ADDISONS

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Conducting Business in Australia

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Overview

Strong Economy

In recent years, Australia's $1.4 trillion economy has been one of the most resilient in the world. According to economic surveys by the Organisation for Economic Co-operation and Development (**OECD**), Australia's efficient financial and labour markets, combined with effective political and policy responses, have allowed the Australian economy to withstand the shocks of the global financial crisis better than most other economies worldwide.

Australia's economic stability is reflected in an unemployment rate of 5.4% as July 2018.

Business-Friendly

Australia recognises the importance of foreign investment for stimulating economic growth and encouraging prosperity. In its "Doing Business 2016 Report", the World Bank and International Finance Corporation placed Australia amongst the leading world economies with the most business-friendly regulation. Australia is highly ranked in the world for ease of starting a business, and third in the world for ease of obtaining credit.

World's Third Highest Standard of Living

Australia is not just an attractive location for business and investment. It is also an attractive place in which to live. The Human Development Index 2018, published by the United Nations Development Programme, ranked Australia as having the third highest standard of living globally. Australia's excellent standards of education and high gross national income per capita, along with its population's long life expectancy, makes Australia an attractive option for families and businesses alike.

Is Australia Your Next Business Destination?

We trust that this guide will be useful to you and your colleagues and our team looks forward to working with you.

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About Addisons

Legal Advice that Makes Business Work

Addisons has been providing tailored legal solutions to Australian and international leading brands and businesses for over 140 years. Our commitment to excellence, collaboration, respect, trust and long term partnerships with our clients is central to our philosophy and approach to business.

Addisons has assisted many international businesses looking to operate or expand in Australia, this experience along with the expertise of its lawyers and the high quality, complex transactions that it undertakes for clients demonstrates its ability to deliver. It is well known for providing legal advice that helps to make clients' businesses work, through being commercially astute and practical as well as technically accurate.

The firm's practice areas include competition/antitrust, corporate and commercial law, employment, gambling and gaming, insolvency/reconstruction, intellectual property, litigation and dispute resolution, marketing and advertising, media, mergers and acquisitions and planning and environment.

To discover more visit www.addisonslawyers.com.au or follow us on www.Linkedin.com/company/Addisons

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Introduction

The population of Australia is approximately 25 million with the majority living along the eastern and south-eastern coast in and near the major cities of Sydney, Melbourne and Brisbane. Australia is the sixth largest country, by area, in the world – being slightly smaller than the United States' contiguous fifty states. Given its size, flying time between certain major cities is as much as six hours. The official language is English. However, with significant levels of immigration since the 1940s, many Australians are fluent in other languages.

The tax rates applicable to income derived from conducting business in Australia is generally considered very competitive, compared with the corporate tax rates applicable in other major economies, such as the United States, France and Japan.

Australia is a federal parliamentary democracy, with six states and two mainland territories. The head of state is Queen Elizabeth II (who is represented by the Governor General) and the Prime Minister (currently Scott Morrison) is the head of government. Government and laws exist at three levels: the Commonwealth (federal) level, the state/territory level and the local/municipal level. Federal parliament consists of the Senate and the House of Representatives, being the upper house and lower house respectively. The High Court of Australia is the ultimate appeals court. There are judicial systems at both the state/territory level and the federal level, with each judicial system having responsibility for different legal issues.

In 2017, Australia's GDP amounted to US$1.69 trillion and GDP per capita (purchasing power parity) amounted to approximately US$56,000.

Australia's currency is the Australian dollar (as at 1 December 2018, AUD$1 = USD$0.73).

Business Structures

There are a range of different structural options for carrying out business in Australia. These include:

- an Australian company;
- a registered foreign company;
- a joint venture;
- a partnership;
- an agency or distributorship arrangement;
- a trust; and
- a sole trader.

The choice of business structure will depend on various factors such as the nature and size of the proposed business and tax and legal issues.

Australian Companies

As in other major jurisdictions, Australian companies are separate legal entities with the right to own and transfer property, to enter into contracts and to commence, and be subject to, legal proceedings. The *Corporations Act 2001* (Cth) is the principal statute dealing with Australian corporate law and sets out the rules concerning financial and securities dealings and the rights, obligations and liabilities of companies, directors, shareholders and other market participants. Common law also imposes various rules on the conduct of businesses and companies.

Companies are registered at the federal level and are not registered separately in each state and territory. However, when registering a company, a state or territory must be

selected as the place of registration. The choice of state or territory is important as it can have stamp duty implications for the company in the future.

In addition to the *Corporations Act* and common law, an Australian company is governed by its constitution, previously referred to as its "memorandum and articles of association". If a company does not have a constitution, it will be governed by the "replaceable rules", which are a set of common rules for the management of companies provided in the *Corporations Act*.

Every Australian company is required to have at least one member, at least one director who ordinarily resides in Australia and a registered office in Australia. The minimum number of directors will depend on the type of company. The two main types of companies in Australia are proprietary companies and public companies, for which different legal requirements apply.

Proprietary Companies

Foreign companies wishing to establish a presence in Australia commonly incorporate proprietary companies as their local subsidiaries.

The maximum number of shareholders in a proprietary company is 50 (not including employee shareholders) and the minimum number of directors is one. At least one director must ordinarily reside in Australia. A proprietary company is not required to have a company secretary. However, if it does have a company secretary, that person (who may also be a director) must ordinarily reside in Australia.

Depending on their size, proprietary companies may be exempt from some of the regulatory requirements applicable to larger companies. As a result, they can be easier and cheaper to operate. For example, proprietary companies do not have the same disclosure requirements as public companies. Guidance regarding the administration of proprietary companies limited by shares is set out in the "Small Business Guide" in Part 1.5 of the *Corporations Act*.

Public Companies

Public companies are usually larger companies. Unlike proprietary companies, public companies are not limited to a maximum of 50 shareholders. Public companies are required to have a minimum of three directors, at least one of whom must ordinarily reside in Australia, at least one company secretary and at least one shareholder.

Public companies can be listed or unlisted. Listed companies are companies whose securities may be traded on a securities exchange. There are several securities exchanges in Australia of varying sizes and focus, including the Australian Securities Exchange (**ASX**), the National Stock Exchange (**NSX**), the Sydney Stock Exchange (**SSX**), the SIM Venture Securities Exchange and Chi-X Australia.

The NSX describes itself as a listing exchange focused on small and medium enterprises and growth companies, whereas the SSX seeks to differentiate its platform as a bridge for capital, knowledge and deal flows between Asia and Australia. On the other hand, the SIM VSX is focused on driving investment in the clean technology, renewable energy, biological science and related technology and service industries.

However, the ASX is Australia's largest and most well-known exchange, and is amongst the top 15 largest securities exchange in the world.

In order to be admitted to the official list of the ASX, a company must have a sufficient 'spread' of at least 300 non-affiliated shareholders that hold a 'parcel' of at least A$2,000 worth of the company's main class of shares (excluding restricted securities[1]).

Companies that satisfy the above 'shareholder spread' requirement must also comply with various other conditions in order to be admitted to the official list of the ASX.

[1] "Restricted securities" are securities that are required by ASX to be restricted from trading and other dealings for a prescribed period of time.

Unlisted public companies are not subject to the rules of any securities exchange but, as a result, they have more limited access to capital and there exists less liquidity in respect of a market for their securities.

Registering a Company

In order for a company to conduct business in Australia, a company must be formed by registration with the Australian Securities & Investments Commission (**ASIC**). Registration officially brings the company into existence and allows business to be conducted under the registered name.

When lodging an application, the applicant is required to nominate:

- the type of company to be registered;
- the name of the company (the name must not already be registered);
- how the company will be internally managed, i.e. under its own constitution, the replaceable rules in the *Corporations Act* or a combination of both;
- the director/s and company secretary (if any) of the company;
- the member/s of the company;
- the number and class of shares to be issued to each member;
- the amount to be paid up on the shares;
- whether the company will be limited by shares or guarantee or both; and
- the principal place of business and the registered office of the company, which must be located within Australia.

Once ASIC is satisfied with the application, it will register the company, issue the company a certificate of registration and a registration number known as the Australian Company Number (**ACN**). This can happen within a day. The ACN must be used on every public document of the company including all cheques and documents lodged with ASIC.

Once a company has been registered, it must maintain and keep up-to-date a register of its officers and security holders and its minute books within the jurisdiction, usually at its registered office.

