is charged at a flat rate of 47% after adjusting for GST credits on the grossed up value of the benefit.

(b) Payroll tax

Each state and territory government levies payroll tax, which varies across each state and territory subject to differing exemptions and rates. For example, in New South Wales, from 1 July 2019 to 30 June 2020, payroll tax is imposed at the rate of 5.45% of taxable wages, with an annual tax-exempt threshold of $900,000 (but note the payroll tax waiver and deferral relief measures applicable to the 2019-2020 financial year, announced by the New South Wales Government to help businesses impacted by COVID-19).

(c) Death and gift duties

There are no death or gift duties in Australia.

(d) Customs, excise and other taxes

The Australian Government also levies customs duties and excise duties (on goods such as petroleum, alcohol and tobacco). The state and territory governments also levy further taxes, including taxes with respect to gambling and motor vehicles.

9.4 ATTRACTING OVERSEAS INVESTORS

In order to increase the attractiveness of Australia for foreign investors, the Australian Government has a number of attractive tax measures in place. These include:

(a) CGT exemption for non-residents

Non-residents are generally not subject to Australian tax on the disposal of shares in a company (that are held on capital account) unless the company's value is principally derived from Australian real property.

(b) Managed investment trusts regime

Subject to integrity rules, non-residents who hold interests in a qualifying withholding MIT are subject to a final withholding tax of 15% (or 10% where the withholding MIT holds an interest in certain energy efficient buildings).

(c) Conduit foreign income rules

Subject to integrity rules, no Australian tax (including withholding tax) is payable in respect of certain foreign sourced income that is ultimately received by a non-resident through one or more interposed Australian corporate tax entities.

(d) Research and Development (R&D) tax incentive

Australia provides a generous incentive programme for entities incurring eligible expenditure on R&D activities. Depending on the size of a business, claimants under the R&D programme may be eligible for one of the following incentives:

(a) For small businesses (less than AU$20 million aggregated turnover): a 43.5% refundable tax offset (i.e. cash in hand).

(b) For other businesses: a 38.5% non-refundable tax offset for eligible expenditure below AU$100 million and 30% for eligible expenditure over AU$100 million.

Significant changes to the R&D tax incentive are expected subject to the passing of the Treasury Laws Amendment (Research and Development Tax Incentive) Bill 2019. Among the changes is the introduction of an "incremental intensity threshold" which increases or decreases a business' non-refundable tax offset based on how much the company spends on R&D. These changes are expected to apply retrospectively to income years commencing on or after 1 July 2019.

(e) Venture capital investments

Australian venture capital investment vehicles may be structured as venture capital limited partnerships (VCLPs) or early stage venture capital limited partnerships (ESVCLPs), and receive favourable tax treatment for eligible venture capital investments. For VCLPs, benefits include tax exemptions for foreign investors (limited partners) on their share of any revenue or capital gains made on disposal of the investment by the VCLP, and concessional treatment of the fund manager's carried interest in the VCLP. For ESVCLPs, the income tax exemption for VCLPs is extended to both resident and non-resident investors, plus investors can obtain a 10% non-refundable tax offset for new capital invested in the ESVCLP.

Incentives are available for eligible investments made in start-ups known as Early Stage Innovation Companies (ESICs), which are generally newly incorporated entities with low income and expenses. Investments of less than 30% of the equity in an ESIC would generally qualify for a 20% non-refundable tax offset (capped at AU$200,000 per investor including any offsets carried forward from the prior year's investment) and a 10-year tax exemption on any capital gains arising on disposal of the investment.

CONTRIBUTORS

MUHUNTHAN KANAGARATNAM

PARTNER
TAX

T +61 2 9263 4184
E mkanagaratnam@gtlaw.com.au

HANH CHAU

PARTNER
TAX

T +61 2 9263 4027
E chau@gtlaw.com.au

MATTHEW CHARMAN

LAWYER
TAX

T +61 2 9263 4153
E mcharman@gtlaw.com.au

ALINA SEDMAK

LAWYER
TAX

T +61 2 9263 4211
E asedmak@gtlaw.com.au

GILBERT +TOBIN

10. COMPETITION LAW

The *Competition and Consumer Act 2010* (Cth) (**CCA**) is made up of several parts and schedules, each dealing with particular issues or types of conduct relevant to competition or consumer protection law (for consumer protection law, see section 11).

The key competition law provisions of the CCA are contained in Part IV which regulates cartels, restrictive trade practices and mergers. Its aim is to prevent anti- competitive activity by companies and individuals.

The CCA also deals with obtaining access (by third parties) to services provided by major facilities of national significance (e.g. rail facilities, port facilities, gas, electricity, water, waste water, airports) (Part IIIA), the prescription of various industry codes (Part IVB), enforcement and remedies provisions (Part VI), and procedures for authorisation or notification of certain conduct which might otherwise be illegal (Part VII). The CCA also contains special provisions which apply to the telecommunications industry, the international shipping industry and to export agreements.

DID YOU KNOW?

The CCA includes a variety of potential penalties for different offences. For example, the ACCC can seek penalties of up to $10 million for some breaches of the competition provisions of the CCA. It may be possible to structure a transaction or business dealing to avoid exposing the business, and its directors, to these large penalties, but this needs to be considered at the start of any deal. The CCA also includes criminal penalties (including jail) for some offences, and an individual who has breached or been involved in a restrictive trade practice may be disqualified from being a director or being involved in the management of a corporation.

Conduct engaged outside Australia by a body corporate will also be caught by the CCA if the corporation is either incorporated in Australia or carrying on business within Australia.

Conduct that is engaged outside Australia by individuals will be caught by the CCA if the individual is an Australian citizen or ordinarily resident within Australia.

It is possible that a corporation outside Australia that engages in conduct in contravention of the CCA can be considered to be acting in Australia through a subsidiary. This can occur where:

+ the corporation engages in communications (including phone calls and emails) from places outside Australia to its subsidiary in Australia; and
+ the corporation's Australian subsidiary acts in a way that gives effect to the agreement reached outside Australia as a result of the direction or control of the parent.

10.1 PART IV – KEY COMPETITION LAW PROVISIONS

Part IV of the CCA was originally modelled on the antitrust legislation and case law in the United States, but also includes many features in common with the antitrust provisions of the European Community's Treaty of Rome and China's Anti-Monopoly Law. It seeks to protect competition by prohibiting conduct that threatens the competitive process. The prohibited conduct, discussed at greater length below, includes cartel conduct, entering into contracts, arrangements or understandings that restrict dealings or affect competition, engaging in a concerted practice, misusing market power, anti-competitive exclusive dealing arrangements, resale price maintenance and mergers which would affect competition.

(a) Cartel conduct (sections 45AD, 45AF, 45AG, s25AJ, s45AK)

Cartel conduct involves the making or giving effect to a contract, arrangement or understanding that contains a "cartel provision".

A cartel provision is a provision of an agreement between competitors comprising:

+ price fixing – that is, a provision of an agreement which has the purpose or effect of fixing, controlling or maintaining prices;
+ output restrictions – for example, restrictions on production, capacity or supply;
+ market sharing – for example, sharing of customers or sharing of geographic areas of supply; and

- bid rigging – for example, a provision that has the purpose of ensuring that in the event of a request for bids, two or more parties to an agreement bid, but a material component of at least one of those bids is worked out in accordance with the agreement.

Contracts, arrangements and understandings include "meetings of the minds" whether or not in writing and whether express or implied. Understandings such as moral obligations and even a "nod and a wink" are also caught.

The CCA provides for parallel civil prohibitions and criminal offences for cartel conduct.

There are certain exceptions to both the civil cartel prohibitions and the criminal cartel offences, however their operation can be quite complex and specific advice should always be sought on their application.

(b) Concerted practices (section 45(1)(c))

The prohibition against concerted practices came into effect on 6 November 2017. A concerted practice is not defined in the CCA, but has been described as involving any form of cooperation that substitutes the uncertainty of competition. The prohibition is aimed at businesses that publicly or privately disclose competitively significant information or take other coordinated action that is intended or likely to substantially lessen competition.

Conduct that does not meet the requirements of a contract, arrangement or understanding under the cartel provisions may fall within the wider scope of a concerted practice. For conduct to constitute a concerted practice, the ACCC has said that reciprocity is not required, meaning that even 'one way' communications with a competitor could potentially be a concerted practice.

The concerted practices prohibition captures horizontal as well as vertical arrangements, meaning that conduct involving suppliers, distributors, industry associations and consultants could also be caught. It is important to remember however, that the prohibition requires that there be an actual or likely substantial lessening of competition.

(c) Anti-competitive agreements (sections 45(1)(a) & (b))

Contracts, arrangements or understandings which have the purpose, effect or likely effect of substantially lessening competition in a market (anti-competitive agreements) are also prohibited.

The ban on anti-competitive agreements applies to so-called horizontal agreements and vertical agreements.

A horizontal agreement is one between firms at the same level in the market (e.g. an agreement between two suppliers of components to share production facilities).

Determining what the "market" is and/or whether there has been a "substantial lessening of competition" is not straightforward and requires considered and detailed analysis.

(d) Misuse of market power (section 46)

The misuse of market power prohibition applies to any conduct by a corporation with substantial market power that has the purpose, effect or likely effect of substantially lessening competition in a market. (Prior to 6 November 2017, it had to be shown that the corporation had taken advantage of its market power for one of 3 specified purposes).

If the corporation's conduct does not have the purpose of lessening competition, it may still breach section 46 if it would have the effect or likely effect of substantially lessening competition.

The misuse of market power prohibition may apply to conduct such as bundling, pricing below cost, cross-subsidisation, price discrimination, loyalty rebates, or refusal to supply.

Market power is the ability to act unconstrained by competitors. A "substantial" degree of market power is a degree that is "large or weighty" or "considerable, solid or big". A company may have market power even with a low market share.

Corporations whose conduct may otherwise be prohibited under the misuse of market power provisions can apply to the ACCC for authorisation to undertake the conduct. Authorisation may be granted where the public benefits of the proposed conduct would outweigh any public detriments.

(e) Exclusive dealing (section 47)

Exclusive dealing consists of supplying (or acquiring) goods or services on the condition that the purchaser (or supplier) accepts a restriction on its ability to deal with others.

Exclusive dealing can take many forms, including:

+ supply of goods or services on the condition that the acquirer will not (at all, or except to a limited extent):
  - acquire goods or services from a competitor;
  - re-supply a competitor's goods or services; or
  - re-supply those goods or services to particular persons;
+ refusal to supply goods or services on the basis that a person has not fulfilled the above conditions;
+ acquisition of goods or services (at all, or at a particular price) on the condition that the supplier will not (at all, or except to a limited extent) supply the goods or services to particular persons; or
+ refusal to acquire goods or services on the basis that a person has not fulfilled the above conditions.

However, exclusive dealing is generally only illegal if it has the purpose or likely effect of substantially lessening competition in a market.

