Doing Business and Investing in Australia

August 2024 edition

A guide to legal issues

Russell Kennedy

Member of Ally Law

Welcome

Welcome to Russell Kennedy Lawyers' 2024 guide to *Doing Business and Investing in Australia*.

The purpose of this guide is to provide a general overview of the key legal issues that foreign organisations should be aware of when seeking to do business in or investing in Australia.

Russell Kennedy Lawyers is a leading Australian law firm with offices in Melbourne and Sydney and over 150 lawyers. We provide our clients with market-leading expertise, outstanding service and exceptional legal solutions.

We build long-standing relationships with our clients and work hard to attract and retain the best people. We are committed to making a difference through our work across industry sectors that matter to communities. Our firm is the perfect size to effectively manage large or complex matters while delivering personal and prompt service. In conjunction with Ally Law, we also advise national and international clients whose business interests bring them to Australia and beyond.

In existence for more than 150 years, Russell Kennedy acts for a broad range of clients, including major public and ASX-listed companies, larger private companies, foreign corporations, banks, state and federal governments, local governments and statutory authorities, not-for-profits, start-ups and private individuals. Our clients are drawn from all three levels of government, the commercial sector, the not-for-profit sector, and private citizens.

Russell Kennedy Lawyers acknowledges the Traditional Custodians of the lands on which we meet and work. We pay our respects to their Elders, past and present, to their emerging leaders and to the resilience, creativity and vitality of their cultures including their laws and systems of governance.

What this guide covers

The beautiful artwork used on the cover of this document was created by Stormie Lee Dutton, a proud Barkinji/Wiradjuri woman. Stormie is based in Albury-Wodonga, on the Dhungala (Murray River) the mighty waterway which dissects the states in which the two Russell Kennedy offices are located.

The Guide is not intended to provide comprehensive details of the topics referred to.

Organisations seeking to do business in or invest in Australia should seek advice tailored to their specific industry and circumstances. Laws and regulations change. Information contained in this Guide should not be relied on without first seeking advice that the information remains current and is applicable to the reader's specific circumstances.

Australia in 2024

Australia in 2024

Australia, the legal system and structure of government

A brief history and demographics

For more than 50,000 years before British settlement in the late 18th century the land mass now known as Australia was inhabited by the continent's Indigenous people.

The Commonwealth of Australia was formed on 1 January 1901 when the British self-governing colonies of Queensland, New South Wales, Victoria, Tasmania, South Australia and Western Australia agreed to unite to form a federal based system.

The Statute of Westminster passed by the British Parliament in 1931 formally ended most of the constitutional links between Australia and the United Kingdom. The passing of the British Parliament and the Australian Parliament of the Australia Acts of 1986 removed any lasting avenue of control by Britain and judicial appeals to the Privy Council in London.

Strong connections with the United Kingdom remain. Following the death of Queen Elizabeth II, King Charles II became Australia's head of State, represented in Australia by the Governor-General.

Australia has a population of approximately 26.64 million people. As a continent it covers 7,692,024 km^2. In contrast, China and the United States cover 9,500,000 km^2, while the United Kingdom covers 242,495km^2.

Australia is a highly urbanised country with most of its people living in or near the state capitals. Major cities include Sydney, the state capital of New South Wales (approximately 5,297,000 people); Melbourne, the state capital of Victoria, (approximately 5,031,000 people); Brisbane, the state capital of Queensland (approximately 2,628,000 people); Perth, the state capital of Western Australia (approximately 2,224,000 people) and Adelaide, the state capital of South Australia (approximately 1,418,000 people).

The Nation's Capital is Canberra located in the Australian Capital Territory. Canberra has a population of approximately 456,000 people.

Australia has the world's 14th largest economy and 10th highest per capita income. Australia has the world's ninth-highest immigrant population, with overseas born persons accounting for approximately 30% of the population.

Structure of government

Australia's structure of government is derived from the Australian constitution and is based on a federation of states and territories with a central Commonwealth government based in the nation's capital Canberra. Because of Australia's historical links to the United Kingdom, Australia's system of government has been influenced by the Westminster system of government.

Federal government

The Australian Parliament consists of the King (represented by the Governor-General), the Senate and the House of Representatives. The Parliament has powers to enact laws in certain defined areas, such as laws relating to corporations, industrial relations, foreign affairs and the armed forces.

There are three arms of government in Australia:

- The legislature (or **Parliament**) is responsible for debating and voting on new laws to be introduced.
- The executive (the **Australian Government**) is responsible for exercising the powers of government. Certain members of the executive (called ministers) are also members of the parliament, with special responsibilities for certain departments of state.
- The judiciary is the judicial arm of the federal government. It is independent of the other two arms, and is responsible for exercising the judicial power of government.

Australia in 2024

State and territory government

The six states retain the power to make their own laws over matters not controlled by the Commonwealth, such as health, education, policing and property law. State governments also have their own parliaments, as well as a structure of legislature, executive and judiciary.

Australia's ten territories are either self-governing or administered by the federal government. The two mainland territories are the Northern Territory and the Australian Capital Territory. External territories include a number of islands and the Australian Antarctic Territory (covering 42 percent of the Antarctic continent).

Local government

The third tier of government in Australia is local government. Responsibility for local government lies with the state and territory governments. Local governments make rules and regulations in relation to a range of local matters including planning zones, waste disposal and road management.

Australia in 2024

Common law legal system

There are two sources of law in Australia. The first is statute law, passed by the Commonwealth and various state or territory parliaments. The second source of law is the common law, which is the law developed by the courts through the decision of judges over the years. The common law of Australia was originally inherited from the United Kingdom during Australia's colonial history and is based on precedent which means that the decision of a senior court binds a lower court. This is intended to ensure consistency in court decision making. The common law applies to all of Australia but can be overridden by federal and state statute law.

Important areas of commerce and business are regulated by the common law such as the law of contract, some aspects of employment law and banking and finance.

The common law system of precedents is set by superior courts such as the Supreme Court in each state, the High Court of Australia and the Federal Court. Once a precedent has been set, all the lower courts must follow it. A precedent may change if a higher court overturns it. Decisions of foreign courts including the United Kingdom are considered persuasive. They cannot form the basis of a binding precedent.