Further, the company may be subject to annual financial reporting obligations to ASIC. As a starting point, all public companies, large proprietary companies and small proprietary companies that are controlled by foreign companies are required to lodge an audited financial report and directors' report with ASIC each financial year. Certain foreign-owned Australian companies however, may be eligible to apply for an exemption from these requirements depending on the size of the operations of the company and its corporate group.

Foreign Companies

As an alternative to establishing a subsidiary as a new Australian company, a foreign company may conduct business in Australia by registering itself as a foreign company in Australia, i.e. as an Australian branch.

A foreign company wishing to carry on business in Australia as a branch must register as a foreign company with ASIC. An application for registration of a foreign company must be lodged with ASIC, together with certified copies of its certificate of registration and other constituent documents.

The following information must be provided to ASIC when registering as a foreign company in Australia:

- the name of the company (the name must not already be registered in Australia);
- the registered office of the company in Australia;
- the directors (or equivalent officeholders) of the company;

- the company's local agent, which may be an individual or a company but must be ordinarily resident in Australia;
- details of the company's registration and registered office in its country of origin; and
- certified copies of the company's certificate of registration (or equivalent document) and constitution, amongst other documents, including certified English translations where necessary.

The company is registered as a foreign company when ASIC enters the foreign company's name in ASIC's public register. Once registered, ASIC will issue the foreign company with an Australian Registered Body Number (**ARBN**). The registered foreign company will then be required to lodge certified copies of its balance sheet, cash flow statement and profit and loss statement with ASIC each calendar year (even if it is not required to prepare such documents in its place of registration) together with any other document that the company is required to prepare under the laws of its place of origin. New Zealand companies that are registered as foreign companies in Australia may be exempt from lodging certain documents (including financial statements) with ASIC where identical documentation has been lodged with the New Zealand Companies Office.

Foreign companies registered in Australia must also maintain a register of its members within Australia and comply with various notification obligations under the *Corporations Act*.

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

Joint Venture

A joint venture may be entered into between two or more individuals, companies or other legal persons. Joint ventures are often formed for a specific project or business venture but may also be formed for a continuing business relationship.

Entering into a joint venture agreement with an existing Australian entity can avoid the need to incorporate an Australian subsidiary or register as a foreign corporation. Joint ventures are governed primarily by the terms of the joint venture agreement (or similar document) in addition to general law. Care is needed because a foreign entity cannot "conduct business" in Australia unless it is registered in Australia.

Partnership

Partnerships may be entered into between two or more individuals, companies or other legal persons.

Partnerships can be registered or unregistered. An unregistered partnership does not have the public disclosure and reporting requirements that apply to corporations or registered partnerships. However, unregistered partnerships have unlimited liability and, generally, partners are personally liable, jointly and severally, for all debts and obligations of the partnership. In contrast, the liability of the members of a company is limited to the amount paid or payable on the shares issued to them.

Whilst limited liability partnerships – which must comprise at least one partner whose liability is limited and one general partner whose liability is unlimited – can be established, once registered, they have a different tax profile to a simple partnership.

Distribution Arrangements

Foreign companies that wish to develop a business presence and reputation in Australia but which may not be prepared to invest the necessary capital, human resources and/or systems to operate a permanent establishment in Australia, may alternatively enter into a distribution arrangement – exclusive, non-exclusive or otherwise – with a local representative.

Distribution arrangements generally involve costs which are lower than the costs involved in establishing an Australian branch office. This is because the foreign entity avoids the costs of maintaining customer accounts and ensuring compliance with applicable regulatory requirements (including corporate and tax obligations).

However, distributors may also demand a higher share of the sales proceeds depending on the terms of the distribution agreement. Distributors may earn a higher share of the revenue generated from the sale of the foreign company's products due to risks incurred as the local distributor. For example, the distributor may assume a greater degree of legal and commercial risk in relation to the promotion and sale of the product.

Trusts

A trust can be formed to operate a business in Australia. A trust is managed by a trustee who has the legal title to the trust property and carries on the business on behalf of the beneficiaries of the trust. The rights of the beneficiaries are determined by the terms of a trust deed.

A common form of trust is a discretionary trust which provides maximum flexibility to the trustee in relation to the distribution of income and capital among beneficiaries.

Another form of trust is a unit trust which is most suitable for investment purposes where investors hold a number of units in the trust in proportion to their investment.

Some trusts and their respective trustee company "staple" their units and shares in the trustee company respectively so that each unit and share must be traded together as a "stapled" security.

Trusts can carry a very different tax profile from that applicable to companies, and this is often a key consideration in selecting a trust structure.

Sole Trader

An individual may carry on a business on his or her own behalf as a sole trader. A sole trader is personally liable for all obligations incurred in the course of the business. If a sole trader wants to trade under a name that is not his or her own name, then a business name must be registered.

Directors' Duties

Directors of Australian companies owe duties under the *Corporations Act* and common law to their company and their company's shareholders. Among the duties owed by directors are duties to:

- act in good faith and in the best interests of the company;
- act honestly;
- avoid situations where there is a conflict of interest between the company and the director;
- exercise due care and diligence; and
- prevent insolvent trading by the company.

Breaches of certain directors' duties carry serious penalties including fines, imprisonment and being prohibited from acting as a director or managing a company. For instance, a director who is reckless and fails to exercise his powers and discharge his duties in good faith in the best interests of the company can be ordered by a court to pay up to A$340,000 and be sentenced for up to five years imprisonment or both.

Taxation

Introduction

In 2017, Australia had the eighth lowest tax burden of the OECD countries, ahead of the United Kingdom, Germany, Japan and France. Since 1965 (when comparable data first became available), Australia has typically ranked in the bottom third of countries in terms of tax burden.

As Australia is a federal system, different taxes are levied by each of the Australian federal and state/territory governments. These include:

- at the Federal Government level:
  - direct taxes such as income tax and capital gains tax; and
  - indirect taxes such as goods and services tax (**GST**), fringe benefits tax (**FBT**) customs duty and taxes in respect of petrol, oil, tobacco and alcohol; and
- at the State/Territory Government level:
  - stamp duties (a transaction tax);
  - mining royalties;
  - land tax;
  - gambling taxes;
  - employer's payroll tax; and
  - motor vehicle taxes.

At the Australian Federal Level, the tax system is administered by the Australian Taxation Office (**ATO**).

Tax Registrations

A company is resident in Australia for income tax purposes if:

- it is incorporated in Australia;
- its central management or control is in Australia; or
- shareholders who control voting power are Australian residents.

A foreign entity which carries on business through a permanent establishment in Australia will also be taxed as a resident. .

If a company or other entity is considered to be an Australian resident, the business will typically need to obtain the following tax registrations:

- an Australian Business Number (**ABN**);
- a Tax File Number (**TFN**) from the ATO, which identifies the business as a taxpayer. Individuals and businesses alike are taxed through a system of income tax;
- registration for GST if the business has a "permanent establishment" in Australia for GST purposes and its annual turnover is greater than the prescribed amount (currently A$75,000 for for-profit businesses and A$150,000 for non-profit organisations). GST of 10% is charged on taxable supplies of goods and services, where the supply is "connected with" Australia;
- registration for the Pay-As-You-Go (**PAYG**) tax withholding system if the business plans to employ staff in Australia - the PAYG system requires an employer to deduct tax from wages or salaries of employees and remit it to the ATO on behalf of its employees;
- registration for fringe benefits tax (**FBT**) where the business plans to provide employees with non-cash benefits, e.g. the use of a company car; and

- in the case of a company, registration for withholding tax if it is likely to make dividend, royalty or interest payments to non-residents.

GST Overview

A Goods and Services Tax (**GST**) of 10% is charged on "taxable supplies" of goods, services and intangibles in Australia. Special rules apply to sales of interest in land. It is similar to "value added tax" indirect tax models adopted by most OECD countries. There are some exceptions; including where food, medical services and some educational services are supplied. Whilst GST is generally payable by the supplier, GST is invariably recovered by the supplier by including it as part of the purchase price. Input tax credits for businesses are available where GST has been paid on goods and services that are acquired by the business.

Foreign entities may be required to register for GST, if they have a "permanent establishment" for GST purposes. It should be noted that the threshold for determining whether a foreign entity is required to register for income tax purposes is higher – this may mean that the entity is required to register only for GST purposes.

GST is also charged on the "imported value" of most goods imported into Australia. The imported value includes the costs of transport, insurance and any customs duty. Whilst there used to exist a threshold of A$1,000 for "low value" imported goods, since 1 July 2018, GST applies to all imported goods, regardless of value.

In some circumstances, "reverse charges" apply on the importation of services where the parties agree that the recipient will be responsible for GST.