(f) Third line forcing (sections 47(6) and 47(7))

Third line forcing is a type of exclusive dealing. It involves supplying products or services on the condition that the buyer will acquire products or services from a third party.

Third line forcing is only illegal if it has the purpose or likely effect of substantially lessening competition in a market. A party may engage in third line forcing so long as the conduct does not have the purpose, effect or likely effect of substantially lessening competition

If the proposed conduct may raise competition issues, the corporation can seek immunity by lodging a formal "notification" with the ACCC, but in most cases the need to notify third line forcing conduct is no longer required.

(g) Resale price maintenance (section 48)

Resale price maintenance involves imposing a minimum resale price on a reseller. It is illegal for a company to set the minimum price at which dealers or distributors may sell or advertise products or services supplied to them by the company (although it is not illegal to recommend a retail price (RRP) provided it is just a recommendation).

A price includes any formula for calculating a price. Setting a minimum price includes inducing or attempting to induce a person not to sell below that price. This is prohibited absolutely. This means it is illegal regardless of any actual or likely effect on competition.

Some commercial arrangements can be structured to avoid resale price maintenance. Since November 2017, companies proposing to engage in resale price maintenance may lodge a formal "notification" with the ACCC to obtain immunity. If the ACCC does not object (by issuing a draft notice objecting to the notification) within 14 days of the notification being validly lodged, the conduct will be protected from legal action.

(h) Mergers and acquisitions (section 50)

The CCA prohibits a corporation from directly or indirectly acquiring shares or assets where the likely effect of the acquisition would be a substantial lessening of competition in a market. Mergers and acquisitions are subject to a competition test under the CCA.

The ACCC investigates and reviews transactions that may raise concerns under the CCA. The ACCC will approve a merger or acquisition if it does not substantially lessen competition or (depending on the type of clearance sought) if the public benefits outweigh any detriment to the public.

Following changes to the merger provisions in November 2017, parties now have two options to seek approval for their mergers:

+ informal clearance from the ACCC, which involves the parties requesting that the ACCC provide a "letter of comfort" that states it does not intend to oppose the proposed transaction. A party may initially approach the ACCC on a confidential basis, but the ACCC will in most cases wish to conduct a public review before providing a firm view about whether or not it will oppose the proposed merger. A clearance by the ACCC does not preclude third-party action (such as by customers, distributors or competitors – although this is uncommon); or

+ merger authorisation from the ACCC, as the ACCC now has power to authorise a proposed merger or acquisition if it is satisfied that it will not substantially lessen competition, or it is likely to result in a net public benefit. There is a 90 day statutory time frame for the ACCC to determine a merger authorisation, which may be extended with agreement from the applicant. If the applicant is unhappy with the ACCC's authorisation decision, they can apply for a review of the decision by the Australian Competition Tribunal.

If none of these steps are taken and the ACCC seeks to challenge a merger, it may commence court proceedings seeking:

+ injunctions preventing companies completing transactions or preventing business reconstruction following acquisitions;
+ forced divestiture followi, ng a merger;
+ compensation for customers or competitors; and
+ penalties of up to $10 million for companies and up to $500,000 for the key employees of the company concerned.

AVOID THE PITFALLS

The ACCC has established processes for reviewing and giving clearance for mergers where there is a potential effect on competition. While it is not mandatory in Australia to notify the ACCC prior to a merger or acquisition, the ACCC strongly encourages merger parties to do so. It is therefore prudent to notify the ACCC in a timely manner and work effectively with the ACCC to manage the clearance process

10.2 THE ROLE OF THE ACCC UNDER THE CCA

The ACCC has broad powers under the CCA to assist in the investigation of suspected breaches of the competition provisions of the CCA. In some cases, these powers are broader than police powers of investigation. As a first step in its investigation, the ACCC will usually seek voluntary interviews with anyone it suspects of contravening the CCA.

Section 155 of the CCA gives the ACCC the power to force a company or individuals to disclose information, to attend hearings and answer questions, or to provide documents, and the ACCC can obtain warrants for "dawn raids" and other seizures.

The ACCC has the power to compel witnesses to submit to an investigation. A person may be compelled to furnish written information, produce documents or give evidence relating to a matter that may constitute a contravention.

The ACCC also has power to access telecommunications records of telephone calls, mobile telephone calls and faxes.

The ACCC also finds out about breaches of the CCA without having to rely on its statutory powers of investigation. The ACCC often receives complaints from unhappy customers, employees, competitors or consumer associations. It also reviews advertisements in the media on a regular basis.

The ACCC shares information extensively with competition agencies in other countries throughout the world.

CONTRIBUTORS

CHARLES COOREY

PARTNER
COMPETITION + REGULATION
T +61 2 9263 4019
E ccoorey@gtlaw.com.au

CLAIRE GREEN

MANAGER
COMPETITION + REGULATION
T +61 2 9263 4343
E cgreen@gtlaw.com.au

DILYS TENG

LAWYER
KNOWLEDGE + PRACTICE INNOVATION
T +61 3 8656 3388
E dteng@gtlaw.com.au

11. FAIR DEALING AND CONSUMER PROTECTION

Australia has a single, national consumer law known as the Australian Consumer Law (**ACL**). It applies nationally and in all states and territories. The ACL is incorporated in a Schedule of the CCA. The ACL includes:

+ general protections against misleading and deceptive conduct and unconscionable conduct;
+ specific protections against unfair practices, including prohibitions against false and misleading representations;
+ an unfair contracts regime covering standard form contracts;
+ laws relating to consumer guarantees;
+ product safety laws and enforcement systems;
+ laws regulating unsolicited consumer agreements (i.e. door-to-door sales and other direct marketing); and
+ penalties, enforcement powers and consumer redress options.

11.1 MISLEADING OR DECEPTIVE CONDUCT AND UNCONSCIONABLE CONDUCT

The ACL prohibits a person, in trade or commerce, from engaging in misleading or deceptive conduct. This prohibition is not limited to the supply of goods or services and creates a broad, economy-wide norm of conduct.

The ACL also prohibits:

+ conduct which is unconscionable under the general law;
+ unconscionable conduct in connection with the supply or possible supply of goods or services in consumer transactions; and
+ unconscionable conduct in some business transactions.

11.2 UNFAIR PRACTICES

The ACL contains specific prohibitions against certain false or misleading representations, such as:

+ false or misleading representations about goods and services;
+ certain types of false or misleading representations made, in trade or commerce, in connection with the sale or grant of an interest in land;
+ false or misleading representations concerning the profitability, risk or any other material aspect of certain business activities;
+ conduct that is liable to mislead a person seeking employment as to the availability, nature, terms or conditions of the employment or another matter relating to the employment;
+ conduct, in trade or commerce, that is liable to mislead the public as to the nature, the manufacturing process, the characteristics, suitability for purpose or quantity of any goods; and
+ false or misleading representations regarding the "country of origin."

The ACL also prohibits other unfair practices, including:

+ offering gifts, prizes or other free items with the intention of not providing them;
+ bait advertising – advertising goods or services for supply at a specified price where there are reasonable grounds for believing that the person will not be able to offer reasonable quantities of goods or services at that price for a reasonable period, having regard to the nature of the market and the advertisement; and
+ wrongly accepting payment – accepting payment for goods or services if the person does not intend to supply them, is aware they can't supply them or can't supply them within a reasonable time.

11.3 UNFAIR CONTRACT TERMS

Under the ACL, a term in a standard form "consumer contract" or a standard form "small business contract" will be void if that term is unfair.

A consumer contract is defined as a contract for the supply of goods or services (including financial services and financial products as defined in the ASIC Act) or the sale or grant of an interest in land to an individual for predominantly personal, domestic or household use or consumption. A small business contract is defined as a contract for the supply of goods, services (including financial services and financial products as defined in the ASIC Act) or a sale or grant of an interest in land where:

+ at the time the contract was entered into, at least one party to the contract is a business (including a not for profit business) that employs fewer than 20 persons; and
+ the "upfront price" payable under the contract is not more than $300,000 (or $1,000,000 if the duration of the contract is more than 12 months).

While the term "standard form contract" is undefined, in broad terms it is a contract that is not subject to negotiation between the parties.

The ACL does not apply to terms in standard form contracts which define the subject-matter of the contract; establish the upfront price payable; or are required or permitted by law. The unfair contract term provisions also do not cover terms in negotiated (as opposed to standard form) contracts, as well as contracts for the carriage of goods by ship, a charter party of a ship and contracts for marine salvage or towage.

Under the unfair contract term provisions, a term of a standard form consumer contract will be void if the term is unfair. In simplistic terms, a term will be unfair if it:

+ would cause a significant imbalance in the parties' rights and obligations arising under the contract;
+ is not reasonably necessary to protect the legitimate interests of the party who would be advantaged by the term; and
+ would cause detriment (whether financial or otherwise) to a party if it were relied on.

AVOID THE PITFALLS

The ACL contains some examples of unfair contract terms. However, reviewing contract terms to establish if they are unfair terms is not a straightforward exercise, especially given the general nature of the legislation and lack of any real case law in this area. Persons dealing in standard form consumer contracts or small business contracts (as defined above) should seek advice when developing their contracts.

11.4 CONSUMER GUARANTEES

The ACL also imposes consumer guarantees which provide consumers with a statutory basis for seeking remedies where the guarantees are not met.

A "consumer" means a person who acquires goods or services:

+ of a kind ordinarily acquired for personal, domestic or household use or consumption; or
+ for $40,000 or less. This does not include the purchase of goods for re-supply.

It is important to note that this definition is different from the definition of "consumer contract" which defines when the unfair terms regime applies.

In applying the $40,000 threshold, there are "unbundling" provisions which apply. Generally speaking, individual items may be considered separately in determining whether they fall under the $40,000 threshold, if they are available for sale separately.

The following table summarises the consumer guarantees:

Goods
Title: guarantee that the supplier has the right to dispose of the property in the goods.
Undisturbed possession: guarantee that the consumer's possession of the goods will not be disturbed (except for disclosed securities, charges or encumbrances).
Undisclosed securities: guarantee that the goods are free of undisclosed securities.
Acceptable quality: guarantee that the goods will be of acceptable quality (except where prior disclosure of defects, defects caused by the consumer, or prior examination ought to have revealed the defects).
Fitness for purpose: guarantee that the goods will be fit for any purpose disclosed by the consumer, or represented by the supplier (except where unreasonable or no reliance on the skill or judgment of the supplier).
Match description: guarantee that the goods will match their description.
Match sample: guarantee that the goods will match a sample or demonstration model, the consumer will have a reasonable opportunity to compare the goods with the sample, and the goods are free from any defect that (i) would not be apparent on reasonable examination, and (ii) would cause the goods not to be of acceptable quality.
Repairs and spare parts: (manufacturer only) guarantee that repairs and spare parts will be available for a reasonable time (except where unavailability is disclosed).
Express warranties: guarantee that any express warranty given by a manufacturer or supplier is complied with.
Services
Due care and skill: guarantee that the services will be rendered with due care and skill.
Fitness for purpose: guarantee that the services will be fit for their intended purpose or result (except where unreasonable or no reliance on the skill or judgment of the supplier).
Reasonable time for supply: guarantee that the services will be provided in a reasonable time (except where the time of performance is stated in the contract or to be determined).