Common law precedents may also arise from the interpretation of statute law. The wording of the statute may require interpretation to the specific context of a case which is recorded in a judgment. The interpretation of a statute is binding on lower courts.

All jurisdictions have established tribunals to hear appeals against government decisions, administer particular areas of business (such as industrial relations) or administer particular laws (such as planning laws or retail tenancy laws). These tribunals are not courts but can be an important regulatory factor in various industries.

Therefore business in Australia is generally regulated by both federal and state statute law rather than common law. The courts are therefore responsible for interpreting and enforcing particular legislation.

COVID-19 in Australia

Australia was relatively effective in stopping the spread of COVID-19 several times through its border closures both internationally and nationally, enactment of stay at home orders, closure of non-essential businesses and successful vaccination program. These mechanisms prevented the Australian health care system from becoming overwhelmed. As a result, the mortality rate in Australia has been significantly lower than the global average, with Australia reporting approximately 76 deaths per 100,000 people, compared to nations such as the United States and the United Kingdom, reporting approximately 665 deaths and 325 deaths per 100,000 people respectively.

There are no longer any travel restrictions relating to COVID-19.

How to conduct business in Australia

How to conduct business in Australia

Foreign corporations can carry on business in Australia in their own right. Doing so brings with it a requirement to register as a foreign company with a branch in Australia.

For asset protection and tax reasons, it is common for foreign businesses looking to operate in Australia to set up an Australian subsidiary, which generally takes the form of a proprietary company limited by shares.

Foreign company registration

To open an Australian branch, a foreign company must register with the Australian Securities & Investments Commission (**ASIC**).

Prior to registration, the foreign company should confirm with ASIC and IP Australia Trademark register that the company name is available and does not infringe any existing trademark. The foreign company must have a registered office in Australia and appoint a local agent to ensure it is compliant with Australian law.

To register with ASIC, the foreign company must provide general information about its structure and how it will operate. This includes providing certified copies of its certificate of incorporation, constitution and a memorandum stating the powers of certain directors.

Whether the foreign company is "carrying on a business" in Australia is determined by its activities in Australia and determined by reference to the *Corporations Act 2001* (Cth) (**Corporations Act**) and common law principles. Merely being involved in legal proceedings, holding director meetings or maintaining a bank account in Australia is not, in itself, sufficient to require registration. Under the Corporations Act, a foreign company will carry on business in Australia if it:

- offers debentures in Australia, or is a guarantor body for debentures offered in Australia;
- establishes or uses a share transfer office or share registration office in Australia; or
- administers, manages or otherwise deals with property situated in Australia as an agent, legal personal representative or trustee.

The Australian common law has developed a number of non-exhaustive relevant factors to determine whether a company is carrying on a business, including:

- whether the company is undertaking some form of commercial enterprise, systematically and regularly, with a view to profit;
- whether there is a succession or repetition of acts, as opposed to a singular or isolated transaction; and
- the duration of the undertaking or acts.

Once the application has been approved, the foreign company will receive a registration certificate and a unique nine digit number (known as an Australian Registered Body Number) that must appear on all public documents. The foreign company will have regulatory compliance obligations, including lodging financial statements and notifying ASIC of certain matters.

Corporate structures

Proprietary companies limited by shares

Foreign companies most commonly conduct business in Australia through a local proprietary company limited by shares. Benefits of proprietary companies limited by shares include:

- all shares in the Australian subsidiary can be owned by a foreign company or person;
- no minimum capital requirements;
- non-residents may be appointed as directors, but at least one director must be ordinarily resident in Australia;

- there is no requirement to have a company secretary, but if one or more secretaries are appointed, at least one must be ordinarily resident in Australia;
- there is no requirement to hold an annual general meeting; and
- less onerous reporting obligations for smaller businesses and corporate groups.

Public company limited by shares

Similar to a proprietary company limited by shares but suitable where the number of shareholders exceeds 50. More onerous reporting obligations apply.

Company limited by guarantee

Not-for-profit organisations often adopt this structure. Companies limited by guarantee do not have share capital and the liability of members is limited to the amount of the members'' guarantee.

No liability company

This structure can only be adopted by mining corporations.

Incorporated bodies

Incorporated bodies include incorporated associations and co-operatives. Incorporated associations are usually used by clubs and special interest groups to achieve not-for-profit objectives. While co-operatives are used for profit making ventures and is governed by a uniform Co-operative National Law.

Joint ventures

A joint venture is an agreement between parties to work towards a common goal while remaining legally separate entities.

Joint ventures can be unincorporated (created by contract) or incorporated (operated via a joint venture company).

Partnerships

Partnerships comprise between two and twenty (or more, depending on the industry) partners who agree to work together in conducting a joint business.

Partnerships are generally not separate legal entities. Partners can be jointly and severally liable for the obligations and debts of the business.

Trusts

Businesses can be conducted through a trust. The trust must have a trustee, who may either be an individual or a corporation. The trustee holds the business' assets, distributes the business' income and complies with the trust deed.

The two most common types of trusts under which businesses can be conducted are a discretionary trust and a unit trust. A discretionary trust gives the trustee discretion over what income or capital is distributed to each beneficiary, while unit trusts divide the property into fixed and quantifiable parts called units. Unit trusts that have a corporate trustee, commonly have unitholders that also hold shares in the corporate trustee.

Office holders and personal liability

The Federal Government has introduced a registration scheme for directors of Australian companies that requires all directors to obtain a director identification number (**DIN**). A DIN is a unique identifier that a director will need to keep indefinitely. Directors must apply for a DIN before their appointment.

How to conduct business in Australia

Where a company has been managed responsibly the debts of the company will generally be confined to the company. Persons appointed as directors are responsible for the management of the company. A number of common law and statutory duties and obligations are imposed on directors, including the duty to act in the company's best interests.

Directors may incur personal liability if they breach their duties and obligations to the company. Personal liability may also be imposed if a company continues to trade while insolvent, if the company fails to discharge certain taxation or superannuation obligations, in the case of some workplace events (such as industrial manslaughter), or if the company breaches particular laws such as laws relating to foreign bribery offences, occupational health and safety laws and environmental protection laws.