Withholding Tax

Subject to the provisions of double tax treaties, withholding tax may be payable on:

- dividends, where no company tax has been paid as profits derived in Australia;
- interest paid to non-resident lenders;
- royalties paid to non-residents; and
- sales of direct and indirect interest in real estate by non-residents.

Tax Rates

The rate of tax payable on income derived by a business operating in Australia will depend (in part) on the structure of the business.

In most cases, income derived by a company that is a 'resident' for Australian income tax purposes is taxed at a flat rate of 30%. Companies that have an annual turnover of less than $25 million are eligible for a lower rate of 27.5%, provided they have no more than 80% "passive income". It is proposed that the turnover threshold will increase to $50 million and the tax rate for those entities will be reduced to 25% in subsequent years.

In contrast, partnerships are not taxed in their own right. Instead, the members of a partnership are liable for income tax on their share of the income from the partnership, calculated by reference to individual tax rates. As at 1 July 2018, individuals deriving income in Australia are taxed at marginal tax rates of between nil and 45%

A "Medicare Levy" of 2.0% of taxable income and reportable fringe benefits is payable as part of funding Australia's universal health insurance scheme. An additional levy of 1% is payable by higher income earners who do not have appropriate private hospital insurance.

Dividends are deemed "franked dividends" to the extent that company tax has been paid on the earnings.

Income derived through trusts is typically taxed in the hands of the beneficiary if the beneficiary is "presently entitled" to the income. Where no beneficiary is presently entitled to the income, the trustee can be taxed at the highest marginal rate.

Each party to an unincorporated joint venture is also taxed in their 'individual' capacity on the income derived from the joint venture. The applicable tax rate will depend on the structure of the relevant joint venture entity.

Capital gains are taxed by reference to the tax rate payable on income.

Transfer Pricing

Australia has adopted the OECD "arm's length" policy in its transfer pricing rules. Subject to thresholds being met, cross border dealings between related parties must be disclosed to the ATO. The ATO also requires that transfer pricing documentation reflect "arm's length" dealings.

Where a company is part of a consolidated group formed for Australian tax purposes, transactions between local group members are ignored for income tax purposes. However, care should be taken in pricing transactions relating to tangible and intangible assets, services and funds between commonly controlled parties, particularly where they involve less than "arm's length" consideration for the purposes of reducing total assessable income.

Public Officer

Upon commencing business, companies must appoint an Australian-resident public officer and notify the ATO of the appointment. A public officer is personally responsible for ensuring that the company complies with its tax obligations.

Tax Incentives

There are various incentives in Australia for in-bound capital investment, including:

- accelerated depreciation;
- research and Development deductions of up to 175% of expenditure;
- investment allowances for non-depreciable capital expenditure; and
- the Early Stage Venture Capital Limited Partnership (**ESVCLP**) program which is designed to encourage investments in start-up enterprises. The benefit of ESVCLP's include:
  - flow-through tax treatment for an ESVCLP;
  - an exemption for limited partners (both Australian and foreign) from income tax on some or all of the revenue or capital gains and losses from the disposal of eligible venture capital investments made through an ESVCLP;
  - limited partners receive a non-refundable carry forward tax offset of up to 10% of their eligible contributions;
  - the interests of general partners (managers) are taken to be held on capital account rather than revenue account; and
  - ESVCLPs are no longer required to divest an eligible venture capital investment when the investment exceeds $250 million in assets.

Withholding tax regime for foreign investors

Where a buyer of:

- taxable Australian real property (e.g. interests in land and certain mining interests),
- indirect Australian real property interests (such as shares in entities which hold property interests), or

- options or rights to acquire such property or interests

from a seller who the buyer knows or reasonably believes is a foreign resident, it must (with some exceptions) pay 12.5% of the value on acquisition to the ATO as withholding tax. Exceptions include:

- sales of real property which have a value of less than A$750,000,
- the seller provides a certificate from the ATO which confirms it is not a foreign resident.

Additional stamp duty on acquisitions of real property interest by foreign investors

Direct or indirect acquisitions of residential real estate interests by foreign residents now attract additional stamp duty. The changes are,

- for interests in NSW, a 8% surcharge
- for interests in Victoria, a 7% surcharge, and
- for interests in Queensland, a 7% surcharge.

NSW and Victoria also impose surcharges on land tax payable on residential land owned by foreign residents

Recent developments

While managed investment trusts (**MIT**) are commonly used in Australia, overseas investors are less familiar with them. Two new managed investment entities have been introduced: the corporate collective investment vehicle (**CCIV**) was introduced in the 2016-17 tax year and a limited partnership CIV in 2017-18. Being partially inspired by European entities such as the SICAV and the British OEIC, it is expected that foreign investors familiar with such funds will be attracted to invest in CCIVs.

Employment and Industrial Relations

Employment of workers in Australia is governed by federal and state/territory legislation, which address matters such as:

- annual leave;
- long service leave;
- compulsory superannuation contributions by employers;
- workers' compensation;
- workplace health and safety (**WHS**);
- discrimination;
- redundancy;
- unfair contracts; and
- unfair dismissal.

Many workers' employment is also governed by federal industrial awards or agreements in relation to matters such as minimum rates of pay, working hours, overtime rates, sick leave, annual leave and entitlements on termination of employment. The main federal statute dealing with employment law is the *Fair Work Act 2009* (Cth).

The *Fair Work Act* requires employers to comply with enforceable minimum employment terms and conditions which are referred to as the National Employment Standards. The National Employment Standards set out 10 minimum workplace rights and entitlements for all employees covered by the national workplace relations system.

The *Fair Work Act* recognises a number of modern awards. Modern awards are industry or occupation-based enforceable employment standards which set out mandatory, minimum conditions for employers and employees. Modern awards do not apply to high-income earners (i.e. those employees who are paid a guaranteed amount of, as at 1 July 2018, at least A$145,400 per annum (indexed annually).

Executive remuneration is also subject to regulation under the *Corporations Act*. Part 2D.2 of the *Corporations Act* prescribes the maximum permissible termination payment that may be given to a person holding a managerial or executive office in a company without shareholder approval. Further, additional obligations exist that:

- prohibit key management personnel from voting on remuneration matters;
- require companies to disclose details relating to the use of remuneration consultants; and
- in respect of listed companies:
  - require a general meeting to be held for the re-election of directors if shareholder concerns on the remuneration reports of the company are not adequately addressed over two consecutive years; and
  - prohibit key management personnel from hedging their incentive-based remuneration.

WHS requirements exist at the state/territory level are harmonised across Australia, except in Victoria and Western Australia and some employment obligations will also extend to certain independent contractor arrangements. These requirements are stringent and strongly enforced and significant penalties may apply for non-compliance.

Further information relating to employment regulation can be found at www.fairwork.gov.au.

Securities and Raising Capital

Capital raisings and dealings in securities must be conducted in accordance with the *Corporations Act*. Listed entities are also subject to the ASX Listing Rules (or, if not listed on the ASX, the listing rules issues by the relevant securities exchange), which impose further requirements on their management and conduct.

Disclosure to Investors

Generally, offers of securities, whether by way of a new issue of securities or a sale of existing securities made within 12 months of their issue, require regulated disclosure to investors unless an exemption applies. Securities include shares, options, debentures, bonds, derivatives and interests in managed investment schemes.

Disclosure to investors when capital is raised by way of an equity raising is commonly in the form of a disclosure document, such as a prospectus or, in the case of a managed investment scheme, a product disclosure statement. While the requirements vary (depending on the nature of the investment offered), in broad terms, a disclosure document must contain all material information required to make an informed assessment of the investment offered. A disclosure document must not contain any information that is likely to mislead or deceive investors or omit any material information. Serious civil and criminal penalties apply for failing to adhere to the disclosure requirements under the *Corporations Act*.

Given the time and cost involved in preparing disclosure documents, where an exception to the disclosure requirements is available, entities will often avail themselves of that exception. A common exception is where an entity offers securities to “sophisticated investors”. For these purposes, a “sophisticated investor” is a person who has net assets of at least the prescribed amount (currently A$2.5 million) or a gross income for each of the last two financial years of at least the prescribed amount (currently A$250,000) – in each case, as certified by a qualified accountant. Another exception is where an entity offers

securities to a person and the minimum amount payable for the securities is at least A$500,000.

Continuous Disclosure

Listed entities – and certain large unlisted public companies – are required to comply with continuous disclosure obligations. This requires the *immediate* disclosure of any information concerning the company that a reasonable person would expect to have a material effect on the price or value of its securities.