The ACL guarantees cannot be excluded, restricted or modified. However, where the goods are less than $40,000 and are not goods for domestic use, a supplier may limit its liability under the guarantees to: the replacement of the goods or the supply of equivalent goods; the repair of the goods; or the payment of the costs of doing those things (unless it is not fair or reasonable to do so).

As noted above, the ACL includes a guarantee that a supplier will comply with any "express warranty". This guarantee is far-reaching and it is worth noting that it:

+ applies to suppliers as well as manufacturers;
+ is not limited to provisions stated to be "warranties", and could include pre-contractual representations and product descriptions or specifications; and
+ most notably, will override any exclusive remedy provisions applicable to existing warranties, or exclusions or limitations of liability (given that a supplier cannot exclude, restrict or modify the guarantee except where permitted under the ACL).

Rather than a consumer seeking a remedy by bringing an action for breach of condition or warranty under normal contractual principles, the ACL provides specific remedies to consumers depending on the severity of a supplier's failure to comply with a guarantee. In certain circumstances, this includes the right to reject the goods and request a refund or replacement goods.

The ACL prohibits the making of false or misleading representations concerning the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy that may be available to a consumer under the ACL. This might include exclusions and limitations of liability which do not acknowledge the existence of statutory entitlements such as the ACL.

Most of the consumer guarantees apply to conduct "in trade or commerce". This is defined as trade or commerce within Australia or trade or commerce between Australia and places outside Australia. The ACCC has interpreted this phrase broadly in recent years and has initiated proceedings against a number of foreign corporations which are domiciled overseas, on the basis that they engaged in "trade of commerce" by supplying goods and services to Australian consumers (usually via internet sales).

11.5 WARRANTIES AGAINST DEFECTS

Many suppliers and manufacturers choose to offer voluntary warranties in relation to their goods or services. The ACL regulates these as "warranties against defects", and prescribes certain requirements regarding their form and content. For example, any such warranties must be in a document that is transparent, sets out the procedures for the consumer to claim the warranty, includes a prescribed form of words which clarify that the warranty against defect is in addition to (and not a substitute for) the consumer's statutory rights under the ACL, and includes other specified details. Additionally, because the ACL requires that the document complying with these requirements is provided at the same time as the warranty, it is not sufficient to simply provide details of a website or telephone number that consumers can visit or call to obtain the necessary information.

11.6 UNSOLICITED CONSUMER AGREEMENTS

The ACL also includes a regime governing unsolicited consumer agreements (i.e. door-to-door and telemarketing sales), imposing various obligations for the benefit of consumers.

An agreement is an unsolicited consumer agreement if:

+ it is for the supply, in trade or commerce, of goods or services to a consumer;
+ it is made as a result of negotiations between a dealer (not necessarily a supplier) and a consumer either in person (not at the supplier's premises) or by telephone;
+ the consumer did not instigate the negotiations for the supply; and
+ the total price is over $100 or cannot be determined at the time of the agreement.

Where the negotiations for the supply of goods or services take place in person, the ACL imposes various conditions with respect to such negotiations, including: the permitted hours when a dealer may call on the consumer; the obligation to notify the consumer of their identity and the purpose of negotiations; the obligation to leave on request and not contact the consumer for at least 30 days; and the obligation to notify the consumer of their right to terminate and how to do so.

The ACL also imposes obligations on the supplier to disclose to the consumer a copy of the agreement and that such agreement must contain the full terms of the supply including consideration, delivery charges, termination rights and the supplier's details. Also, the agreement must be signed by the consumer (unless negotiated by telephone) and any amendments to it must be signed by both parties.

The ACL provides that consumers may terminate the agreement within a 10-day cooling-off period after it is made, and that during this period the supplier must not supply the goods or services or accept or request any payment for them. Consumers may also terminate the agreement within a specified time period where a supplier breaches one of the above obligations.

11.7 ENFORCEMENT POWERS

The CCA contains the following enforcement powers which are available to the ACCC or the state and territory consumer protection agencies:

+ Undertakings – a regulator can accept court-enforceable undertakings in connection with a breach of a matter for which the regulator has a power or function under the ACL.
+ Substantiation notices – these are notices issued by the regulator to a business requesting information relevant to substantiating claims made in the marketplace that the regulator considers may contravene the ACL. The power is intended as a preliminary investigative tool where the ACCC suspects a representation may not be able to be substantiated.
+ Infringement notices – if the ACCC has reasonable grounds to believe that a person has contravened one of the provisions of the CCA or the Australian Securities and Investments Commission Act 2001 (Cth) that is subject to civil pecuniary penalties (known as "infringement notice provisions"), the ACCC or ASIC may issue an infringement notice for the suspected contravention.
+ Public warning notices – these are notices issued by the regulator which inform the public of a suspected breach of certain provisions of the ACL
+ Information gathering notices – if the ACCC or ASIC (in respect of financial products or services) suspect an unfair contract term, they can issue information gathering notices and investigate.
+ Disclosure notices – the ACCC and the Commonwealth can issue disclosure notices to parties who may possess relevant information, documents or evidence about the safety of goods or services (including relevant third parties).

11.8 REMEDIES

Chapter 5 of the ACL makes a number of remedies available to a regulator, and/or to private litigants for breaches of the consumer protection provisions.

Remedies available to a regulator and private litigants include:

+ injunctions – the ACL clarifies the types of restraining and performance orders that can be made; and
+ a declaration in certain circumstances.

Remedies available to private litigants include:

+ damages; and
+ a compensation order if they have suffered or are likely to suffer loss or damage because of a contravention of Chapter/s 2, 3 or 4 of the ACL.

Remedies available to a regulator include:

+ a redress order (other than for damages) in favour of a non-party consumer;
+ non-punitive orders, e.g. community service, establish a compliance program, establish a training program, engage in corrective advertising;
+ an adverse publicity order; and
+ an order disqualifying a person from managing a corporation.

11.9 PENALTIES

In addition to enforcement powers and remedies, a regulator may apply to the court for civil pecuniary penalties or criminal penalties for contraventions of a number of the provisions of the ACL.

For individuals, the maximum penalty is $500 000 per contravention. For bodies corporate, the maximum penalty is $10 million, three times the value of the benefit obtained or 10% of the annual turnover in the previous 12 months (whichever is greater) per contravention.

CONTRIBUTOR

TIM GOLE

PARTNER
TECHNOLOGY + DIGITAL
T +61 2 9263 4077
E tgole@gtlaw.com.au

12. EMPLOYMENT LAW

Australia's national employment legislation is known as the *Fair Work Act 2009* (Cth) (**FW Act**). The FW Act applies to all private sector employers (including unincorporated employers) and their employees in all Australian states (other than Western Australia) and the territories. In Western Australia, the FW Act applies to private sector employers which are trading or financial corporations and their employees.

12.1 FAIR WORK COMMISSION (FWC)

FWC is the tribunal responsible for administering the FW Act. FWC's functions include approving enterprise agreements, ensuring good faith bargaining, varying modern awards and hearing unfair dismissal claims.

The Fair Work Ombudsman is responsible for promoting compliance with modern awards, enterprise agreements and other statutory obligations.

12.2 MODERN AWARDS

The minimum terms and conditions of some employees are governed by "modern awards". Modern awards are limited to dealing with 10 entitlements, including minimum rates of pay and overtime. All modern awards must include a flexibility term which allows for negotiated arrangements between an employer and individual employees.

Modern awards do not apply to employees earning over $148,700 (from 1 July 2019), provided their earnings are guaranteed by agreement with their employer. This threshold is indexed from 1 July annually.

12.3 COLLECTIVE BARGAINING AND ENTERPRISE

Under the FW Act, there is a focus on collective, as opposed to individual, bargaining. In order for an enterprise agreement to be approved, each employee or prospective employee must be better off under the agreement compared with an applicable modern award.

The FW Act also requires employers and other bargaining representatives to negotiate an enterprise agreement in good faith. This involves the parties complying with specified procedural and behavioural rules in relation to a negotiation known as the good faith bargaining requirements, examples of which include attendance and participation at meetings, genuinely considering proposals by other representatives, not engaging in capricious or unfair conduct, and recognising other bargaining representatives.

FWC may make various orders in relation to bargaining, including the ability to compel bargaining representatives to comply with the good faith bargaining requirements.

12.4 NATIONAL EMPLOYMENT STANDARDS (NES)

The FW Act sets out the following 10 minimum statutory conditions of employment, known as the NES: maximum weekly hours of work, a right to request flexible work arrangements, parental leave, annual leave, personal/carer's leave, community service leave, long service leave, public holidays, notice of termination and redundancy pay, and a right for employees to receive an information statement explaining their rights under the FW Act. These conditions cannot be modified to an employee's detriment by a contract, award or workplace agreement.

12.5 GENERAL PROTECTIONS

The FW Act contains "general protection" provisions which are intended to protect:

- a person's "workplace rights";
- freedom of association (including the right to join, or be represented or not represented by industrial associations; or to engage in lawful "industrial activities"); and
- a person from workplace discrimination.

The FW Act provides remedies where the protections have been contravened.

Other protections include that an employer must not dismiss an employee who is temporarily absent from work due to illness or injury. A person may make an application to FWC claiming a breach of the general protections provisions.

12.6 TERMINATION OF EMPLOYMENT

All employers, regardless of their size, may be subject to a claim to FWC for unfair dismissal once an employee's probationary period is completed, assuming no other jurisdictional objection applies. Some employees are not eligible to make claims for unfair dismissal, including casual employees. However, these employees may have other kinds of claims (such as claims regarding workplace rights).

A dismissal is not unfair when it occurs because of a "genuine redundancy". A genuine redundancy occurs if an employer no longer requires an employee's job to be performed because of operational requirements, such as an operational restructure, or, head count reduction and the employer complies with consultation obligations in an applicable industrial instrument.

A dismissal is not a genuine redundancy if in all of the circumstances the employee should have been redeployed within the employer's enterprise or the enterprise of an associated entity of the employer.

In addition, under the FW Act, it is unlawful for any employer to terminate employees for certain reasons, such as temporary absence due to illness or injury; membership of a trade union; commencing certain legal proceedings against the employer; and certain kinds of discrimination.

All employers must provide notice of termination in accordance with the FW Act.

12.7 CONTRACTUAL TERMS

A contract of employment may be entered into with the minimum of formality. There is no requirement for a contract to be in writing to be enforceable. An employment contract may therefore be valid even if made entirely orally. However, a prudent employer will enter into a written employment contract with an employee upon commencement of the employment and ensure the contract continues to reflect the employee's position during the course of their employment.