Fundraising

Fundraising activities are regulated by the Corporations Act and applied by ASIC, the Australian Prudential Regulation Authority (**APRA**) and the Reserve Bank of Australia (**RBA**). The Act applies to all financial products offered within Australia irrespective of whether a financial product is issued by an Australian or foreign issuer and regardless of where any resulting issue, sale or transfer occurs. The concept of offering securities includes inviting applications.

"Financial Product" is defined as a facility through which or through the acquisition of which, a person makes:

- a financial investment, which includes investing in company shares;
- manages financial risk, which includes taking out insurance and hedging liability by acquiring a futures contract; or
- makes non-cash payments, which includes payments through direct debit facilities, cheque facilities; electronic payment systems and traveller's cheques.

Offers of financial products generally require disclosure in accordance with the Corporations Act. There are however a number of exceptions including rights issues, small scale personal offers and certain offers to 'sophisticated investors' or persons closely associated with the company making the offer (and in these instances no disclosure document is required to be registered).

There are two main types of disclosure documents – prospectuses and offer information statements. These must be lodged and approved by ASIC. Depending on the circumstances a requirement to prepare a prospectus may be satisfied by the preparation of a full prospectus, a short form prospectus or a transaction specific prospectus. It is also common for companies who are not required to prepare a disclosure document to instead issue an 'information memorandum' (that does not required lodgement).

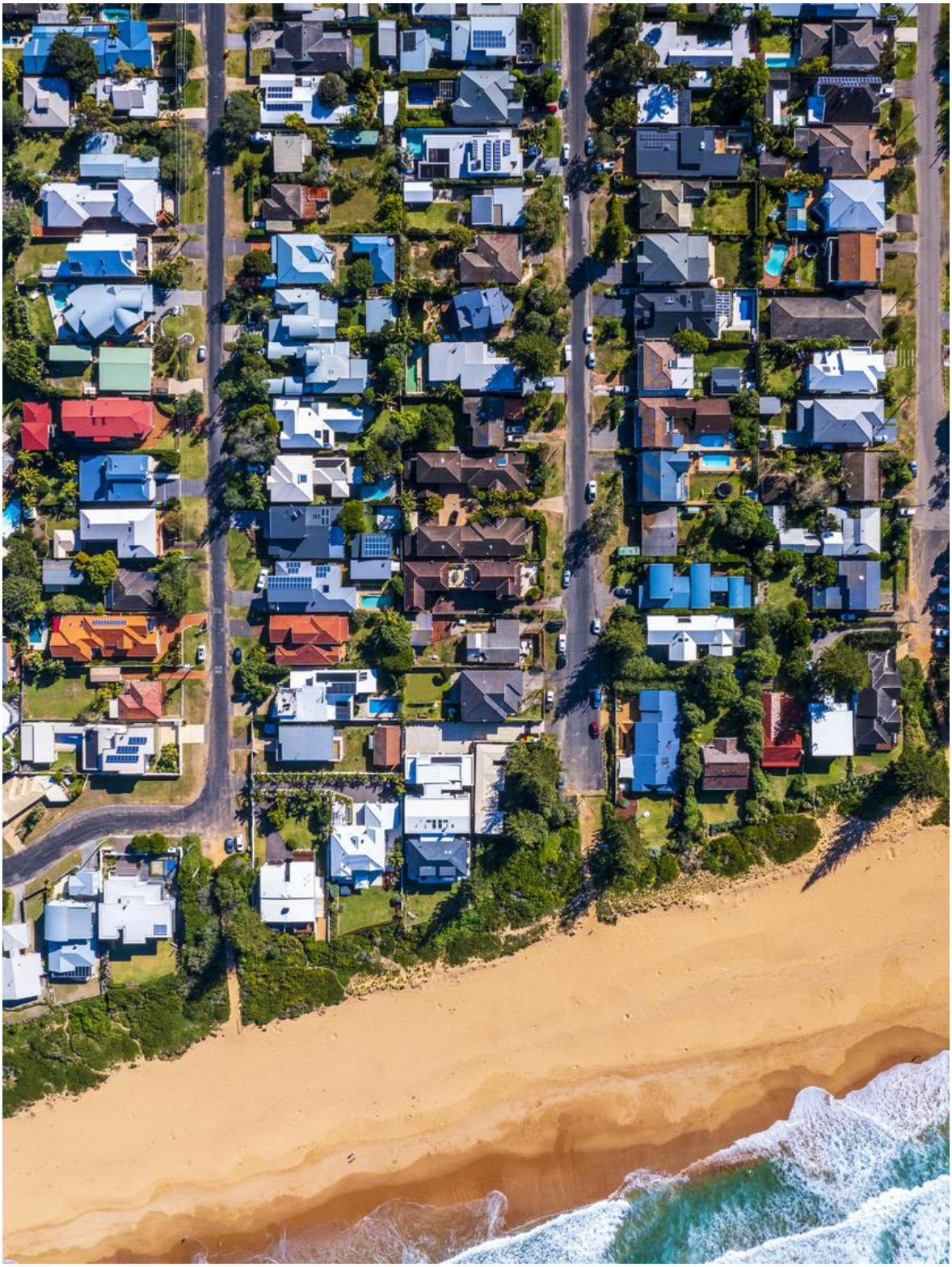
Immigration and visa requirements

Australia's migration and visa program provides for the permanent and temporary entry of skilled individuals. Visa requirements vary depending on the applicant's citizenship, purpose in visiting and length of stay.

Electronic Travel Authorities (**ETA**) or an EVisitor visa are generally available to business people, entitling the holder to remain in Australia for a period of up to 3 months from each entry to participate in business activities such as attending board meetings and conferences, attending to contract negotiations and making general employment enquiries.

On 18 April 2017 the Australian government announced the abolition of the popular 457 visa, an aspect of which provided for the sponsorship of employees by foreign companies wishing to establish business in Australia. The 457 visa was replaced by the new Temporary Skill Shortage (**TSS**) visa in March 2018. Organisations looking to establish a business presence in Australia using foreign workers should seek specific advice tailored to their circumstances.