Prohibition against Insider Trading

Individuals who have possession of price-sensitive information relating to a company – whether or not listed – that is not publicly available are prohibited from trading, or enabling any other person to trade, in the shares or other securities of that company. The *Corporations Act* imposes heavy penalties on persons found to have engaged, directly or indirectly, in 'insider trading'.

Acquisitions

The *Corporations Act* imposes restrictions on the acquisition of voting power in certain entities (including Australian companies and managed investment schemes). In broad terms, subject to certain exceptions, an entity must not enter into any transaction with respect to securities (whether of an Australian entity or foreign entity) that would increase its voting power in a listed Australian company or in an unlisted Australian company that has more than 50 members:

- from 20% or less to more than 20%; or
- from a starting point that is above 20% and below 90%.

These restrictions also apply to acquisitions of interests in listed managed investment schemes.

Exceptions to this restriction include where:

- an entity increases its voting power in a company by no more than 3% every six months;
- the acquisition is approved by the target's shareholders; or
- an entity makes a takeover bid for the company.

An entity (whether foreign or local) that has an interest (whether through its own holding or the holdings of its associates) in 5% or more of the voting shares in an Australian listed company or 5% or more of the voting interests in a listed Australian registered management investment scheme is required to lodge a substantial shareholder (or security holder) notice with the listed entity and the relevant securities exchange. Further notices are required whenever this 'relevant interest' in the listed entity increases or decreases by 1% or more. A person may have a relevant interest in shares or interests held by a third party, depending on:

- the level of control it has over the disposal of, and voting rights attached to, those shares or interests; or
- the level of interest it has in the shares of, or level of control it has over, that third party.

Since the global financial crisis, there has been increased focus on disclosure of dealings in securities in listed companies, especially short selling. For instance, regulations exist for the reporting of short selling transactions to market operators (e.g. the ASX).

Financial Assistance

Where a company proposes to give financial assistance to investors – existing or prospective – for the purpose of acquiring shares (or units of shares) in the company or its holding companies, the company will generally be required to obtain the prior approval of its

shareholders (and, if applicable, the shareholders of its holding companies) as prescribed under the *Corporations Act*, unless it is able to meet certain limited exemptions.

Foreign Investment

Introduction

Where a foreign person proposes to make an investment in an Australian company or asset, the investment proposal may need to be notified to a division of the Australian Treasury known as the Foreign Investment Review Board (**FIRB**) for prior approval in accordance with the *Foreign Acquisitions and Takeovers Act 1975* (Cth) (**FATA**).

A foreign person can be:

- a natural person not ordinarily resident in Australia;
- a foreign government investor (as defined below);
- an entity[2], in which a natural person not ordinarily resident in Australia, a foreign corporation or a foreign government, holds a 'substantial interest' of at least 20%; or
- an entity, in which two or more natural persons not ordinarily resident in Australia, a foreign corporation or a foreign government, holds an 'aggregate substantial interest' of at least 40%.

For the purposes of FATA, a "foreign government investor" includes:

- a body politic of a foreign country;
- a separate government entity (i.e. an individual, corporation or corporation sole that is an agency or instrumentality of a foreign country);
- an entity in which a foreign government or separate government entity of one foreign country, alone or together with their associates, holds a substantial interest (that is, an interest of at least 20%); and
- an entity in which foreign governments or separate government entities of more than one foreign country, together with their associates, hold an aggregate substantial interest (that is, an interest of at least 40%).

Proposed foreign investment in industry sectors that are commonly associated with the national interest – such as media, transport and telecommunications – are generally the subject of greater scrutiny.

When is notification required?

The FATA distinguishes between "notifiable actions" and "significant actions". Only "notifiable actions" must be notified to FIRB before they are implemented whereas "significant actions" may be notified voluntarily. However, the Treasurer has broad powers to make orders and decisions relating to "significant actions" that have been implemented without prior notification, including orders to unwind the action, if the Treasurer determines that it is contrary to the national interest.

Actions that must be notified to FIRB include:

- acquisition of a "substantial interest" (as defined below) in, or control of, an Australian entity or business where the value of its gross assets is, or its total issued share capital is valued, in excess of A$266 million. For investors (other than foreign government investors) from a country with which Australia has free trade or similar bilateral agreements, a higher threshold of A$1,154 million will generally apply, except for

[2] In this section, a reference to an "entity" includes a corporation, a trustee of a trust and a general partner of a limited partnership.

investments in prescribed sensitive sectors where the general A$266 million threshold will usually apply for private foreign investors from agreement countries. Private investors from the US, New Zealand, Chile, South Korea, Japan, China, Singapore, Canada, Mexico and Vietnam are in a position to benefit from the higher threshold under the respective free trade agreement with Australia.[3]

Acquisition of a "substantial interest" that is notifiable to FIRB occurs when a single foreign person (and any associates) acquires 20% or more, or when several foreign persons (and any associates) acquire 40% or more, in aggregate, of the ownership of an Australian entity or business;

- acquisition of a "direct interest" (as defined below) by "foreign government investors" (as defined below), including proposals to establish new businesses and funding arrangements that include debt instruments having quasi-equity characteristics, irrespective of size.

  Acquisition of a "direct interest" that is notifiable to FIRB generally occurs when a foreign investor acquires 10% or more of the ownership of an Australian entity or business. A "direct interest" may also occur where an interest of less than 10% is acquired, if the foreign investor acquires a certain level of control over the Australian entity or business;

- portfolio investments in the media sector of 5% or more, and all non-portfolio investments, irrespective of size;

- acquisition of a "direct interest" (as defined above) in Australian agricultural businesses where the value of the consideration for the acquisition (together with the total value of any other interests held by the foreign person in the entity) exceeds A$58 million. Private investors from the US, Chile and New Zealand are subject to a higher threshold of A$1,154 million. However, the higher threshold does not apply to investors from other agreement countries (i.e. South Korea, Japan, China, Singapore, Canada, Mexico or Vietnam);

- acquisition of an interest in Australian land (including interests that arise via leases, financing and profit sharing arrangements) that involve:
  - developed commercial land valued in excess of:
    - A$58 million, where the land is classified as sensitive land (i.e. land used for critical infrastructure, such as an airport or port);
    - A$266 million, where the land is not classified as sensitive land; or
    - A$1,154 million, where the foreign investor is from an agreement country (currently, US, New Zealand, Chile, South Korea, Japan, China, Singapore, Canada, Mexico and Vietnam), regardless of whether or not the land is classified as sensitive;
  - vacant commercial land, irrespective of value;
  - agricultural land, valued in excess of:
    - A$15 million (cumulative, i.e. value of all investments in agricultural land by the foreign investor must be counted together);
    - A$50 million, where the foreign investor is from Thailand and the land is used wholly and exclusively for a primary production business; or
    - A$1,154 million, where the foreign investor is from the US, New Zealand or Chile;

[3] Private investors from additional countries that signed the TPP-11 on 8 March 2018 will benefit from higher monetary screening thresholds once the TPP-11 comes into force for those countries (i.e. Brunei Darussalam, Malaysia and Peru).

  - mining and production tenements,
    - valued in excess of A$1,154 million, where the foreign investor is from the US, New Zealand or Chile; or
    - irrespective of value for foreign investors from other countries;
  - residential real estate, irrespective of value, subject to certain limited exemptions, including where the acquirer is:
    - a company, trust or managed investment scheme that has been established primarily for the benefit of individuals ordinarily resident in Australia; or
    - an Australian corporation that is owned by, or an Australian trust that has been established for the benefit of, Australian or New Zealand citizens and/or Australian permanent residents; or
- acquisition of shares or units in Australian land corporations or trusts (i.e. corporations or trusts whose interests in Australian land exceed 50% of their total assets), in which case the same monetary thresholds as set out above for the acquisition of interests in Australian land apply, depending on the type of land held by the corporation or trust; and
- proposals where any doubt exists as to whether they are notifiable to FIRB.

Investments by "Foreign Government Investors"

For foreign government investors the following actions must be notified to FIRB, regardless of the value of the proposed investment.

- acquisition of a direct interest in an Australian entity or an Australian business;
- starting a new Australian business;
- acquisition of an interest in Australian land or an Australian land corporation or trust;
- acquisition of a legal or equitable interest in a mining, production or exploration tenement (this applies irrespective of the duration of the tenement); and
- acquisition of an interest of at least 10% in securities in a mining, production or exploration entity.

Investors should be aware that "foreign government investor" has a very wide definition and, therefore, the notification requirements that apply in respect of foreign government investors may apply to entities that are not traditionally considered to be "foreign government controlled", such as private equity funds or other investment funds that have one or more significant investments by foreign government agencies.