The terms and conditions of an employee's contract come from various sources. First, some terms are expressly agreed by the parties orally or in writing. Second, there are terms implied into the contract by law, from facts or custom and practice.

12.8 SUPERANNUATION

The Commonwealth superannuation guarantee legislation currently requires employers to pay a percentage of their employee's ordinary time earnings (currently 9.5%) to an approved superannuation fund which is independently administered and generally unrelated to the employer. The rate of superannuation contributions increases to 10% on 1 July 2021, then by 0.5% on 1 July of each year until it reaches 12% in 2025.

An employee is not obliged to make any matching or further contribution. Salaries as stated in Australia generally include the superannuation contribution amount. It is important to ensure that each prospective employee understands whether a proposed salary is inclusive or exclusive of the required superannuation contribution.

12.9 WORK HEALTH AND SAFETY

Most Australian jurisdictions (the Commonwealth, New South Wales, Queensland, South Australia, Tasmania and both Territories) have uniform legislation dealing with work health and safety legislation. The Government of Western Australia has developed new work health and safety legislation based on the uniform legislation. In February 2020, the Work Health and Safety Bill 2019 (WA) was passed by Western Australia's Legislative Assembly and was referred to the Legislative Council's Standing Committee on Uniform Legislation and Statutes Review.. Victoria has declared to retain its own safety legislation and will not adopt the uniform legislation. There is a duty placed on employers to provide a work environment which is safe and without risk to the health of employees. The various Australian laws reflect the following general themes:

- ensuring that the premises controlled by the employer are safe and without risk to health;
- ensuring that any plant or substance provided for use by the employees is safe and without risk to health;
- ensuring that the systems of work and the working environment are safe and without risk to health;
- providing information, instruction, training and supervision as necessary to employees;
- providing adequate facilities for the welfare of employees at work; and
- consulting with employees in relation to occupational health and safety issues.

Employers are also required to obtain workers compensation insurance for their employees which covers them for workplace injuries. The rates and regimes

CONTRIBUTOR

JAMES POMEROY

SPECIAL COUNSEL
DISPUTES + INVESTIGATIONS

T +61 2 9263 4295
E jpomeroy@gtlaw.com.au

GILBERT +TOBIN

13. INTELLECTUAL PROPERTY

In Australia, intellectual property rights are protected by federal legislation and the common law. Australia is also a signatory to the World Trade Organization Agreement on Trade-related aspects of Intellectual Property Rights (TRIPS) which sets minimum standards for intellectual property protection and enforcement.

13.1 COPYRIGHT

The Copyright Act 1968 (Cth) (Copyright Act) protects all original literary works, dramatic works, musical works, artistic works, sound recordings and films broadcast or published by an Australian or first published in Australia. Under the Copyright Act, copyright protection is automatic and does not require registration. Because of its history, the Copyright Act refers to creators generally as 'authors'; literary, dramatic, musical and artistic works are protected for the life of the author plus 70 years. If the works are published after the death of the author, they are protected for 70 years after first publication. As of early 2019, 'orphan works' (works by unknown authors), and sound recordings and films, are protected for 70 years from first publication, or 70 years from creation if they have not been made public. Australia is also a signatory to the Berne Convention for the Protection of Literary and Artistic Works which provides for 'national treatment' (works of Australian authors must be treated in the same way as other signatory country's author's works), and sets minimum rights to works first published in or created by citizens of other member countries, including moral rights (to attribution and non-derogatory treatment of a work).

13.2 TRADE MARKS

The Trade Marks Act 1995 (Cth) enables any owner to register a mark or sign used in connection with their goods or services. The owner of a registered trade mark has the exclusive right to use, and authorise others to use, the trade mark for 10 years (which is renewable, potentially indefinitely).

Unregistered trade marks may be protected by the tort of passing off and the misleading and deceptive conduct provisions of the Competition and Consumer Act 2010 (CCA) discussed below. These are akin to unfair competition law or antitrust principles in other jurisdictions. Whereas previously, trade marks had to be registered for at least 5 years before being susceptible to removal for non-use, on 24 February 2019, the law changed so that unused trade marks may be removed after 3 years of registration. Foreign companies planning to register a trade mark in Australia should seek legal advice about the impact of these changes.

Australia is one of the106 members of the Madrid Protocol which establishes an international system for the registration of trade marks. Under the Madrid Protocol, an applicant for a trade mark may designate Australia as a country in which protection is sought; following successful local examination, the trade mark is registered in Australia.

A foreign company should check whether its trade marks have already been registered in Australia by virtue of a Madrid Protocol registration before exploring registration here. Under the Paris Convention for the Protection of Industrial Property, it may be possible to claim the same priority date as overseas applications if filed in Australia within 6 months. Foreign companies should consider acquiring registration for their trade marks in Australia prior to the commencement of any dealings.

13.3 PATENTS

The Patents Act 1990 (Cth) enables an inventor, or a person entitled to be assigned the invention, to apply for a patent for a device, substance, method or process which is novel and involves an inventive or innovative step. Like the trade marks system, patents is a registration-based form of rights protection, in which applicants may be granted a standard patent for up to 20 years (or up to 25 years for a pharmaceutical patent), with annual renewal fees payable. Following recommendations by the Productivity Commission in 2016, the innovation patent system in which applicants could be granted patent protection for "second tier" inventions (for a maximum of 8 years) are being phased out. The last day new innovation patents can be filed will be 25 August 2021. Any existing innovation patents filed on or before this date will continue until their expiry. This means that the last innovation patent in Australia will expire on 25 August 2029. Australia is one of 153 members to the Patent Cooperation Treaty, which establishes a streamlined, international system for obtaining patent protection in member states.

13.4 REGISTERED DESIGNS

The Designs Act 2003 (Cth) (Designs Act) enables the owner of a "new and distinctive" design to apply for the exclusive right to use or authorise the use of the design through a registration system. "New and distinctive" means a design that looks different in comparison to other products available on the market, and that has not been publicly disclosed or advertised before the application is filed, except at an internationally recognised industry exhibition. The Designs Act protects the visual appearance (not the function) of the design for up to 10 years.

Australia is also a party to the Paris Convention for the Protection of Industrial Property (Paris Convention), which applies to design registration overseas. Under the Paris Convention, the filing date for an Australian design application may establish priority for corresponding design applications made overseas if pursued within six months of filing the Australian application.

There is no unregistered design right in Australia and copyright does not protect designs that should have been registered under the Designs Act. Australian courts have held that only very limited protection of designs is available under our equivalent of unfair competition laws. Foreign companies wishing to protect their designs should apply for a design registration before the designs are published or released elsewhere or within six months of applying to register their designs in their home markets.

13.5 CONFIDENTIAL INFORMATION

There is no Australian legislation that specifically protects confidential information. Rather, protection comes from a common law doctrine that recognises an obligation to keep information secret in circumstances where a person communicates information to another on the express or implied understanding that the information is for a restricted purpose. Legal remedies are available where an unauthorised disclosure of confidential information causes detriment to the original discloser. A combination of contractual and where applicable, physical and technological mechanisms, to maintain secrecy is often recommended to bolster companies' safeguarding of their confidential information (and better their chances at achieving legal remedies if things do go awry). It is important to seek legal advice to ensure that appropriate written agreements are in place to protect such information.

13.6 DOMAIN NAMES

The most relevant domain names to Australian businesses are .com.au domain names. These are licensed by a small number of accredited Australian registrars on a "first come, first served" basis. However, applicants must also satisfy eligibility and allocation requirements. They must:

+ have an Australian connection (which includes either (i) being an Australian registered company, (ii) being a registered foreign trader in Australia, or (iii) owning an Australian registered trade mark);
+ seek the domain name for an appropriate commercial purpose; and
+ have a genuine intention to use it.

There must also be a "close and substantial" connection between the domain name and the name or business activities of the applicant.

The .au domain space is regulated by auDA (.au Domain Administration Limited) on behalf of the Australian Government. auDA has imposed stiff regulations on the use of .com.au domain names to limit the problem of cyber-squatting and to better protect the rights of business name and trade mark owners. It has also established a specialised dispute resolution procedure for conflicts over .com.au domain names.

Other domains available in Australia include: asn.au; . net.au; and .org.au.

auDA is expected to launch registrations for second level domain name .au in 2020. The .au domain names will be licensed in substantially the same way as other Australian domain names such as the com.au and .org.au domains, with 3 key changes:

(a) a new expansive concept of 'Australian Presence' is introduced setting out 17 different eligibility categories – each domain name registrant will have to satisfy the requirements of at least one such category;

(b) if the registrant relies on trade mark rights to satisfy the 'Australian Presence' eligibility criterion, then the trade mark must be a word mark or incorporate words and remain pending/validly registered throughout the domain name licence period. This means that registrants will not be able to rely on logo marks without any verbal elements to establish their eligibility to hold the .au domain name; and

(c) if the registrant relies on trade mark rights to satisfy the 'Australian Presence' eligibility criterion, then the domain name applied for must be an exact match of that word mark (or word(s) within the mark). Thus, a foreign entity not otherwise trading in Australia but holding an Australian trade mark ABCD will not be entitled to register the domain name WXYZ;

13.7 COMPETITION AND CONSUMER ACT 2010 (CTH) (CCA)

In addition to specific legislation enacted in relation to intellectual property rights, the CCA contains the Australian Consumer Law (ACL), which provides additional grounds upon which to protect such rights. Certain provisions can be utilised by intellectual property rights owners to prevent misleading or deceptive conduct and/or false representations by a third party. These provisions are often likened to the common law tort of passing off and unfair competition/antitrust legislation in other jurisdictions.

13.8 RECENT LEGAL CHANGES

There have recently been a number of important changes to Australia's intellectual property laws, including changes to:

+ the phasing out of the innovation patent system;
+ the duration of copyright in certain circumstances;
+ parallel importation and site blocking laws.

We will assist our clients to navigate the implications of these changes for their businesses.

CONTRIBUTORS

LISA LENNON

PARTNER
INTELLECTUAL PROPERTY
T +61 2 9263 4190
E llennon@gtlaw.com.au

MINDAUGAS SKAVRONSKAS

LAWYER
INTELLECTUAL PROPERTY
T +61 2 9263 4344
E mskavronskas@gtlaw.com.au

JOANNA TSAPROUNIS

LAWYER
INTELLECTUAL PROPERTY
T +61 2 9263 4783
E jtTsaprounis@gtlaw.com.au

14. ENVIRONMENTAL, PLANNING AND CLIMATE CHANGE LAW

In Australia, environmental, planning and climate change laws are principally regulated through State and Territory enacted legislation. Each legal framework is generally divided into two main categories:

+ environmental protection laws (including management of contaminated land, protection of threatened species, water rights, pollution and waste disposal, protection of Aboriginal and European heritage and native title rights); and
+ planning laws (regulating land use and development).

At the federal level, the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) regulates development that is likely to have a significant impact on 'matters of national environmental significance', through the implementation of an additional approval pathway. For example, a proposed development that is likely to have a significant impact on a nationally listed threatened species and/or ecological community, will require approval from the Federal Government, in conjunction with the standard approvals required at the State or Territory level.