How to conduct business in Australia



Foreign Investment Review Board

Foreign Investment Review Board

Foreign investment in Australia is regulated by legislation, regulations and the Australian Foreign Investment Policy.

The Foreign Investment Review Board (**FIRB**) is the body that advises the Treasurer and Government on Australia's Foreign Investment Policy. With the advice of FIRB, the Treasurer reviews investment proposals and either prohibits or permits a proposed investment based on whether it satisfies the national interest test.

Considerations including the economic benefits of foreign investment will be weighed up against concerns surrounding foreign ownership of Australian assets, in addition to issues surrounding Australian government policies, national security, competition and the character of the investor.

The foreign investment scheme applies to 'foreign persons', meaning:

- an individual who is not ordinarily resident in Australia; or
- a corporation in which an individual not ordinarily resident in Australia, a foreign corporation or a foreign government holds an interest of at least 20 percent; or
- a corporation in which two or more persons, each of whom is an individual not ordinarily resident in Australia, a foreign corporation or a foreign government, collectively hold interests comprising at least 40 percent; or
- the trustee of a trust in which an individual not ordinarily resident in Australia, a foreign corporation or a foreign government holds an interest of at least 20 percent; or
- the trustee of a trust in which two or more persons, each of whom is an individual not ordinarily resident in Australia, a foreign corporation or a foreign government, collectively hold interests comprising at least 40 percent; or
- a foreign government; or
- any other person, or any other person that meets the conditions, prescribed by the *Foreign Acquisitions and Takeovers Regulation 2015* (Cth); or
- person deemed to be a foreign person under section 54(7) of the *Foreign Acquisitions and Takeovers Act 1975* (Cth) (**FATA**).

Foreign investment in Australia in 2020-21

On 29 September 2023, FIRB released its Quarterly Report on Foreign Investment (**Report**) for the period 1 April 2023 to 30 June 2023. Some of the key findings of the Repot are referred to below.

Reforms to Foreign Acquisition and Takeover Act

The 2021 foreign investment reforms saw the implementation of the most significant reforms to the FATA since its inception. The reforms are designed to keep pace with emerging risks and global developments, as well as strengthening Australia's foreign investment regime.

The reforms include:

- transitioning away from the temporary zero dollar screening threshold arrangement, which was introduced during COVID-19;
- introducing additional national security powers such, as mandatory screening of sensitive investments, "call-in" powers, and a last resort power to be used only in exceptional circumstances;
- a new Register of Foreign Ownership of Australia Assets;
- new fee arrangements; and
- regular performance reporting to improve the transparency of foreign investment regulation in Australia.

Foreign Investment Review Board

A continued reduction in approved foreign investment proposals

During the period 1 April 2023 to 30 June 2023, 297 commercial foreign investment proposals were approved by FIRB, bringing the total number of 2022-23 proposals approves to 1,310. The number of approvals continues to decline when compared to 2021-22 (1,563 approvals) and 2020-21 (2,325 approvals). However, the large number of proposals approved in 2020-21 can be attributed to the temporary zero-dollar thresholds that applied at the time in response to the COVID-19 pandemic.

The total value of commercial investment proposals approved during the 2022-23 reporting period was AU$171.5 billion, a significate reduction in total value compared to 2021-22 (AU$330.5 billion) and 2020-21 (AU$227.2 billion). Within the 2022-23 reporting period, there was considerable volatility in value of proposals from quarter-to-quarter, as outlined in the table below.

Reporting period	Value of approved proposals
Q1 2022-23	AU$48.6 billion
Q2 2022-23	AU$58.7 billion
Q3 2022-23	AU$29.3 billion
Q4 2022-23	AU$34.9 billion

Commercial real estate sector soars, while residential real estate continues to grow

In 2022-23, the commercial real estate sector attracted the highest number of approvals and investment, accounting for 31.1% of total proposed commercial investment. Within the sector, 431 proposals totalling AU$50.2 billion were approved, compared to 61 approvals totalling AU$66.6 billion in 2021-22. This represents a 706.6% increase in approvals and a 23.6% reduction in total investment, demonstrating that FIRB approved a larger number of smaller valued proposals in 2022-23 (average proposal value of AU$116.2 million) compared to a small number of larger valued proposals in 2021-22 (average proposal value of AU$1.1 billion).

There was also significant growth in approvals and value of investment for residential real estate. In 2022-23, there were 6,576 approvals totalling AU$7.9 billion in proposed investment value, compared to 5,433 approvals totalling AU$7.6 billion in in 2021-22 and 4,327 approvals totalling AU$5.7 billion in 2020-21.

Save for Agriculture, Forestry & Fishing, which remained constant in approval value when compared to 2021-22, all other sectors experienced a decline in total approval value. Please refer to the below table for a comparison of each sector's 2022-23 performance as compared to the 2021-22 reporting period.

Industry	Approved investment proposals (AU$ billion)		Value of approved proposals (AU$ billion)	
	2022-23	*2021-22*	*2022-23*	*2021-22*
Services	382	486	42.5	109
Commercial Real Estate	431	61	50.2	66.6
Mineral exploration & development	126	135	13.1	14.7
Manufacturing, Electricity & Gas	168	134	24.8	37.2
Residential Real Estate	6,576	5,433	7.9	7.6
Agriculture, Forestry & Fishing	200	187	8.5	8.5
Finance & Insurance	79	105	32.4	94.7

Foreign Investment Review Board

US continues as top investor, with Canada rising upwards

The United States continues to be the largest source of commercial investment in 2022-23, with 598 approvals totalling AU$34.5 billion in proposed investment (equal to 31.5% of total foreign commercial investment). However, despite retaining the mantle as the largest foreign investor, the total investment value from the United States fell dramatically from AU$118.9 billion during the 2021-22 reporting period. The decline in total investment value is a trend seen across all foreign jurisdictions, with the exception of Japan, whose total investment value increased to AU$14 billion (compared to AU$7.1 billion in 2021-22) and the United Kingdom, whose total investment value remained unchanged at AU$6.5 billion.