Offshore acquisitions

Acquiring an interest in offshore companies is a *significant* action under Australia's foreign investment framework if:

- the offshore target company (directly or indirectly) holds relevant Australian assets (that is, land in Australia, including legal or equitable interests in that land or securities in an Australian entity) and carries on an Australian business;
- the Australian assets or businesses of the offshore target company are valued at more than the applicable monetary threshold value; and
- there would be a 'change in control' in the offshore target company as a result of the acquisition.

Thresholds

The monetary thresholds, which are applied in determining those investments by foreign persons and entities that require prior notification to FIRB, are subject to annual indexation.

As detailed above, the thresholds that apply to private investors from agreement countries in relation to proposed investments in non-sensitive sectors are generally higher than the general threshold, with the effect that such investors will usually have the ability to make larger investments in Australia without seeking prior FIRB approval.

Exemption certificates

Generally, each proposed acquisition of an interest in Australian land or an Australian business by a foreign person must be notified separately. However, foreign persons proposing to make multiple acquisitions, including over a period of time, can apply for an up-front approval for a program of land and / or business acquisitions without the need to seek separate approvals for each acquisition. These program approvals are also referred to as "exemption certificates".

For example, an exemption certificate regarding land acquisitions is suitable for property developers, whereas a business acquisition exemption certificate is useful for investment funds, particularly those with low-risk foreign government investors, and investors who intend to make a series of passive investments in sectors or industries that are typically not considered sensitive from a national interest perspective.

One of the benefits of exemption certificates is that they may be valid for periods longer than 12 months.

Application fees

Foreign investment notifications attract application fees. The application fees vary depending on the type and value of the acquisition. Generally, the application fees for a non-land acquisition are A$25,700 (however, if the consideration exceeds A$1 billion the application fee increases to A$103,400), whereas the application fees for most land acquisitions start from A$5,600 (where the consideration is up to A$1,000,000) and increase in increments of approximately A$11,300 (for each additional A$1,000,000).[4]

Once a foreign investment application is lodged, applicants will receive an application receipt and application fee details and payment options by email. Once the appropriate application fee has been paid to the ATO, applicants will receive a notification which will include details of the statutory timeline for assessment. Applications will only be assessed by FIRB (and the statutory time period for assessment will only commence) following the ATO's confirmation of receipt of the requisite filing fee payable for the notification.

FATA permits the Treasurer to waive or remit payment of a fee in certain cases.

Timing

The FATA also stipulates certain timeframes within which a decision must be made. The statutory time period in which the Treasurer needs to make a decision is 30 days from the date on which the application fee has been received by the ATO. Once a decision has been made, the Treasurer has 10 additional days to notify the applicant about his decision. Accordingly, the maximum time period during which a decision must be made and notified is 40 days.

Further information can be found at www.firb.gov.au.

Competition and Consumer Protection

The *Competition and Consumer Act 2010* (Cth) (**CCA**) (formerly known as the *Trade Practices Act 1974* (Cth)) deals with almost all aspects of commercial dealings, including dealings with (and between) suppliers, wholesalers, retailers, competitors and customers.

[4] Application fees are indexed annually and may increase from 1 July of each year.

Some of the key matters regulated by the CCA include:

- restrictive trade practices and anti-competitive behaviour, including cartel conduct;
- consumer protection;
- mergers and acquisitions that lessen competition;
- industry codes of practice (such as the Franchising Code of Conduct); and
- specific industries, such as telecommunications, gas, electricity and airports.

The CCA is enforced by the Australian Competition and Consumer Commission (**ACCC**).

Restrictive Trade Practices, including Cartel Conduct

Broadly speaking, the restrictive trade practices provisions prohibit the following market conduct:

- contracts, arrangements and understandings that contain a cartel provision;
- other contracts, arrangements or understandings that substantially lessen competition (but do not contain a cartel provision);
- exclusionary provisions;
- misuse of market power;
- exclusive dealing, including third line forcing; and
- resale price maintenance.

The restrictive trade practices provisions (including those relating to cartel conduct) have extraterritorial application, and may apply where the relevant conduct occurs in a foreign jurisdiction but in some way involves or affects Australia.

Companies must be especially mindful of the cartel provisions of the CCA, which can attract both civil and criminal penalties (see “Penalties” section below). A cartel provision in a contract, arrangement or understanding is a provision:

- fixing prices;
- restricting outputs in the production and supply chain;
- allocating customers, suppliers or territories; or
- involving bid-rigging,

between parties that are, or would otherwise be, in competition with each other.

The ACCC has the power to authorise certain arrangements which would otherwise breach the anti-competitive provisions of the CCA. In certain circumstances, it may be advisable for companies to take advantage of the authorisation and notification provisions under the CCA to mitigate the risk of investigation and prosecution.

Consumer Protection

Schedule 2 of the CCA, known as the *Australian Consumer Law* (**ACL**), contains a range of consumer protection provisions including those which are aimed at ensuring accuracy in advertising. Other provisions within the ACL relate to the fairness of contracts with consumers, direct selling and multi-level marketing business arrangements and product recalls. Each state and territory has adopted the ACL. This means that the same consumer protection provisions apply across Australia.

Specifically, the ACL:

- prohibits misleading and deceptive conduct;
- prohibits unfair terms in standard form consumer contracts and small business contracts;

- provides statutory consumer guarantees for consumers against suppliers and manufacturers;
- provides for product liability and recall schemes; and
- regulates direct selling and multi-level marketing businesses.

In addition, manufacturers' liability can apply to importers of products into Australia under the ACL.

Mergers and Acquisitions

The CCA prohibits mergers or acquisitions that have, or would be likely to have, the effect of substantially lessening competition in any market.

The CCA does not set out a mandatory notification regime. However, the ACCC encourages parties to notify the ACCC of a proposed merger where:

- the products of the merger parties are either 'substitutes' or 'complements'; and
- the merged business will have a post-merger market share of greater than 20% in the relevant market(s).

The ACCC monitors actively both domestic and international mergers that may have an impact on Australian markets, and has standing to apply for a court order to 'block' any proposed transaction, and 'unwind' any completed transaction, that it considers may have the effect of substantially lessening competition.

To assist parties in assessing whether a proposed transaction is permissible under the CCA, companies may apply to the ACCC for its preliminary views as to whether a merger proposal – including confidential merger proposals and proposed acquisitions where no approach has been made to the target company – may be objectionable on the above basis.

Misleading or Deceptive Conduct

The ACL contains various provisions which prohibit conduct by businesses which is misleading or deceptive or which is likely to mislead or deceive. Whether or not conduct is misleading or deceptive will depend on the particular circumstances of each case.

In addition to the general prohibition on misleading and deceptive conduct, there are specific prohibitions on certain types of false or misleading statements made by businesses to consumers.

Unfair Contract Terms

Unfair terms in standard form, non-negotiated contracts entered into with customers (including small business owners) are now unenforceable. A contract term will be unfair if:

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

Businesses need to be mindful of these provisions of the ACL if their operations involve contracting with consumers. Examples of industry sectors where these provisions are particularly relevant are car hire, hospitality, removals, telecommunications, travel agencies, airlines, fitness and online retail.

Consumer Guarantees

Along with guarantees as to title, encumbrance and undisturbed possession, the ACL sets out guarantees that cannot be excluded by contract. Suppliers of goods of a kind normally

purchased for personal, domestic or household use or with a value of less than A$40,000 have a legal obligation to ensure that:

- the goods are of acceptable quality;
- the goods are fit for the purposes specified by the supplier;
- a reasonable supply of spare parts or repair facilities is available after purchase;
- the goods match any description or sample given to the consumer; and
- the goods will satisfy any extra promises made about them (express warranties).

Under the ACL, remedies may be available – including compensation, costs, refunds and replacement – where one or more of these guarantees are breached. The severity of the remedy will depend on the seriousness of the non-compliance.

In the case of products manufactured overseas, importers will be liable to customers in respect of a breach of consumer guarantees relating to products for which the manufacturer would be responsible if the manufacturer were in Australia.

The ACL also sets out guarantees relating to the supply of services. These include guarantees as to due care and skill, fitness for particular purpose, as well as reasonable time for supply.

Australia's Product Safety Regime

The ACL also provides the legal framework for Australia's consumer product safety regime, incorporating recalls, mandatory reporting requirements, mandatory safety standards and product bans.