In recent years, we have witnessed a growing trend by both state and federal governments to introduce complex pieces of legislation, policies and mechanisms, including increases to penalties, to regulate industry sectors and activities that have the potential to adversely affect the environment.

Companies looking to invest in Australia need to be informed about the everchanging complexities that underpin the planning and environmental legal framework, but also look at industry opportunities, government policies and programs that can create benefits to business and the environment. State and federal governments are planning for more growth and development. We are seeing implementation of long term metropolitan and regional strategies as well as reforms to state planning laws. Investments in infrastructure are encouraged and are creating world class service sectors and transport networks for Australian cities.

Investment opportunities in renewable energy sectors and low-emissions technologies are also on the rise. The Australian federal government has introduced a range of regulatory reforms aimed at reducing Australia's carbon emissions and facilitating investment in renewable energy projects, including:

+ direct action policies on climate change, including the Emissions Reduction Fund, which provide financial incentives to business for emissions reduction activities;
+ a target of 23.5 per cent of Australia's electricity to be generated from renewable sources in 2020, implemented through the Renewable Energy Target schemes; and
+ targets to reduce Australia's emissions to 26-28 per cent on 2005 levels by 2030 (based on Australia's commitments under the Paris Agreement).

Importantly, the above regulatory measures are subject to change, being under constant review and scrutiny from policy makers and the wider public, highlighting the importance of needing to be informed and up to date on the latest developments and opportunities in this area of law in Australia.

CONTRIBUTOR

BEN FULLER

PARTNER
REAL ESTATE + PROJECTS
T +61 2 9263 4171
E bfuller@gtlaw.com.au

15. PROPERTY

In Australia, each state and territory has its own legislative requirements and conventions for the transfer of real property and registration of interests in land.

The Torrens system of registering title to land exists in each state and territory. Under this system, interests in land are registered in a central state register which provides a government-guaranteed indefeasible title (subject to limited exceptions, e.g. obtaining title by fraud). Upon registration, a legal interest is created in the land subject only to the pre-existing interests registered on the title.

The interests which may be registered on title include mortgages, leases, easement and covenants.

15.1 SALE AND PURCHASE OF LAND

If the vendor is registered (or required to be registered) for GST, GST is payable on the sale of land that is commercial vacant land or new residential premises. However, no GST is payable on the sale of commercial land which is sold subject to full tenancies, or on existing residential premises. Any GST payable is payable by the vendor but it is usual commercial practice for the vendor to contractually pass its GST liability to the purchaser. If the purchaser is registered for GST, it may claim input tax credits (i.e. refunds of GST) from the ATO for the acquisition of the taxable component of the purchase price.

Certain purchasers of new residential premises or potential residential land are required to withhold the taxable component of the purchase price and remit it to the ATO, rather than paying it to the vendor.

Stamp duty on the contract and transfer is generally payable by the purchaser, and the rate of duty and time for payment varies in each state or territory. In some states the purchase of property by foreigners is subject to a stamp duty surcharge in addition to the standard rates of stamp duty.

Depending on the land value and the way the land is owned (e.g. by a trustee) or used, state or territory land tax may be payable. A person's principal place of residence is usually exempt, but most land used for commercial and investment purposes will be liable for land tax. Some states impose a land tax surcharge on foreign owners of property in addition to the standard rates of land tax.

The sale of land may give rise to a CGT or an income tax liability for the vendor, depending upon the period of ownership of the land and whether the land was "trading stock" or held as a longer-term investment. The purchase price of the land and associated non-deductible expenses will generally establish a tax cost base for the calculation in due course of any gain or loss realised by the purchaser on the subsequent sale of the land.

Unless a vendor of property (among other transactions) with a market value of AU$750,000 or more has obtained a clearance certificate from the ATO, the purchaser will be required to pay 12.5% of the consideration payable to the ATO.

Until recently, all settlements for the sale of land required a paper certificate of title and transfer form to be physically submitted to the land registry for processing. Australia's States and Territories are currently transitioning to an electronic settlement system, though the timing of this transition varies across the States and Territories. Once in place, the electronic system is intended to streamline the settlement process.

It is now required practice to carry out a verification of identity process on clients involved in conveyancing transactions, which involves taking copies of clients' identity documents (eg passport and drivers' licence) and storing these in a secure database. This purpose of the VOI process is to avoid fraudulent transactions.

15.2 LEASING

The commercial terms and statutory requirements for leasing of retail, commercial and industrial premises are similar in all Australian jurisdictions.

In most jurisdictions leases with a term exceeding three to five years are required to be registered on the title to the land. Each jurisdiction has minimum lease covenants implied into leases (e.g. the tenant's right to quiet enjoyment), but these are usually significantly amended or excluded completely by the terms of the lease.

There is also specific legislation in each jurisdiction to protect retail tenants (other than large or anchor tenants, e.g. supermarkets and department stores). This legislation ensures that small and specialty tenants are given adequate disclosure about their obligations before entering into a lease. It also mandates or prohibits certain terms from leases (e.g. a minimum five-year term, unless waived with legal advice, limit on number of rent reviews, prohibition on payment of key money). In most jurisdictions, if the lease terms are inconsistent with the retail lease legislation, the legislation will prevail.

15.3 FOREIGN INVESTMENT APPROVAL

Many acquisitions of interests in land by foreign persons are likely to require foreign investment approval. Please see section 2.

CONTRIBUTORS

AMANDA HEMPEL

PARTNER
REAL ESTATE + PROJECTS
T +61 2 9263 4017
E ahempel@gtlaw.com.au

CHRIS TOHME

LAWYER
REAL ESTATE + PROJECTS
T +61 2 9263 4859
E ctohme@gtlaw.com.au

16. NATIVE TITLE AND INDIGENOUS HERITAGE

Native title describes the rights and interests of Aboriginal and Torres Strait Islander people in land under their traditional laws and customs. Native title matters in Australia are governed by the *Native Title Act 1993* (Cth) (as amended) (**NTA**). Some states have also introduced complementary legislation which deals with certain aspects of native title.

The existence of native title depends on whether the group of people claiming to hold native title rights have maintained their traditional connection with the land to the satisfaction of the courts. The existence and content of native title rights are determined by the Federal Court.

The NTA distinguishes between grants of interests in land prior to, and after, 23 December 1996. All grants of interests in land before that date have generally been validated by the NTA. Grants of interests after 23 December 1996 in respect of land which either is, or may be, the subject of native title will be valid provided that the applicable "future act" procedures prescribed by the NTA have been complied with.

Where a person proposes to do something that affects native title over land which is subject to a registered native title claim or determined native title rights or interests, the native title claimants or holders must be notified. This triggers certain processes under the NTA, including:

+ the "right to negotiate" process, which requires the state and the proponent to negotiate in good faith with the claimants or holders in order to obtain their agreement to the proposal (generally resulting in execution of either an Indigenous Land Use Agreement, which is then registered and has the effect of law between the parties, or a land access agreement, which is an unregistered agreement), failing which the matter can be referred to the National Native Title Tribunal for determination;
+ an expedited process which can apply where the proposal has a minimal impact on the land; or
+ a notification and consultation process where the rights to be granted relate to infrastructure.

If a grant of an interest in land is made without the appropriate process under the NTA being followed, this can result in the invalidity of that grant to the extent that it is inconsistent with the continued existence or enjoyment of any native title rights in the subject land.

Separate from the question of native title is the issue of protection of sites and items of significance to Indigenous people, which is dealt with through various state and Commonwealth laws. Negotiations regarding matters of Indigenous heritage are often conducted contemporaneously with the negotiation of native title issues. Consent of the relevant government minister may be required if activities on the land may damage sites or items of significance.

The NTA also specifies the procedures by which people determined to hold native title can claim compensation. Such compensation is payable by the Crown in the first instance, but depending on the circumstances the Crown might have a right of recovery against a title holder.

Compensation may also be payable by a person as a result of agreements made pursuant to the "right to negotiate" or other grant process, and depending upon the terms of the payment, this may be set off against any compensation payable to the native title party or to the Crown.

AVOID THE PITFALLS

The most common situation in which native title issues arise for overseas investors is in respect of the acquisition of mining tenements. An overseas investor acquiring mining tenements should seek advice regarding native title and Indigenous heritage matters as early as possible. Failure to take advice can result in significant delays to a project.

CONTRIBUTORS

MARSHALL MCKENNA

PARTNER
DISPUTES + INVESTIGATIONS
T +61 8 9413 8410
E mmckenna@gtlaw.com.au

CLAIRE BOYD

PARTNER
ENERGY + RESOURCES
T +61 8 9413 8404
E cboyd@gtlaw.com.au

17. KNOW YOUR CUSTOMER AND CORRUPT PRACTICES LEGISLATION

The *Anti-money Laundering and Counter-terrorism Financing Act 2006* (Cth) (**AML/CTF Act**) and its associated regulations and rules seek to reduce the risk that transactions involve money laundering or financing of terrorism. The AML/CTF Act is administered by the Australian Transaction Reports and Analysis Centre (**AUSTRAC**).

The AML/CTF Act applies to those entities that provide "designated services", which includes a wide range of activities including the provision of financial services. The legislation imposes obligations on those entities, "reporting entities", including to adopt and maintain their own anti-money laundering and counter-terrorism financing programs. Generally, a program is divided into two parts:

+ Part A (general), the purpose of which is to identify, mitigate and manage the risk that the services provided by the reporting entity involve money laundering or financing of terrorism; and
+ Part B (customer identification), the purpose of which is to set out customer identification and verification procedures. Reporting entities are required to collect and verify information relating to the identity of customers, customer's beneficial owner(s) and customers who are identified as politically exposed persons.

A reporting entity may use an external provider to satisfy its know-your-customer obligations, however it should ensure obligations under the privacy law are complied with (see section 18). In both parts, the emphasis is on putting in place appropriate risk-based systems or controls, depending on the nature, size and complexity of the business.

Reporting entities are also required to report certain transactions to AUSTRAC, perform ongoing customer due diligence, keep accurate records, and lodge annual compliance reports.

The compliance report relates to a reporting entity's compliance with its obligations under the AML/CTF Act. In 2016, the AML/CTF Act and associated rules and regulations were subject to a statutory review in which 84 recommendations were made to streamline and strengthen Australia's AML/CTF regime. The implementation of recommendations was broken down into two phases. A number of phase one high priority initiatives were implemented during 2017. Notably, this included the expansion of the AML/CTF Act application to also cover digital currency exchange providers. Phase two initiatives will constitute more significant reforms and will be developed in the longer term.

Penalties for non-compliance with the AML/CTF Act can be substantial, including penalties of up to AU$21million.

In Australia, providing, offering or promising to provide a benefit to another person where:

a. the benefit is not legitimately due to the person; and
b. the person provides the benefit with the intention of influencing a public official in order to obtain or retain business or a business advantage not legitimately due, is prohibited.