Notification requirements

Foreign investors seeking to invest in certain types of Australian assets may need to notify the Government of the proposed action and seek prior approval from the Treasurer. Failure to comply with notification requirements can result in a fine or imprisonment, for the investor and in certain circumstances, persons who were involved in the action, for example, directors of an investor entity. Further, the Treasurer may prohibit or order the divestment of an investment if the acquisition is subsequently found to be contrary to the national interest.

There are a number of key concepts relating to notification of foreign investment, including a '**significant action**', a '**notifiable action**', a '**reviewable national security action**' and a '**notifiable national security action**'. These can be divided into mandatory notifications and voluntary notifications to the Treasurer, as follows:

Mandatory notification:

- A 'notifiable action' is an action by a foreign person that must be notified to the Treasurer before it can be undertaken. Offences and civil penalties may apply if notice is not given. Sections 47 to 49 of the FATA outlines when an action will constitute a notifiable action.
- A 'notifiable national security action' is an action undertaken or proposed to be undertaken by a foreign person, which is any of the following actions:
  - Starting a national security business;
  - Acquiring a direct interest in a national security business;
  - Acquiring a direct interest in an entity which carries on a national security business;
  - Acquiring an interest in Australian land that is, at the time of acquisition, national security land; or
  - Acquiring a legal or equitable interest in an exploration tenement in respect of Australian land that, at the time of acquisition, is national security land.

It is also important to note that an internal restructure which meets the requirements of a notifiable action or national security action will also trigger the requirement for FIRB approval, even if there is not change of control as a result of that restructure.

Voluntary notification: whilst not compulsory, it is recommended that foreign persons seeking to undertake these actions seek prior approval from FIRB.

- A 'significant action' is an action by a foreign person that does not require formal notification to FIRB before it can be undertaken. However, under the FATA, the Treasurer has the power to make a variety of orders in relation to a Significant Action and, as a result, it is recommended that investors make a voluntary notification to the Treasurer that a 'significant action' is proposed, in order to receive a 'no-objection letter', thereby extinguishing the power of the Treasurer to 'call in' and review the action at a later date. Sections 40 to 45 of the FATA outlines when an action will constitute a significant action.

- A 'reviewable national security action' is an action which is not otherwise notified to FIRB, which the Treasurer may call in for review if it considers the action may pose national security concerns. The Treasurer may exercise this power while the action is proposed and up until ten years after it is taken. A foreign person may extinguish the Treasurer's 'call-in power' by voluntarily notifying the Treasurer of the action and applying for Confirmation of No Objections. There is very broad criteria for what might constitute a reviewable national security action and it is important to note that, simply because an investment is not required to be notified or encouraged to be voluntarily notified does not limit the call-in power available to the Treasurer. For sectoral guidance as to whether voluntary notification is encouraged, see FIRB's Guidance Note 8.

It is also important to note that an internal restructure which meets the requirements of a significant action or reviewable national security action is still subject to the recommendation for voluntary notification, even if there is no change of control as a result of that restructure.

Fees are payable for FIRB applications depending on the type of action proposed. It is recommended that approval be sought well in advance of conducting any action or making any investment which may be subject to review under FATA.

If the Treasurer does not object to the proposed action, it will issue a Confirmation of No Objection, meaning the proposed action may proceed. This is commonly referred to as "FIRB approval". In addition to a no objection notification/FIRB approval, the Treasurer may also issue a notice imposing conditions on the action proposed to be taken.

Notwithstanding the grant of a no objections notification, exemption certificate, deemed approval or notice imposing conditions, the Treasurer retains a 'last resort' power to review investments in instances where a national security risk is identified in relation to the investment. Treasurer may give orders providing directions to reduce the national security risk.

National security actions are subject to a AU$0 threshold, meaning any national security action will require FIRB approval, regardless of its value. For significant actions and notifiable actions, there is a threshold test. Notification thresholds vary for different countries and whether Australia has a treaty or free trade agreement with the specific country.

These thresholds may differ based on the type of investment, whether it is in relation to a sensitive business, non-sensitive business, the media sector, agribusiness or land investments and whether the investor is a foreign government entity.

A sensitive business includes those in the media; telecommunications; transport; defence and military related industries and activities; encryption and securities technologies and communications systems; and the extraction of uranium or plutonium; or the operation of nuclear facilities.

Monetary Thresholds

Monetary thresholds are indexed annually on 1 January, except for the more than AU$15 million (cumulative) threshold for agricultural land and the more than AU$50 million threshold for agricultural land for Thailand investors, which are not indexed.

Foreign Investment Review Board

Thresholds for non-land investments (not including investments in land)

Investor Nationality	Investment Type	Threshold – more than:
All investors	National security business Australian media business	AU$0
Private investors from FTA partner countries that have the higher threshold (being, Chile, China, Hong Kong, Japan, New Zealand, Peru, Singapore, the Republic of Korea, the United States, the United Kingdom and any other countries not otherwise listed (other than Australia) for which the Comprehensive and Progressive Agreement for Trans-Pacific Partnership applies, Collectively "FTA Partner Countries")	Acquiring a substantial interest in non-sensitive businesses	AU$1,427 million
	Acquiring a substantial interest in sensitive businesses	AU$330 million
	Agribusinesses	For Chile, New Zealand and the United States, AU$1,427 million
		For other FTA partner countries, AU$71 million (cumulative)
Other private investors from non-FTA Partner Countries and FTA Partner Countries that do not have the higher threshold	Acquiring a substantial interest in a business (sensitive and non-sensitive)	AU$330 million
	Agribusinesses	AU$71 million (cumulative)
	Service businesses (non-sensitive)	For India, AU$533 million
Foreign government investors	All investments	AU$0

Thresholds for investments in land

Investor Nationality	Investment Type	Threshold – more than:
All investors	National security land Residential land Vacant commercial land	AU$0
Private investors from FTA Partner Countries	Agricultural land	For Chile, New Zealand and United States, AU$1,427 million
		For other FTA Partner Countries, AU$15 million (cumulative)
	Developed commercial land	AU$1,427 million
	Mining and production tenements	For Chile, New Zealand and United States, AU$1,427 million
		For other FTA Partner Countries, AU$0

Foreign Investment Review Board

Investor Nationality	Investment Type	Threshold – more than:
Other private investors from non-FTA Partner Countries and FTA Partner Countries that do not have the higher threshold	Agricultural land	For Thailand, AU$50 million
		For other investors, AU$15 million (cumulative)
	Developed commercial land	AU$330 million
		Where the land is sensitive, AU$71 million
		For India, non-sensitive land for the supply of services, AU$533 million
	Mining and production tenements	AU$0
Foreign government investors	All investments	AU$0

Other regulatory bodies

Other regulatory bodies

Australian Taxation Office (ATO)

The Australian Taxation Office (**ATO**) is the regulator of the federal tax system. It is responsible for administering Australia's tax legislation, in particular the various income tax Acts and related legislation.