When a safety problem is identified in a consumer product, suppliers or government regulators may determine that the product needs to be recalled. Many recalls are initiated voluntarily by suppliers when they become aware of safety issues in a consumer product, in which case they must notify the relevant Commonwealth Minister. Although initiated by the supplier, the ACCC may require input in respect of the manner in which the recall is to occur and will likely enforce compliance.

Relevant Commonwealth, State and Territory Ministers also have the power to order a compulsory recall to protect the public from an unsafe good. When this happens, the ACCC will direct the manner in which the recall is to occur and will enforce compliance.

The ACL includes a mandatory reporting regime within the Australian product safety framework. Under the ACL, within two business days of becoming aware of an incident where a person has suffered death, serious injury or illness that was caused by, or may have been caused by, a consumer good or product related service the relevant supplier must provide a written report (notice) to the Commonwealth Minister.

Additionally, mandatory standards set out compulsory safety or information requirements for certain types of consumer goods and services supplied into the Australian market. These apply where the products are likely to be especially hazardous. Examples of goods covered by these mandatory safety standards are baby walkers, bicycle helmets, bunk beds and bean bags. It is an offence to supply consumer goods or services in Australia covered by a mandatory safety or information standard if they do not comply.

Finally, while interim bans on certain types of consumer goods or product related services can be imposed by the relevant State and Territory Ministers in their respective jurisdictions, the Commonwealth Minister may impose both interim and permanent bans throughout Australia. Where a ban is imposed in respect of a consumer good, it is unlawful to supply or offer for supply the banned consumer good or manufacture, possess or have control of the banned consumer good for the purposes of supply. Where a ban is imposed in respect of a product related service, it is unlawful to supply or offer for supply the service.

Direct Selling and Marketing

The ACL also sets out a national framework that regulates unsolicited sales practices, including door-to-door selling, telephone sales and other forms of direct selling outside the retail context.

The ACL contains specific provisions as to the time of day and the manner in which businesses may interact with consumers through direct selling. The ACL also regulates the content of agreements made with consumers using direct selling.

Penalties

Companies that breach the anti-competitive provisions of the CCA can be ordered to pay pecuniary penalties of up to the greatest of:

- A$10 million;
- three times the value of the benefit (when the value of the illegal benefit can be ascertained); or
- 10% of the annual turnover of the company and all of its related bodies corporate in the 12 months period ending at the end of the month in which the act or omission occurred (when the value of the illegal benefit cannot be ascertained).

Additional criminal penalties may be imposed in respect of cartel conduct. For a criminal conviction, it must be proven, beyond reasonable doubt, that the prohibited arrangement was given effect intentionally and the accused knew or believed that the prohibited arrangement contained a cartel provision.

The criminal penalties for cartel conduct include up to 10 years' imprisonment. However, companies and individuals may be granted immunity from criminal (and civil) penalties for engaging in cartel conduct where they are the first to apply for immunity and co-operate fully with authorities. Significant penalty reductions may be available to those that co-operate with authorities.

As of 1 September 2018, the same penalties apply to companies and individuals that breach certain provisions of the ACL

Further information can be found at www.accc.gov.au.

Intellectual Property

Businesses trading in Australia should consider the protection of their intellectual property, including trade marks, patents, copyright, moral rights, designs and circuit layouts, domain names, trade names, business names and confidential information.

Trade Marks

If a name or logo (and in some cases, a colour, sound, shape or smell) is being used in connection with an Australian business, trade mark registration should be considered. Although not compulsory, registration gives some protection against other people using a substantially identical or deceptively similar mark in the course of trade.

Any person can apply to register a trade mark with IP Australia. A trade mark will be registered provided that it meets the requirements of the *Trade Marks Act 1995* (Cth), there are no objections to the registration of the trade mark and the registration fees are paid.

Before a new logo or brand is developed, it is prudent to conduct searches, initially of IP Australia's database, for similar trade marks.

Patents

There are two types of patents available under the *Patents Act 1990* (Cth), namely:

- a standard patent which gives the owner protection for 20 years (or up to 25 years if a pharmaceutical substance); and
- an innovation patent that is available for inventions that do not meet the inventive threshold which gives the owner protection for 8 years.

Patent protection requires registration with IP Australia. The cost of patenting will depend, among other things, on the type of patent being granted and the number of countries for which protection is sought.

Designs

Design registration protects the appearance or 'look' of manufactured products. This includes the shape of articles. To obtain design protection, the design must be registered with IP Australia.

Copyright

Australia's copyright law is set out in the *Copyright Act 1968* (Cth). There is no requirement to register a work for copyright. Copyright rights come into existence at the time that the work is put into material form.

In most cases, the period of copyright protection commences on the date of creation and expires on the date which is 70 years after the author's death.

As a result of Australia's obligations under a number of international treaties, almost all copyright works created overseas are protected in Australia under the *Copyright Act*.

Business Names

A business name is a name under which a business may trade. Business names must be registered with the National Business Names Registration Service.

The registration of a business name does not create a separate legal entity or give the owner any proprietary rights in the name. However, it will prevent other people from registering the same name, either as a business name or a company name.

Business names can be registered for a period of one year or three years and can be renewed.

The law governing business name registration is set out in the *Business Names Registration Act 2011* (Cth).

Domain Names

Given that the first contact that many consumers have with a business is through the company's website, registering a domain name in an Australian second level domain, such as "yourbusiness.com.au", can be a good way to target Australian consumers. Like business names, the mere registration of a domain name does not confer on its owner any proprietary rights in the name.

There are a number of accredited second level domain name registry operators with whom a domain name can be registered. Registration generally provides the holder of the domain name with a two-year licence that can be renewed.

There are certain rules and requirements for the registration and administration of .au second level domain names, which are administered by .au Domain Administrators (**auDA**). These rules and requirements are, broadly speaking, more onerous than the rules and requirements for registration of domain names in the .com space. Where a dispute arises in respect of an .au domain name, auDA's mandatory dispute resolution policy applies, providing an alternative to litigation. Decisions made under the policy are binding on the parties.

It is also possible to register top level domain names (**TLD**), whereby a business can apply to register its company name, brand name or trade mark as an independent 'domain name space', that is, ".yourbusiness" instead of ".com". Registering a TLD can offer valuable

protection for brand owners and can strengthen and reinforce a brand owner's trade mark rights. The registration process however is both time and cost intensive.

Applications to register a TLD are processed by the Internet Corporation for Assigned Names and Numbers, which is a non-profit international body that governs the naming and addressing practices of domain names.

Further information can be found at www.ipaustralia.gov.au, www.icann.org and www.auda.org.au.

Financial Services Regulation

Financial Services Licensing

Chapter 7 of the *Corporations Act* regulates financial markets and services. Financial services providers are required to hold an Australian Financial Services Licence (**AFSL**) issued by ASIC or to be authorised representatives of an AFSL holder. A person provides a financial service if they provide financial product advice, deal in a financial product, make a market for a financial product, operate a registered scheme or provide a custodial or depository service.

Credit ratings agencies and providers of margin lending facilities are also required to hold an AFSL. Each financial services business is subject to its own set of specific licence conditions.

Certain exemptions from holding an AFSL are available, for example:

- in relation to financial services only involving the financial services provider itself, such as a company issuing shares; and
- where the financial service is regulated by an approved overseas (i.e. non-Australian) regulatory authority.

The definitions and rules for determining whether a person engaged in a particular activity is required to hold an AFSL, or whether an exemption applies, are relatively complex and need to be assessed on a case by case basis.

AFSL holders can be subject to licence conditions such as being limited to offering financial services only to wholesale clients. An AFSL for the carrying on of one kind of financial services business will not authorise the licence-holder to carry on another kind of financial services business. There are also a range of financial and operational requirements imposed on AFSL holders as conditions of their licences.

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

Financial Products

The definition of "financial products" is critical to determining whether the regulatory regime under the *Corporations Act* applies. The concept is defined broadly as a facility through which a person:

- makes a financial investment, where an investor gives money to another person to generate a financial return for the investor and the investor has no day-to-day control over the money, e.g. shares and options;
- manages a financial risk, where a person manages the financial consequence of particular circumstances happening or avoids or limits the financial consequences of fluctuations in, or in the value of, receipts or costs (including prices and interest rates), e.g. insurance products; or
- makes non-cash payments, where a person makes payments or causes payments to be made otherwise than by the physical delivery of Australian or foreign currency in the form of notes and/or coins, e.g. through card payment systems.

Offering a financial product to a retail investor will normally require the preparation of a product disclosure statement or a prospectus, and potentially also the provision of a financial services guide. The form and content of these types of documents are prescribed by the *Corporations Act*.