Giving or offering a benefit as an inducement or reward for doing or not doing something or for showing or not showing favour or disfavour to any person in relation to business affairs is also prohibited.

CONTRIBUTORS

PETER REEVES

PARTNER
CORPORATE ADVISORY
T +61 2 9263 4290
E preeves@gtlaw.com.au

GEORGINA WILLCOCK

LAWYER
CORPORATE ADVISORY
T +61 2 9263 4202
E gwillcock@gtlaw.com.au

CATHERINE COLLINS

LAWYER
CORPORATE ADVISORY
T +61 2 9263 4008
E clcollins@gtlaw.com.au

GILBERT +TOBIN

18. PRIVACY AND DATA PROTECTION, DIRECT MARKETING, SPAM AND DO NOT CALL

18.1 OVERVIEW OF PRIVACY RELATED LAWS AND REGULATORS

In Australia, the use of "personal information" (**personal information**) is principally regulated by the federal *Privacy Act 1988* (**Privacy Act**). The Privacy Act applies to the handling of personal information by Australian federal government agencies and Australian Capital Territory (**ACT**) government agencies. The Privacy Act also governs the private sector, including corporations and other businesses, but in general only applies to group businesses with aggregate group (global) revenue greater than AU$3 million.

The Privacy Act regulates collection and use in a "record" or generally available publication, and disclosure, of two main types of information:

+ personal information, being information or an opinion about an identified individual, or an individual who is reasonably identifiable, whether the information is true or not and whether it is in a recorded form or not. Information will also be personal information where the identification or re-identification is practicable from the information itself or in combination with reference to other information. Common examples of personal information are names, addresses and telephone numbers; and
+ sensitive information, being such information or an opinion about certain characteristics of an individual, including racial or ethnic origin, political opinions, membership of a professional or trade association, criminal record, health and health status, and biometrics used for the purpose of biometric verification and identification.

Sensitive information is subject to higher levels of regulatory protection. For example, an organisation must not collect sensitive information about an individual unless the individual consents (expressly or impliedly) to the collection of the information and the information is reasonably necessary for one of the organisation's functions or activities.

The two principal regulators of privacy laws in Australia are the Australian Privacy Commissioner and the Australian Communications and Media Authority (**ACMA**).

The Australian Privacy Commissioner is responsible for enforcing compliance with the Privacy Act and reviewing proposed privacy codes. This involves investigating instances of non-compliance by agencies and organisations in relation to all commercial and public sectors.

The ACMA is responsible for administering and enforcement of the following legislative instruments which supplement the Privacy Act and deal with related privacy issues:

+ the *Spam Act 2003* (Cth) (**Spam Act**), which deals with the sending of unsolicited commercial electronic messages, including emails and SMS;
+ the *Do Not Call Register Act 2006* (Cth), (**Do Not Call Register Act**) regulating unsolicited commercial calling to telephone numbers listed on the national Do Not Call Register; and
+ Part 13 of the *Telecommunications Act 1997* (Cth), which imposes restrictions on the use and disclosure of telecommunications and communications-related data.

State and territory regulators, generally called Privacy Commissioners, relevantly regulate state and territory government agencies and in some states also health service providers and some surveillance activities. Health privacy is an area that is dually regulated under both state and federal legislation.

There are a range of other laws in Australia, at federal and state level, which indirectly impact on handling of personal information, including:

+ state and territory privacy legislation, applying to personal information held by government agencies and contractors to government agencies and in some states also health service providers and some surveillance activities. Health privacy is an area that is dually regulated under both state and federal legislation;
+ federal laws relating to telecommunications interception;
+ telecommunications sector specific laws governing access to call product, stored electronic communications and information about telecommunications customers use of telecommunications networks;
+ federal and state/territory freedom of information legislation applying to information held by government agencies;

- federal and state/territory laws relating to health records;
- federal laws relating to the disclosure of or data-matching of tax file numbers; and
- federal and state/territory laws governing the use of tracking devices, listening devices and workplace surveillance, and/or unauthorised optical surveillance.

The Privacy Act has extraterritorial operation and extends to an act done, or practice engaged in, outside Australia and Australian external territories by an organisation (including a small business operator), that has an "Australian link". An organisation or small business operator has an "Australian link" where it is:

- an Australian citizen, or a person whose continued presence in Australia is not subject to a legal time limitation;
- a partnership formed, or a trust created, in Australia or an external territory;
- a body corporate incorporated in Australia or an external territory; or
- an unincorporated association that has its central management and control in Australia or an external territory.

Corporations and other bodies that do not fall into the above categories, broadly, any foreign corporation or body, will have an "Australian link" where:

- the organisation carries on business in Australia; and
- the personal information was collected or held by the organisation in Australia, either before or at the time of the act or practice.

The collection of personal information "in Australia" includes the collection of personal information from an individual who is physically within the borders of Australia or an external territory, by an overseas entity.

18.2 AUSTRALIAN PRIVACY PRINCIPLES (APPS)

The Privacy Act principally comprises:

- the 13 Australian Privacy Principles (**APPs**) which apply to the handling of personal information by government agencies and private organisations which are in general collectively referred to as "APP entities"; and
- credit-reporting provisions which apply to the handling of personal credit information about individuals by credit reporting bodies, credit providers and some other third parties.

The APPs follow the personal information lifecycle from collection, to use, to disclosure, to retention, to destruction or de-identification. They are not lengthy, but their interpretation can be complex. The Privacy Commissioner's Guidelines as to interpretation and operation of the APPs run to over two hundred pages. Some APPs draw distinctions in their coverage and operation as between organisations and agencies, while others apply alike to all APP entities (organisations and agencies together). Some APPs require different and higher standards in relation to the sub-category of personal information that is sensitive personal information.

The coverage of the APPs can be briefly summarised as follows:

APP 1 Open and transparent management of personal information

APP entities (that is, entities regulated by the Australian privacy laws) must manage personal information in an open and transparent way. This generally requires APP entities to have a clearly expressed and up to date APP privacy policy. Collection, use and retention of personal information is to be minimised to that reasonably required as notified in a privacy policy or otherwise with a user's consent.

"Transparent" is not defined, but as used in the ACL contractual term is "transparent" if it is expressed in reasonably plain language, legible, presented clearly and readily available to the person affected by the term.

The positive obligation for APP entities to implement practices, procedures and systems to "manage" personal information has been interpreted as requiring implementation of privacy assurance practices and procedures – sometimes called "Privacy by Design" – into business processes and products.

APP 2 Anonymity and pseudonymity

APP entities must give individuals the option of not identifying themselves, or of using a pseudonym.
Limited exceptions apply.

APP 3 Collection of solicited personal information

Outlines when an APP entity can collect personal information that is solicited by the entity. APP 3 applies higher standards to the collection of "sensitive" information, such as health information.

APP 4 Dealing with unsolicited personal information

Outlines how APP entities must deal with unsolicited personal information.

APP 5 Notification of the collection of personal information

Outlines when and in what circumstances an APP entity that collects personal information must notify an individual of certain matters.

APP 1 and APP 5 together set out quite prescriptively those things that need to be notified to an individual in relation to any collection of personal information about that individual. Read together with APP 1, APP 5 constitutes a comprehensive list of what should be covered in a collection notice, although in practice a number of these matters may instead be dealt with in a privacy policy in order to keep the collection notice to manageable length. In Australia the respective roles of privacy policies and collection notices is less defined than is the case in otherwise comparable privacy jurisdictions.

Special requirements apply where any personal information about an individual is collected from anyone other than the affected individual: in particular, notice of that collection is required to be given to affected individuals.

APP 6 Use or disclosure of personal information

Outlines the circumstances in which an APP entity may use or disclose personal information that it holds.

APP 7 Direct marketing

An organisation may only use or disclose personal information for direct marketing purposes if certain conditions are met. Broadly, direct marketing:

- is use or disclosure of personal information to communicate directly with an individual to promote goods and services;
- may only be undertaken where an individual would reasonably expect it, such as with informed consent;
- must provide a prominent statement about a simple means to opt out; and
- must be stopped when an individual opts-out.

APP 8 Cross-border disclosure of personal information

Outlines the steps an APP entity must take to protect personal information before it is disclosed to any other entity (including related entities) outside Australia.

APP 9 Adoption, use or disclosure of government related identifiers

Outlines the limited circumstances when an organisation may adopt a government related identifier of an individual as its own identifier, or use or disclose a government related identifier of an individual. Examples of government related identifiers are drivers' licence numbers, Medicare numbers, Australian passport numbers and Centrelink reference numbers.

APP 10 Quality of personal information

An APP entity must take reasonable steps to ensure the personal information it collects is accurate, up to date and complete. An entity must also take reasonable steps to ensure the personal information it uses or discloses is accurate, up to date, complete and relevant, having regard to the purpose of the use or disclosure.

APP 11 Security of personal information

An APP entity must take reasonable steps to protect personal information it holds from misuse, interference and loss, and from unauthorised access, modification or disclosure. An entity has obligations to destroy or de-identify personal information in certain circumstances.

APP 12 Access to personal information

An APP entity must provide access when an individual requests to be given access to personal information held about them by the entity. Some limited, specific exceptions apply.

APP 13 Correction of personal information

An APP entity must correct information held by it about an individual in response to a reasonable request by an affected individual.

18.3 Mandatory data breach notification

The Privacy Act requires APP entities to notify the Commissioner and affected individuals if the entity experiences an 'eligible data breach' - that is, a breach that a reasonable person would conclude is likely to result in serious harm to the individual/s concerned.

Limited exceptions to the notification requirements are available, including a public interest exception of avoiding prejudicing the activities of law enforcement agencies or disclosing information where it would be inconsistent with a secrecy provision in another law.

The Australian Privacy Commissioner has the power to investigate noncompliance with the mandatory data breach notification scheme and make a determination requiring the entity to remedy such noncompliance.

18.4 Direct marketing and spam

Direct marketing is primarily regulated through the Spam Act, the Do Not Call Register Act and APP 7 of the Privacy Act.

APP 7 initially states a very broad prohibition of direct marketing: an organisation must not use or disclose the personal information that it holds about an individual for the purpose of direct marketing (APP 7.1). APP 7 then carves-down that prohibition in a number of specified circumstances. Key factors as to whether APP 7 applies are:

+ whether a particular marketing activity is "direct marketing" (and then regulated by APP 7); and
+ whether the Spam Act and the Do Not Call Register Act apply to regulate the particular activity, such that APP 7 does not apply (because an exception in APP 7.8 operates).

"Direct marketing" is not defined in the Privacy Act. However, the Australian Privacy Commissioner in the Australian Privacy Principles guidelines (February 2014) has expressed the view that "direct marketing involves the use and/or disclosure of personal information to communicate directly with an individual to promote goods and services. A direct marketer may communicate with an individual through a variety of channels, including telephone, SMS, mail, email and online advertising". APP 7 requires the direct marking organisation to provide a simple way for the individual to request not to receive direct marketing communications from the organisation. There must be a visible, clear and easily understood explanation of how to opt out and a process for opting out which requires minimal time and effort that uses a straightforward communication channel accessible at no more than nominal cost.