The ATO provides each registered company and individual with a Tax File Number (**TFN**), used to assess income and capital gains tax payable.

Australia's goods and services taxation law is also administered by the ATO through the *New Tax System (Goods and Services Tax) Act 1999* (Cth). The GST, as it is commonly known, is a broad-based consumer tax of 10% that applies to most goods and services.

The ATO is also responsible for administering the Register of Foreign Ownership of Australian Assets, designed to centralise information and data relating to foreign investment.

The ATO has significant enforcement powers and can initiate court proceedings against companies and individuals to enforce compliance with Australia's tax laws. For more information about Australia's taxation laws, refer to page 48 of this guide.

Australian Securities and Investments Commission (ASIC)

In Australia, corporations are regulated by ASIC under the Corporations Act. Any foreign entity that registers or incorporates in Australia must comply with the Corporations Act.

A business is required to register their business name with ASIC in order to obtain trading rights within Australia. ASIC provides international businesses with an Australian Registered Body Number (**ARBN**) which is distinguished from an Australian Business Number (**ABN**) for tax purposes.

A company must maintain a registered office within Australia. The existence of this registered office must be communicated to ASIC. All Australian communications and notices must be addressed through this office. The office must be open and maintain specific staffed hours in accordance with ASIC rules.

A company may appoint a local agent to be a representative of the company within Australia. This person must reside within Australia, and when undertaking the role of an agent, they are responsible for ensuring the company adheres to relevant legislation.

Through ASIC, companies are generally required to lodge financial reports for the previous financial year within 4 months of the end of that financial year. There are exceptions for companies that are considered "small".

Businesses are allowed to own land under the Corporations Act, and if a company has registered its name with ASIC, it has the capacity to sue in Australian courts under Australian common law.

Australian Stock Exchange (ASX)

If a foreign entity sets up a public company and lists it on the Australian Stock Exchange Limited (**ASX**), that entity would then be regulated by the ASX Listing Rules.

These rules are relevant to listings, continuous and periodic disclosure, transfer and registration, restricted securities, quotations, reports, trading, clearing and settlement across a diverse array of asset classes; market information, administration and government supervising, in addition to various other aspects of listed entity conduct.

Australian Competition &Consumer Commission (ACCC)

The Australian Competition & Consumer Commission (**ACCC**) regulates compliance by companies with the *Competition and Consumer Act 2010* (Cth) (known in part as the 'Australian Consumer Law').

Other regulatory bodies

The ACCC is responsible for supervising and supporting the workings of competitive markets and protecting consumers. This includes protecting competition, consumer's interests, counteracting and stopping unconscionable conduct, anti-competitive conduct or unsafe and hazardous conduct against consumers within the competitive market.

From 9 November 2023, Australia's unfair contract terms regime was expanded to enhance the regulation of unfair terms in standard form contracts by strengthening and clarifying the existing unfair contract term provisions and reducing their prevalence in both consumer and small business standard form contracts. These amendments include:

- the introduction of new unfair contract term prohibitions;
- creating new civil penalty provisions for breaches of the unfair contract term regime;
- clarifying and expanding the powers of a court to make orders to void, vary or refuse to enforce part or all of a contract;
- clarifying a court's power to issue injunctions in relation to unfair contract terms; and
- extending the application of the unfair contract terms regime to a greater number of small business contracts.

In particular, the definition of "small business" has expanded to include "small business contracts" where a party to the contract:

- is a business that employs fewer than 100 employees, including part-time employees (to be counted as an appropriate fraction of a full-time employee) and excluding casual employees (unless employed on a regular and systematic basis); and/or
- is a business that has a turnover for the preceding income year of less than AU$10 million.

The ACCC (in collaboration with the state and territory consumer protection agencies) is responsible for enforcing the unfair contract terms regime, with the exception of financial products and services (which is enforced by ASIC).

The ACCC has enforcement powers and can impose penalties or fines for contraventions of the Australian Consumer Law. The ACCC endeavours to promote effective operation of the consumer market, investments and fair trading terms.

Australian Prudential Regulation Authority (APRA)

APRA supervises financial institutions such as banks, insurers, building societies, credit unions, friendly societies and superannuation funds by administering various legislation that seeks to protect the interests of depositors, policyholders and superannuation fund members. APRA also promotes the stability of Australia's financial system by working closely with the Australian Treasury, the Reserve Bank of Australia (Australia's central bank) and ASIC. Additionally, APRA has extensive investigative powers.

Environment Protection Authority (EPA)

Responsibility for protection of the environment is shared between federal and state governments with the states having primary responsibility. Each state has established its own environment protection authority. For instance, in Victoria, the Environment Protection Authority is responsible for protecting Victoria's environment and administering a number of Acts, including the *Environment Protection Act 1970* (Vic). Similar regulatory bodies exist in Australia's other states and territories.

Other regulatory bodies

IP Australia

IP Australia administers intellectual property (**IP**) rights and legislation relating to patents, trade marks, designs and plant breeder's rights. IP Australia works with the World Intellectual Property Organization (**WIPO**) and a range of international agencies to build and strengthen the IP rights system. For more information about Australia's IP laws, refer to page 40 of this guide.