Anti-Money Laundering

The *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) is the main statute dealing with anti-money laundering and terrorism financing and is administered by the Australian Transaction Reports and Analysis Centre (**AUSTRAC**). Entities covered by the legislation include businesses in the financial, bullion and gambling sectors. These entities are required to:

- conduct risk assessments and implement system and governance arrangements to manage money laundering and terrorism financing risks;
- verify the identity of their customers (e.g. "know your client" checks) and keep adequate records;
- advise AUSTRAC if they have obligations under the legislation; and
- report certain cash and international transactions and any suspicious activity to AUSTRAC.

Further information can be found at www.austrac.gov.au.

National Consumer Credit Licensing

The *National Consumer Credit Protection Act 2009* (Cth) (**NCCPA**) sets out, among other things, a comprehensive licensing regime for all providers of consumer credit and credit services and imposes responsible lending conduct requirements on licensees.

In broad terms, the NCCPA requires two broad categories of people engaged in consumer credit activities to be licensed:

- credit providers (i.e. lenders and lessors); and
- providers of credit services, including intermediaries such as finance brokers.

The provision of credit to consumers for residential investment purposes also falls under the NCCPA.

The NCCPA is administered and enforced by ASIC. Further information can be obtained at www.asic.gov.au.

Credit providers and credit reporting bodies also need to comply with specific obligations in relation to the collection, use and disclosure of personal information under the *Privacy Act 1988* (Cth) and the *Privacy (Credit Reporting) Code 2014*.

Privacy

Businesses operating in Australia are required to comply with federal and state/territory privacy statutes and, in particular, the *Privacy Act 1988* (Cth) which is administered by the Office of the Australian Information Commissioner (**OAIC**).

The *Privacy Act* regulates the way that businesses can collect, use, retain, secure and disclose personal information and also regulates credit providers and credit reporting agencies. The *Privacy Act* establishes 13 Australian Privacy Principles (**APPs**) which apply to most private sector organisations. The APPs cover standards for the collection, use, disclosure, data quality and security, openness, access, correction, identification, anonymity, storage and data flow of personal information. The OAIC may also authorise businesses in the private sector to create and uphold their own privacy codes. Once approved, those codes become binding on the business.

Organisations to which the *Privacy Act* applies must take reasonable steps to make individuals aware that they are collecting personal information about them and inform them of the purposes for which the information is being collected. There are restrictions on how an organisation deals with personal information that it collects and when it can disclose or transfer personal information overseas. In some circumstances, organisations will be held accountable for any mishandling of personal information by an overseas recipient.

Personal information must not be used for direct marketing purposes unless specified criteria are met.

Australia has a mandatory data breach reporting scheme. Organisations to which the *Privacy Act* applies must notify affected individuals and the OAIC if a data breach or suspected data breach is likely to result in serious harm to the affected individuals.

As mentioned above, there are also specific obligations in respect of credit-related personal information which may apply in addition to, or instead of, one or more of the APPs. The collection, use and disclosure of credit-related personal information must also comply with the *Privacy* (*Credit Reporting) Code 2014*.

Each state and territory in Australia has privacy legislation similar to the *Privacy Act*.

In addition, most states and territories have legislation which set privacy standards for handling health information in both the public and private sectors in the particular state/territory. Further information can be found at www.aoic.gov.au.

The OAIC may also obtain court enforceable undertakings from an organisation and apply to a court for a civil penalty order against an organisation (which for a private sector organisation may be up to A$1.8 million for serious and repeated breaches of privacy).

Immigration

The Australian government operates a strict points-based immigration policy and businesses operating in Australia should ensure that their personnel have the correct visas to remain and work in Australia.

People who migrate to Australia as skilled migrants are entitled to work here, but people visiting Australia may or may not have the right to work. Employers have an obligation under the *Migration Act 1958* (Cth) to check a potential employee's work entitlements to ensure that they do not face penalties due to the employment of illegal workers.

There are numerous work visas of both a temporary and permanent nature for which different selection criteria apply. These include employer-sponsored visas and professional and other skilled migrant visas for persons with recognised qualifications and skills or experience in particular occupations required in Australia. There are also special temporary business visas for people to come to Australia for a business-related visit or to establish, manage or develop a new Australian business. More recently, the Federal Government has introduced the Significant Investor Visa scheme, which enables applicants who invest at least A$5 million into complying investments for a minimum of 4 years and satisfy certain other criteria, to apply for permanent residency in Australia.

Companies who wish to sponsor the immigration of employees from overseas need to be specifically approved.

More information on the types of visas and employer requirements are available from the Department of Immigration and Citizenship. Further information can be found at www.immi.gov.au.

Insurance

It is good practice for companies to have insurance policies in place in respect of their business activities in Australia. The most common types of insurance include:

- *Workers compensation*: this is compulsory for most businesses in Australia and covers claims for workplace-related injury or disease;
- *Professional indemnity*: this covers any civil liability for breach of a duty owed in a professional capacity in connection with the company's business;
- *Public liability*: this covers circumstances where a company may be found liable to a third party for death or injury, loss or damage of property or 'pure economic' loss resulting from the company's negligence;
- *Product liability*: this covers damage or injury caused to another business or person by the product that a company is selling or a failure of that company; and
- *Directors and Officers*: this covers claims from allegations against directors and officers of a company of wrongful acts whilst acting in their capacity as a director or officer.

It is prudent for a foreign company wishing to conduct business in Australia to determine whether its existing insurance is sufficient to cover its Australian business activities or whether additional insurance cover needs to be obtained. Most banks and other organisations will require that a business has appropriate insurance in place with a reputable insurer before contracting with it.

Insurers are regulated by the Australian Prudential Regulation Authority. Further information can be found at www.apra.gov.au.

Superannuation

An individual or company conducting business in Australia needs to consider its obligations to pay superannuation contributions in respect of its Australian employees.

Compulsory contribution legislation requires an employer to:

- pay superannuation for its eligible employees. An employee is eligible if he or she is paid at least the prescribed amount (currently A$450 (before tax) in a calendar month), irrespective of whether the employee works on a full-time, part-time or casual basis (subject to certain limited exceptions);
- contribute to the correct superannuation funds; and
- pay contributions by the cut-off date on a quarterly basis (being no more than 28 days after the end of the quarter).

An employer may have to pay superannuation for employees who are visiting Australia on an eligible temporary resident visa.

The minimum superannuation amount payable is currently 9.5% of each eligible employee's ordinary time earnings base and will increase to 12% by 1 July 2025. Employees can direct their employer to contribute more than the statutory minimum contribution to their superannuation fund.

Most employees are entitled to select their own superannuation fund, unless they are employed under certain state awards, industrial agreements or workplace agreements or they are in a particular type of defined benefit fund. Employer-nominated funds are also required to offer minimum life insurance death cover to members.

Environmental and Climate Change Laws

Environmental law is governed by federal and state/territory legislation whereas town planning and land use is regulated by state/territory and local authorities. Environmental law addresses matters such as:

- land, water, air and noise pollution;
- contaminated land;
- waste, recycling and sustainable packaging;
- climate change and energy and gas emissions and reporting;
- heritage including indigenous artefacts;
- dangerous goods and hazardous materials;
- water use including trading in water rights and protection of riparian land;
- threatened species and ecological communities including trading in biodiversity credits; and
- land use regulation.

Emissions Reporting

The *National Greenhouse and Energy Reporting Act 2007* (Cth) establishes a national system requiring certain companies to report on the levels of their greenhouse gas emissions and energy consumption and production for each reporting year (1 July to 30 June). Companies that meet any one of the following thresholds are required to register with the Clean Energy Regulator and to report under the National Greenhouse and Energy Reporting Scheme:

- the entity emits 50 kilotonnes or more of greenhouse gases or produces or uses 200 terajoules or more of energy each year; or
- the entity has operational control of facilities that emit 25 kilotonnes or more of greenhouse gases or use or produce 100 terajoules or more of energy per year.

Further information can be found at www.cleanenergyregulator.gov.au.

Waste and Sustainable Packaging

As a result of co-operation between the states and territories, there is some consistency nationally on the regulation or prevention of waste and, in particular, relating to sustainable packaging. Many companies have signed up to the voluntary Australian Packaging Covenant under which various undertakings are given in relation to sustainable packaging and the reuse and recycling of packaging. There are thresholds in place that determine whether a business (or importer) should sign up to the Australian Packaging Covenant in respect of its packaging. Many leading businesses have become a signatory to the Australian Packaging Covenant, as an alternative to being required to comply with more onerous controls under state and territory law relating to their packaging.