An organisation must also, on request, provide its source for an individual's personal information, unless it is impracticable or unreasonable to do so.

In addition, in any circumstance where the individual would not reasonably expect their information to be used or disclosed for the purpose of direct marketing or personal information about them was collected from a third party, in each direct marketing communication with the individual the organisation must include a prominent statement ("opt out statement"), or otherwise draw the individual's attention to the fact that the individual may request an opt-out.

The Spam Act applies to "electronic messaging", which covers emails, instant messaging, SMS and other mobile phone messaging. The Spam Act prohibits "unsolicited commercial electronic messages" with an "Australian link" from being sent or caused to be sent. The "Australian link" concept is much broader than in the Privacy Act and includes sending of commercial electronic messages from outside Australia to any Australian email account holder.

The Spam Act defines a "commercial electronic message" as an electronic message, where, having regard to the content, presentation and access to other supplementary information it could be considered that a purpose, or one of the purposes, of the message is to (among other things) offer, advertise or promote the supply of goods, services, land or business or investment opportunities. Importantly, commerciality may be a secondary purpose and the message is still caught: for example, a message that is mainly factual or useful information, but then has some marketing or promotional content.

Commercial electronic messages, as defined, may only be sent by a company if each of the following requirements are satisfied:

+ "consent" – the message must be sent with the recipient's consent. The recipient may give express consent, or under certain circumstances consent may be inferred from their conduct or from an existing business or other relationship. It is up to the sender to prove that consent has been given;
+ "sender identification" – the message must contain accurate information about the person or organisation that authorised the sending of the message and how to contact them; and
+ "unsubscribe" – the message must contain a "functional unsubscribe facility" to allow the recipient to opt out of receiving messages from that source in the future. Unsubscribe requests must be honoured within five business days.

If a business engages a third party to send a commercial electronic message/campaign on its behalf, the business needs to be aware of its legal obligations, as it may be found responsible for any contraventions of the Spam Act by the third party.

The Spam Act also prohibits the use, supply or acquisition of address harvesting software and any list of electronic addresses produced using such software.

AVOID THE PITFALLS

A message does not have to be sent out to numerous addresses, or in bulk, to be in breach of the Spam Act. Businesses can also be responsible for breaches of the Spam Act by third-party contractors.

18.5 DO NOT CALL

The Do Not Call Register provides consumers in Australia with the choice to "opt-out" of receiving unwanted and unsolicited telemarketing calls through a regulatory framework under which their "opt-out" is recorded on a centralised Do Not Call Register.

The Do Not Call Register Act prohibits "telemarketing calls" from being made to a number entered on the Do Not Call Register, unless:

+ the recipient of the call (the account holder or their nominee) has consented to the making of the call;
+ the telemarketer "washed" the number against numbers on the Do Not Call Register within the preceding 30 days and the number was not then identified as a "do not call" number (this enables a database check to be relied upon for 30 days, therefore a registration would not be fully effective for 30 days); or
+ the call is otherwise exempted as a "designated telemarketing call".

CONTRIBUTOR

TIM GOLE

PARTNER
TECHNOLOGY + DIGITAL
T +61 2 9263 4077
E tgole@gtlaw.com.au

19. DISPUTE RESOLUTION

19.1 SOURCES OF LAW

The common law system forms the basis of Australian jurisprudence. It embodies judge-made law, whereby rules of law and precedent have been developed by the court. Judges are bound to follow interpretations of the law made by higher courts in cases with similar facts or legal principles. Legislation or statute is the primary body of law. Even in areas which are still primarily based on the common law, important modifications have been made by statute.

19.2 COURT SYSTEM IN AUSTRALIA

The Australian court system comprises Commonwealth (or federal), state and territory courts.

The High Court of Australia is the highest court of appeal. The High Court decides cases of special significance, including challenges to the constitutional validity of legislation, and hears appeals (by special leave) from the federal, state and territory courts.

The Federal Court of Australia typically deals with corporations, competition, constitutional and administrative law, along with other matters arising under Commonwealth legislation such as federal tax and migration matters. The workload in respect of companies and securities litigation is shared between the federal and state courts.

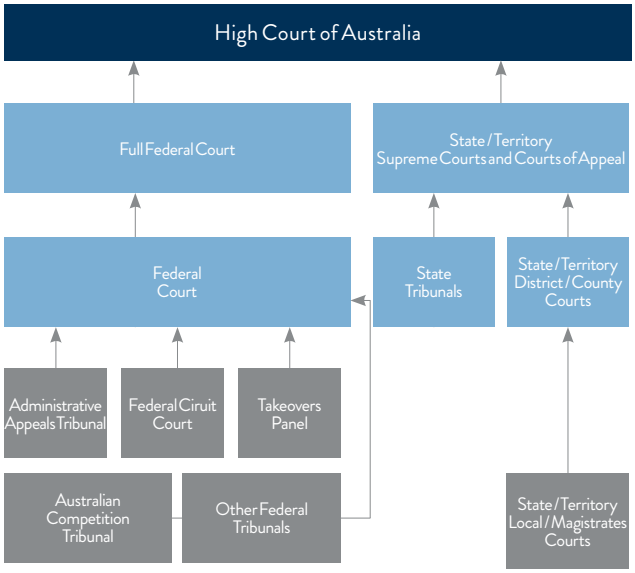
The Federal Circuit Court of Australia oversees family law, bankruptcy, unlawful discrimination, consumer protection, competition, privacy, migration, copyright and industrial law. Nearly all of its jurisdiction is shared with the Family Court or the Federal Court of Australia.

State and territory court systems operate independently. These courts have inherent jurisdiction in respect of all disputes other than those arising under Commonwealth legislation. Each state and territory has a superior court known as a Supreme Court. The Commonwealth has enacted legislation conferring federal jurisdiction on the various Supreme Courts, in all matters except in certain specialist areas such as family law and competition law.

State courts typically deal with contract, tort and criminal matters, as well as cases arising under state legislation. Lower-level courts, including district/county and local/magistrates courts, decide the majority of serious criminal offences and civil litigation up to certain monetary limits.

There are a range of specialist courts and tribunals in each state. They include the Takeovers Panel, the Australian Competition Tribunal, various administrative decision review tribunals, migration review tribunals, land and environment courts, industrial courts, the Family Court and various consumer claims tribunals.

Australian Court System



19.3 SPLIT LEGAL PROFESSION

The legal profession in Australia is essentially a split profession. Lawyers will generally practise as either a solicitor or a barrister. Solicitors provide legal advice directly to a client and are involved in case preparation. Solicitors, upon commencement of court proceedings, may brief a barrister on behalf of a client to appear in court and advocate during the proceeding.

19.4 COMMENCEMENT OF PROCEEDINGS

Selecting the correct court in which to commence proceedings is important, as the court must have the requisite jurisdiction for the matter to be heard.

Limitation periods for commencing proceedings differ according to the type of action and the court in which the action is to be commenced. For example, actions founded in contract and tort must be commenced within six years running from the date the cause of action first accrues.

19.5 COURT PROCEDURE

Each court and tribunal has its own procedural rules.

The superior courts in all jurisdictions have the power to make interim orders on an urgent and ex parte basis. This includes interlocutory injunctions to operate pending a final hearing and determination of a proceeding, asset preservation orders and search orders. Each court has a duty judge who is available on short notice (outside business hours) to hear urgent applications which cannot be satisfactorily accommodated within the ordinary system.

The presumption in civil proceedings is that they will be tried without a jury, unless the interests of justice otherwise require. Civil proceedings are usually determined by a judge, or magistrate, without a jury. Exceptions include defamation and certain personal injury proceedings. The burden of proof in civil proceedings is on the 'balance of probabilities.'

19.6 COSTS

In all Australian jurisdictions, the courts have a discretion to award costs as they see fit. In most cases, an unsuccessful party will be required to pay the successful party's costs. There are generally two types of costs in Australia:

+ solicitor/client costs are the costs incurred by the client for the work performed, pursuant to the retainer between the solicitor and the client; and
+ party/party costs are costs recoverable by the client from the other party, if a cost order is made in their favour. Party/party costs are determined under a court scale with fairly rigid principles (which in practice means the successful party will only recover around 50%–70% of the total solicitor/client costs that they have incurred).

In some cases, costs will be awarded on a solicitor/client, or "indemnity" basis, where all but unreasonably incurred costs may be recovered. Indemnity costs are discretionary and awarded upon application, where there are good reasons for doing so – for example, where the party paying the costs unreasonably refused a settlement offer that was better than the judgment ultimately awarded or where there has been inappropriate conduct during the trial resulting in delays or additional costs.

19.7 PRODUCTION OF DOCUMENTS

"Discovery" is a process often ordered by a court, whereby a party is required to produce to the other party all documents within a party's possession, custody or power that may shed light on any of the issues in the proceedings. This requires parties to discover documents in the possession of an agent or employee, which that party has a right to obtain, if it requests them.

The term "document" is broad and extends to any document, from electronic documents, emails, tape records, letters and accounts to scrap pieces of paper recording information relevant to the matters in issue. Confidential non-privileged documents are not exempt from production (but may be the subject of confidentiality undertakings given by the other party).

Each court has different rules relating to discovery.

19.8 PRIVILEGE

The rules of evidence allow privilege to be claimed on certain types of documentation. Privileged documents usually fall within the following categories:

+ legal professional privilege – gives a client the right to refrain from producing confidential documents prepared for the dominant purpose of a lawyer, or one or more lawyers, providing legal advice to the client or for use in existing or anticipated litigation. The claim is for the client to make and may be waived. Legal professional privilege does not extend to documents created in furtherance of a crime or fraud;
+ privilege against self-incrimination – a witness is entitled to object to answering a question on the grounds that answering would have a tendency to show that they have committed an offence arising under an Australian or foreign law, or are liable to a civil penalty. This form of privilege does not extend to corporations; and
+ public interest immunity – if the public interest in preserving secrecy or confidentiality over a document or information that relates to matters of state outweighs the public interest in admitting it into evidence or disposing fairly of the proceedings, a court may of its own initiative, or on application by a party, direct that document to be privileged.

19.9 ARBITRATION AND MEDIATION

Arbitration proceedings and mediations are common in Australia.

Arbitration involves the referral of the dispute to one or more arbitrators to determine the dispute. The requirement to attend an arbitration requires the agreement of both parties and is usually set out in an existing contract. Generally, Australian courts have enforced arbitration agreements and require parties who agreed to attend arbitration to do so.

Arbitrations are usually conducted in a manner similar to a court process, but the hearing and determination are private and confidential to the parties. An Arbitrator's determination is recorded in a "final award" which is binding on the parties and enforceable upon registration with the court.