Office of the Australian Information Commissioner (OAIC)

The OAIC promotes and upholds privacy and information access rights. It has the power to conduct investigations, review decisions and handle complaints. The OAIC also provides guidance on the Australian Privacy Principles (**APPs**) which are the cornerstone of the privacy protection framework in the *Privacy Act 1988* (Cth). Additionally, the OAIC administers the Notifiable Data Breaches (**NDB**) scheme under which relevant organisations must notify affected individuals and the OAIC when serious data breaches occur. For more information about Australia's privacy laws, refer to page 43 of this guide.

State Revenue Offices (SROs)

Australia's various states and territories collect state-based taxes through their own revenue offices.

The main forms of taxes collected by the states and territories are land tax, payroll tax and land transfer duty.

Foreign organisations seeking to do business in, or investing in Australia should be aware of the state and territory-based tax liabilities they may incur.

A detailed discussion of the tax implications of doing business in, or investing in Australia is outside the scope of this Guide. However, at a high level, foreign organisations will need to consider the income tax implications of:

- financing arrangements (including whether any withholding taxes apply) and whether there are any limits in relation to the deductibility of interest on debt funding;
- profit repatriation, including whether the proposed structure allows for the effective distribution of amounts sheltered from tax by depreciation; and
- tax treatment of income and expenses in relation to the development and income or net gains on disposal.

Corruption, bribery and modern slavery

Corruption, bribery and modern slavery

A global perspective

Australia is no exception to the global trend towards the increased enactment and enforcement of anti-bribery, corruption and modern slavery laws.

At the international level, Australia is a party to the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (Anti-Bribery Convention) and the United Nations Convention against Corruption. The Australian Government has also developed a new five year *National Action Plan to Combat Modern Slavery 2020–25*.

Domestically, Australia's various jurisdictions have their own laws to deal with corruption, bribery and modern slavery. There are also a number of independent, federal, state and territory commissions responsible for investigating allegations of corruption against public officials, including members of the police and politicians.

Bribery of public officials

Under Australia's Commonwealth Criminal Code, as well as its state and territory laws, it is an offence to dishonestly provide a benefit with the intention of influencing a public official in the exercise of their official duties. Under federal law, penalties for individuals include up to 10 years' imprisonment and/or a fine of up to AU$3,130 million. For corporations found guilty of bribery, fines can be imposed up to the greatest of AU$31,300 million, or three times the value of the benefit attributed to the dishonest conduct, or 10% of the annual turnover of the corporation.

False accounting

In 2016, the Commonwealth Criminal Code was amended to introduce false accounting offences. These amendments criminalise intentional and reckless acts or omissions in respect of accounting records.

Whistleblower laws

Major reforms to Australian whistleblower laws commenced on 1 July 2019. Under the whistleblower regime, whistleblowers receive certain protections if they report corruption, fraud, tax evasion/avoidance and misconduct. Companies are subject to strict compliance obligations with respect to secrecy, investigations, and reporting procedures.

Since 1 January 2020, certain types of businesses operating in Australia are required to have a whistleblower policy. The main aims of the policy will be to protect the identity of, and prohibit detrimental conduct against, whistleblowers. Businesses in breach of whistleblower laws can incur significant criminal and pecuniary penalties.

Modern Slavery

The *Modern Slavery Act 2018* (Cth) (**MS Act**) was introduced in 2019 and supports the Australian business community to identify and address risks of modern slavery in the production and supply chains of Australian goods and services.

The MS Act defines slavery to include trafficking in persons, slavery, servitude, forced marriage, forced labour, debt bondage, the worst forms of child labour and deceptive recruiting for labour or services. Generally, modern slavery does not extend to substandard working conditions or underpayment of workers, however these may be present in examples of modern slavery.

The MS Act establishes a national modern slavery reporting obligation, which requires certain large businesses and other entities to publish annual statements on a central register addressing the modern slavery risks in its operations and supply chains.

Corruption, bribery and modern slavery

As it currently stands, an Australian entity or an entity that carries on business in Australia with an annual consolidated revenue of at least AU$100 million must report under the MS Act. Such entities must submit a statement to the Australian Border Force each financial year, describing the risks of modern slavery in the operations and supply chains of the reporting entity and entities owned or controlled by that entity. On 24 May 2023, the Australian Government tabled the report of Professor John McMillan AO, outlining recommendations for reform of the MS Act. One recommendation includes lowering the reporting threshold from AU$100 million to AU$50 million, introducing mandatory due diligence requirements and the introduction of penalties for failing to report, making knowingly misleading reports or failing to have a due diligence system. The Government has not yet confirmed its position in relation to the recommendations.

Investing in property

Investing in property

Foreign investors

In Australia, individuals and bodies corporate are defined as legal entities. Legal entities established in foreign jurisdictions are recognised in Australia, however, they are not permitted to carry on business unless they have satisfied the relevant registration requirements or are trading through an Australian subsidiary (refer to our How to conduct business in Australia section on page 7).

Foreign investors may wish to directly acquire Australian real estate or indirectly invest by acquiring ownership of property trusts such as private unit trusts and real estate investment trusts. Such acquisitions may be pursued via vehicles such as Australian subsidiary companies, trusts, partnerships or joint ventures. The mechanism through which a foreign investor acquires Australian real property is often determined by the nature of the investment and the consequential tax benefits associated with certain entities.

Under the Corporations Act, certain formalities must be satisfied to create these mechanisms facilitating investment, such as a company constitution, trust deed, partnership agreement or joint venture agreement. Entities will also need to satisfy registration requirements.

There are specific laws and regulations dealing with the investment by foreign interests in dealings with land, landholders, trusts and other legal and equitable interests. Foreign investors should first obtain advice regarding any proposed acquisition or investment, before making any investments in Australia; in particular, because there are different investment thresholds, fees and requirements based on the underlying property, investors, shareholders and nationalities of those people or entities.

Dealings in Australian property

Recordings in property in Australia are generally dealt with via registration at a state or territory level. For example, in Victoria, the title records are managed via a registry maintained by the Registrar and Land Use Victoria. Registration on the register permits transfers, leases, mortgages, the recording of certain agreements, charges and other matters on title.