The states and territories also have a range of specific controls relating to single use plastic bags, beverage containers and other products.

Personal Property Securities Law

In general, security interests over personal property in Australia must be registered on the *Personal Property Securities Register* (**PPSR**) to have priority over non-registered or subsequently registered security interests.

The types of security interests that may be registered on the PPSR are regulated by the *Personal Property Securities Act 2009* (Cth) (**PPSA**).

The PPSA takes a 'substance over form' approach in determining what is a 'security interest' and looks to whether a transaction provides an interest in personal property that, in substance, secures payment or performance of an obligation.

Further, the PPSA expressly extends the scope of "security interest" beyond interests traditionally associated with security, such as fixed and floating charges,[5] chattel mortgages and finance leases, to interests provided by such transactions as conditional sale agreements (including agreements to sell subject to retention of title), hire purchase agreements and leases of goods.

Due to the broad definition of "security interest" in the PPSA, businesses may need to register contractual and other rights that they have in personal property in order to ensure the enforceability of those rights as against the rights of third parties.

Interests in land continue to be regulated by state-based legislation and land titles registers.

The Australian Financial Security Authority is responsible for the administration of the PPSR. Further information can be found at www.afsa.gov.au.

Regulatory Bodies

This section summarises the principal regulatory bodies with whom businesses in Australia come into contact regularly – a number of which have been referred to earlier in this guide.

Australian Securities & Investments Commission (ASIC)

ASIC is an independent Commonwealth government body that regulates companies, financial markets and financial service providers to ensure that their activities are carried out honestly and transparently.

ASIC is responsible for administering legislation such as the *Corporations Act 2001* (Cth) and the *Australian Securities and Investments Commission Act 2001* (Cth) and ensuring that companies, financial service providers and their employees comply with the requirements under those Acts.

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

Australian Securities Exchange (ASX)

ASX is among the 15 largest securities exchanges in the world. It is a public listed company and releases detailed reports on market information (such as stock prices), delivers stock market announcements and assists with market education.

Further information can be found at www.asx.com.au.

Australian Competition and Consumer Commission (ACCC)

The ACCC is responsible for enhancing the welfare of Australia through the promotion of competition and fair trading in the Australian marketplace and for the protection of consumers. It regulates companies and individuals to ensure compliance with the CCA. It can also regulate foreign companies conducting business or engaging in activities in Australia.

[5] Known as charges over circulating and non-circulating assets.

The ACCC has significant powers to make decisions or take legal action in respect of consumer protection matters and matters involving anti-competitive behaviour. It has powers to assess whether acquisitions of shares or assets may result in the lessening of competition in the market in breach of the CCA. State and territory consumer affairs agencies also enforce fair trading and consumer protection matters.

Further information can be found at www.accc.gov.au. Also see:

www.fairtrading.nsw.gov.au

www.consumer.vic.gov.au

www.docep.wa.gov.au

www.nt.gov.au/justice

www.cbs.sa.gov.au/wcm/www.fairtrading.qld.gov.au/consumers.htm

www.consumer.tas.gov.au

Australian Taxation Office (ATO)

The ATO is the statutory authority responsible for collecting revenue for the Australian government. It develops and manages the systems that control taxation, excise and superannuation. Australia's income tax law is comprised of the *Income Tax Assessment Act 1936* (Cth), the *Income Tax Assessment Act 1997* (Cth) and the *Taxation Administration Act 1953* (Cth), as well as administrative taxation rulings and court decisions. The current income tax system includes the taxation of income and capital gains of individuals and businesses.

Fringe benefits provided to employees are subject to a separate regime under the *Fringe Benefits Tax Assessment Act 1986* (Cth).

Australia's goods and services taxation law is contained in *A New Tax System (Goods and Services Tax) Act 1999* (Cth).

Further information can be found at www.ato.gov.au.

Australian Transaction Reports and Analysis Centre (AUSTRAC)

AUSTRAC is Australia's anti-money laundering and counter-terrorism financing regulator. Incoming and outgoing monetary transactions may be subject to reporting requirements to AUSTRAC.

Specific requirements exist for a wide range of financial services providers, the gambling industry and others. The regulations are contained in the *Financial Transactions Reports Act 1988* (Cth) and the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth).

Further information can be found at www.austrac.gov.au.

Foreign Investment Review Board (FIRB)

FIRB provides foreign investment policy advice to the Australian federal government. FIRB examines the proposals of foreign investors investing in Australia and advises the government whether the proposals comply with foreign investment policies and the *Foreign Acquisitions and Takeovers Act 1975* (Cth). The Treasurer has the right to disallow a foreign investment proposal.

FIRB issues policy documents which outline the kinds of investments for which a foreign investor will need approval. Additionally, there are some limits on the amount and types of investment a foreign investor can make, for example, purchasing shares in an Australian company or land.

Further information can be found at www.firb.gov.au.

Australian Communications and Media Authority (ACMA)

The ACMA is the government body responsible for the regulation of broadcasting, the Internet, radio communications and telecommunications. ACMA's responsibilities include promoting self-regulation and competition in the communications industry, while protecting consumers and other users. ACMA is also responsible for enforcing Australia's anti-spam law, the *Spam Act 2003* (Cth) and Australia's laws regulating offshore gambling contained in the *Interactive Gambling Act 2001* (Cth). If current legislative proposals are enacted, it may also be responsible for enforcing aspects of Australia's interactive gambling laws.

Further information can be found at www.acma.gov.au.

Clean Energy Regulator

The Clean Energy Regulator is the government body responsible for administering legislation aimed at measuring, managing, reducing or offsetting Australia's carbon emissions.

The Clean Energy Regulator administers schemes, such as the National Greenhouse and Energy Reporting scheme, emissions reduction fund, renewable energy target and Australian registry of emission units.

The Clean Energy Regulator works in collaboration with stakeholders and clients – including government departments and agencies, industry bodies, reporting entities and the community – to assist the transition of Australia to a low carbon economy.

For information can be found at www.cleanenergyregulator.gov.au.

Australian Financial Security Authority

The Insolvency and Trustee Service Australia is the government agency responsible for the administration and regulation of the personal insolvency system, proceeds of crime, trustee services and the administration of the PPSR.

Further information can be found at www.afsa.gov.au.

IP Australia

IP Australia is the regulatory body in respect of intellectual property in Australia. Its main purpose is to administer and keep records of registered patents, designs, trademarks and plant breeder's rights.

Members of the public are able to search the records of IP Australia for information relating to intellectual property rights, including registers of trade marks, designs and patents.

Further information can be found at www.ipaustralia.gov.au.

Office of the Australian Information Commissioner (OAIC)

The OAIC is headed by the Australian Information Commissioner and is the government body responsible for administering and enforcing the *Privacy Act 1988* (Cth). The OAIC consists of two branches:

- Dispute Resolution, which is responsible for case management and the resolution of privacy and Freedom of Information (FOI) complaints and reviews. The Dispute Resolution branch also carries out Commissioner-initiated investigations and is responsible for legal services and the enquiries line.
- Regulation and Strategy, which provides advice and guidance, examines and drafts submissions on proposed legislation, conducts assessments, and provides advice on inquiries and proposals that may have an impact on privacy. The Regulation and Strategy branch is also responsible for communications and corporate functions.

Further information can be found at www.oaic.gov.au.

Therapeutic Goods Administration (TGA)

The TGA is a unit of the Australian Government Department of Health, responsible for administering the *Therapeutic Goods Act 1989* (Cth). The TGA carries out a range of assessment and monitoring activities to ensure therapeutic goods available in Australia are of an acceptable standard, with the aim of ensuring that the Australian community has access to therapeutic advances.

Therapeutic goods, which include medicines as well as medical devices, must be entered on the Australian Register of Therapeutic Goods before they can be supplied in Australia.

.au Domain Administration

auDA is a not-for-profit organisation which was formed in 1999 as the industry self-regulating body for the .au domain name. It has been formally recognised by the Federal Government and has the power to develop and implement domain name policy.

It is responsible for granting licences for second level domain registry operators (e.g. obtaining a .com.au, .net.au or .org.au webpage), as well as ensuring consumer protection by implementing safeguards and dealing with complaints.

Further information can be found at www.auda.org.au. Also see www.melbourneit.com.au.

Environment Protection Authority

Most states have their own Environment Protection Authority to administer, investigate and regulate protection of the environment. The EPA has wide investigatory and enforcement powers and can initiate criminal prosecutions against individuals, companies and company officers. It can also issue orders to remediate contaminated land on companies, holding companies, financiers and directors of companies.