Each of the Australian states and territories has enacted a Commercial Arbitration Act for the conduct of domestic arbitration, based on the UNCITRAL Model Arbitration Rules. The Commonwealth has enacted the *International Arbitration Act 1974* (Cth). Under each Act there is provision for the courts to enforce arbitral awards as if they were judgments of the court.

Mediation is a negotiation process which is structured and facilitated by a mediator who assists with the negotiation. The mediator may be appointed by a court or privately agreed by the parties. The mediator does not make any binding determinations but may express views to facilitate the negotiation process. Most court rules and practice notes contain procedural requirements for parties to attend compulsory mediation.

19.10 OTHER FORMS OF ADR

In addition to arbitration and mediation, there are other "alternative dispute resolution" (ADR) processes which involve a third party who either assists the parties in dispute or conflict to reach an agreement by consent or make a decision which may be binding or non-binding on the parties. Other forms of ADR include expert determinations, referees and adjudication.

Expert determinations are carried out by persons with specialised knowledge who actively gather information relevant to the dispute, rather than hear arguments from the parties. In the absence of factors such as fraud or collusion, expert determinations are binding in Australia if accompanied by an enabling contract. Referees are usually appointed by courts and tribunals on specific issues which are deferred to them. Referrals to referees usually involve complex technical issues such as building cases which involve determination by a technical expert. In the building and construction industry, adjudication is used to make timely and cost-effective interim determinations as to a party's rights to payment under security of payment legislation.

19.11 FOREIGN JUDGMENTS

The *Foreign Judgments Act 1991* (Cth) (**Foreign Judgments Act**) establishes a statutory scheme under which judgments of specified foreign courts are recognised and enforced in Australia. It includes enforceable monetary judgments which are final and conclusive as between the parties. Notably, the Schedule excludes any courts of the United States. Where a statutory regime does not exist, it is also possible to apply for foreign judgments to be recognised and enforced applying common law principles.

To enforce a judgment, the judgment creditor must apply to the appropriate Australian court for registration within six years of the date of the judgment. For the purpose of enforcement, a registered foreign judgment has the same force and effect as a judgment given in the court in which it is registered, including the accumulation of interest on the judgment debt. A judgment debtor can apply to have the judgment set aside on a number of specified grounds.

Australia has enacted the Model Law on Cross-Border Insolvency, which allows a foreign representative, such as a foreign liquidator, to apply to an Australian court for recognition of the appointment in Australia. Upon recognition, at the request of the foreign representative an Australian court may grant relief to assist with the reorganisation or liquidation of a company or individual with assets, rights, obligations or liabilities in Australia.

CONTRIBUTORS

CRISPIAN LYNCH

PARTNER
DISPUTES + INVESTIGATIONS
T +61 2 9263 4420
E clynch@gtlaw.com.au

VINCENT GIANG

LAWYER
DISPUTES+INVESTIGATIONS
T +61 2 9263 4482
E vgiang@gtlaw.com.au

20. RENEWABLE ENERGY

20.1 INTRODUCTION

Like many countries, Australia is in the early stages of a transition from fossil fuels to renewable energy that has a long way to run. Currently, 21% of electricity consumed in Australia is generated from renewable sources, powering the equivalent of more than 10 million homes. 2018 saw AUD$20 billion invested in large-scale clean energy projects, a 100% increase on the previous year.

The rapid increase in intermittent renewable energy generation in Australia, alongside the retirement or planned retirement of some of Australia's ageing fleet of large coal-fired power stations, has led to an increasing need for new sources of firm generation – with an increasing focus on pumped hydroelectric projects and large-scale lithium ion battery energy storage systems.

In this section we consider the key components of the regulatory and policy framework that are in place to incentivise the development of renewable energy and energy storage projects in Australia.

20.2 RENEWABLE ENERGY POLICY AND REGULATORY FRAMEWORK AT FEDERAL LEVEL

Renewable Energy Target

Since 2001, the Renewable Energy Target (RET) scheme has been the key policy mechanism to drive renewable energy investment in Australia. It is widely considered to have been instrumental in stimulating the early phases of Australia's transition towards a less carbon-intensive economy. The RET Scheme sets a target of 33,000 GWh of renewable energy generation in Australia by 2020, to be maintained at this level until 2030. The RET Scheme comprises two main components:

+ the Large-scale Renewable Energy Target, which requires high energy users to acquire a fixed proportion of their electricity from renewable sources; and
+ the Small-scale Renewable Energy Scheme, which effectively subsidises the installation of small-scale renewable energy systems.

Under each scheme, large energy users are required to purchase a fixed portion of certificates and surrender them to meet their obligations under the RET. These certificates (referred to as large-scale generation certificates (LGCs) and small-scale technology certificates, together referred to as renewable energy certificates (RECs)) are generated by renewable energy generators, who sell them to high energy users. RECs are market-based instruments that can be traded.

It is expected that the RET target will be met before the 2020 deadline due to strong investment in renewable energy. Although high energy users will still be required to meet their obligations under the RET scheme until 2030, the market will be flooded with LGCs as the number generated continues to increase, as more renewable energy is produced beyond the target. This will push the price of LGCs towards zero.

Despite this, the development of new renewable projects continues at a rapid pace – in part driven by the lower cost and greater efficiency of wind turbines, solar panels and lithium ion batteries, to which China has made a substantial contribution.

Retailer Reliability Obligation

The Retailer Reliability Obligation (RRO) commenced in Australia on 1 July 2019. It is designed to incentivise dispatchable and 'on demand' generation (in response to the rapid increase in intermittent renewable generation in Australia) and the accompanying increased need to ensure the reliability of electricity supply.

If the Australian Energy Market Operator forecasts any potential reliability gaps in the National Electricity Market, at least 3 years and one month before the identified gap the Australian Energy Regulator may trigger the RRO.

Where the RRO is triggered, energy retailers will be required to enter into sufficient qualifying contracts to cover their share of a one-in-two year peak demand (i.e. peak demand forecast to occur once every two years) at the time of the reliability gap. Retailers can choose to contract with any form of generation – for example solar, hydro, gas, coal and batteries. The 'firmer' the contracted generation source is, the more it will contribute to satisfying the retailer's obligation, therefore incentivising the development of firm generation.

Underwriting New Generation Investments program

The Underwriting New Generation Investments (UNGI) program is a 4-year program (open until June 2023) that, like the RRO, has recently been implemented by the Government to incentivise the development of firm generation.

The UNGI provides financial support to firm generation capacity. It is technology neutral, with all technologies under Australian law being eligible (including greenfield and brownfield projects, such as upgrades or life extensions of existing generators).

Under the current first phase of the UNGI program, the Government has agreed to a shortlist of 12 projects which include:

+ 6 renewable pumped hydroelectric projects;
+ 5 gas projects; and
+ 1 coal upgrade project.

This mix of projects demonstrates the current high level of interest in the development of pumped hydroelectric projects in Australia.

Clean Energy Finance Corporation

The Clean Energy Finance Corporation (CEFC) is a government-funded corporate entity established to provide concessional finance (taking advantage of the Commonwealth's ability to borrow money at low cost) to the clean energy sector. It is responsible for investing AUD$10 billion in clean energy projects (including renewable energy projects) on behalf of the Australian Government.

Since commencing making investments on 1 July 2013, the CEFC has deployed more than AUD$5 billion to investments and projects around Australia, including AUD$1.3 billion in the 2019 financial year. This has driven more than AUD$24 billion in additional private sector commitments.

Australian Renewable Energy Agency

The Australian Renewable Energy Agency (ARENA) was established by the Australian Government in 2012 to improve the competitiveness of renewable energy technologies and increase the supply of renewable energy in Australia, with funds of AUD$2.4 billion to invest over 10 years. It provides financial support for research, development and demonstration of renewable energy technologies, principally in the form of grants.

As at 30 June 2019, ARENA had invested AUD$1.44 billion in renewable projects with a total value of AUD$5.49 billion, including solar, bioenergy, batteries and hydrogen technologies.

20.3 RENEWABLE ENERGY POLICY AND REGULATORY FRAMEWORK AT STATE LEVEL

There are also funding and incentive schemes offered by State Governments on a smaller scale – for example the AUD$75 million Emerging Energy Program in New South Wales supporting the development of innovative, large-scale electricity and storage projects.

CONTRIBUTOR

TIM KENNEDY

PARTNER
ENERGY + RESOURCES

T +61 2 9263 4652
E tkennedy@gtlaw.com.au

GLOSSARY

REGULATORY AUTHORITIES, TRIBUNALS, ADVISORY BODIES AND LEGISLATION

Name	Abbreviation used in this guide	Section references
Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (Cth)	AML/CTF Act	8, 17
Australian Communications and Media Authority	ACMA	18
Australian Competition and Consumer Commission	ACCC	1, 10, 11
Australian Consumer Law	ACL	11, 13, 18
Australian Foreign Investment Policy		2
Australian Law Reform Commission	ALRC	18
Australian Privacy Commissioner		18
Australian Prudential Regulation Authority	APRA	1, 8
Australian Securities and Investments Commission	ASIC	1, 3, 4, 5, 6, 7, 11
Australian Securities and Investment Commission Act 2001 (Cth)		11
Australian Securities Exchange	ASX	1, 4
Australian Taxation Office	ATO	1, 9, 15
Australian Transaction Reports and Analysis Centre	AUSTRAC	17
Banking Act 1959 (Cth)		8
Competition and Consumer Act 2010 (Cth)	CCA	1, 10, 11, 13
Copyright Act 1968 (Cth)	Copyright Act	13
Corporations Act 2001 (Cth)	Corporations Act	1, 3, 4, 5, 6, 7, 8
Designs Act 2003 (Cth)	Designs Act	13
Do Not Call Register Act 2006 (Cth)	DNCR Act	18
Environment Protection and Biodiversity Conservation Act 1999 (Cth)		14
Fair Work Act 2009 (Cth)	FW Act	12

Name	Abbreviation used in this guide	Section references
Fair Work Commission		12
Fair Work Ombudsman		12
Financial Sector (Collection of Data) Act 2001 (Cth)		8
Foreign Acquisitions and Takeovers Act 1975 (Cth)	FATA	2, 4
Foreign Investment Review Board	FIRB	2
Foreign Judgments Act 1991 (Cth)	Foreign Judgments Act	19
International Arbitration Act 1974 (Cth)		19
National Native Title Tribunal		16
Native Title Act 1993 (Cth)	NTA	16
Patents Act 1990 (Cth)		13
Personal Property Securities Act 2009 (Cth)	PPSA	8
Privacy Act 1988 (Cth)	Privacy Act	18
Spam Act 2003 (Cth)	Spam Act	18
Telecommunications Act 1997 (Cth)		18
Trade Marks Act 1995 (Cth)		13
Treasurer		2

CONTRIBUTOR

DEBORAH JOHNS

PARTNER
CORPORATE ADVISORY

T +61 2 9263 4120
E djohns@gtlaw.com.au

GILBERT
+TOBIN

GTLAW.COM.AU