There is specific legislation dealing with transfers, subdivision and other dealings in land in Australia and construction on that land. For example, in Victoria, a subset of the legislation includes the *Building Act 1993* (Vic), *Duties Act 2000* (Vic), *Estate Agents Act 1980* (Vic), *Local Government Act 2020* (Vic), *Owners Corporations Act 2006* (Vic), *Property Law Act 1958* (Vic), *Residential Tenancies Act 1997* (Vic), *Retail Leases Act 2003* (Vic), *Sale of Land Act 1962* (Vic), *Subdivision Act 1988* (Vic), *Transfer of Land Act 1958* (Vic) and the Regulations made pursuant to those Acts. Other requirements and legislation also apply to dealings with water rights and licences.

The system of title by registration provides some comfort to those dealing in properties in Australia (including purchasers and financiers) and the Registers are readily accessible and maintained. There remains a small portion of land which is dealt with under the previous system of a chain of titles, known as “general law” land, which does not provide such a benefit.

Potential purchasers should also be aware of native title rights, which are those rights which recognise the existing rights and customs of Indigenous people in relation to areas of land which have not been extinguished by certain acts (including action by Parliament, the issuing of a certificate of title under the above Torrens system of title or a loss of a connection with the relevant land by its Indigenous people). This is typically a particular consideration for those looking to purchase in regional areas and near waterways. There are also concepts such as “adverse possession”, easements by prescription, general heritage restrictions which affect some land and properties, and Aboriginal cultural heritage management requirements and restrictions (also of particular importance on, in or near waterways) which may affect any potential development of or construction on that land.

Investing in property

Register of Foreign Ownership of Australian Assets

On 1 July 2023, a new Register of Foreign Ownership of Australian Assets (the **New Register**) commenced. The New Register, which is part of the Government's reforms on foreign investment, is designed to centralise information and data relating to foreign investment.

The New Register is administered by the Australian Taxation Office (**Registrar**) and replaced the existing registers for water, agricultural land and residential land.

The New Register also introduced a variety of new reporting obligations relating to interests in land, entities and businesses in Australia. Foreign investors are required to notify the Registrar of certain actions within 30 days. A failure to notify the Registrar within 30 days may result in civil penalties in the form of a fine. No fee applies for registration, and the New Register is not publicly available.

The new and expanded reporting obligations are in addition to the FIRB approval process and the reporting obligations already required under the FATA.

Taxes & duties on property

Transfer duty

Transfers of land are subject to the payment of duty, which must be paid before a transfer can be registered at the relevant Registry. Other dealings in land may also attract duty, including when a person or entity obtains an interest in land or where there is a dutiable transaction. Rates of duty vary for each state and territory, and will depend on the consideration payable (usually the price of the property), the market value. type and location of the property and the nature of the purchaser. There are several incentives available for different types of purchasers; for example, concessional rates or exemptions for first home buyers in some situations, although many of those concessions are not available to foreign purchasers. There are other exemptions available for other reasons; for example, in relation to contracts of sale entered into from 1 January 2021 for properties used for commercial, industrial or extractive industry purposes in regional Victoria, the duty payable is reduced by 50%.

For example, in Victoria at the time of publication, the general rate of duty for land transfers is assessed on a sliding scale as follows:

Dutiable value range (AUD)	Rate (current at the time of publication, Q1 2024) (AUD)
$0–$25,000	1.4% of the dutiable value of the property
$25,001–$130,000	$350 plus 2.4% of the dutiable value in excess of $25,000
$130,001–$960,000	$2,870 plus 6% of the dutiable value in excess of $130,000
$960,000–$2,000,000	5.5% of the dutiable value
More than $2,000,000	$110,000 plus 6.5% of the dutiable value in excess of $2,000,000

For sales of commercial and industrial properties in Victoria from 1 July 2024, a new commercial and industrial property tax will apply instead of duty for eligible transactions – the Victorian government marks this as being a more efficient form of tax. The first purchaser of such a property on or after 1 July 2024 will be the last person to pay duty in relation to that property, and an annual tax will apply 10 years after that first transaction occurs. The tax is 1% of the unimproved land value from time to time. As with land tax, passing this annual tax to tenants of commercial properties will be prohibited by the Retail Leases Act 2003 (Vic), if that legislation applies.

Surcharge on foreign buyers purchasing residential property

Many of the states in Australia have specific surcharges applying to foreign persons. The requirements of each state are different. Potential purchasers should obtain advice in advance as to the application of any surcharge rates of duty which will apply to the foreign purchaser.

Investing in property

In Victoria, the Foreign Purchaser Additional Duty (**FPAD**) is payable in addition to the land transfer duty referred to above, and applies to contracts, transactions, agreements and arrangements entered into on or after 1 July 2015. The FPAD in Victoria is currently 8% of the price or market value of the property (whichever is greater).

FPAD is largely aimed at residential properties, however each state has different requirements. For example, in Victoria FPAD will apply if a person who is deemed to be foreign for these purposes (which have a different test to those explained in section of this guide marked "Foreign Investment Review Board"):

- buys a residential property or a non-residential property that is then converted to residential;
- buys a non-residential property with the intention of converting it to residential property;
- is given a residential property as a gift; or
- enters into certain leasing arrangements in respect of residential property.

From 1 March 2020, the Victorian State Revenue Office no longer applies a "practical approach" to discretionary trusts, and so discretionary trust deeds must specifically exclude foreign beneficiaries or any potential foreign beneficiary.

Vacancy fee for foreign owners

At a federal level, there is an annual charge relating to vacant residential properties owned by foreign persons. Where a property is not occupied or genuinely available on the rental market for at least 6 months per year, the annual charge would apply. The amount of the charge is generally to be equivalent to the relevant foreign investment application fee imposed on the property at the time it was acquired by the foreign person (or, if the fee is waived in relation to the foreign investment application fee, it will be the lowest fee payable for a residential property application).

There are also state-based regimes which apply in addition to the federal charge. For example, in Victoria residential properties and vacant residential land are (or are, in coming years, to be) subject to an annual "vacant residential land tax" equal to 1% of the capital improved value of the property if the property was "vacant" (ie being unoccupied) for more than 6 months in the preceding calendar year.

Land tax and absentee owners

Land tax may be payable in relation to a person or entity's land holdings. These are state-based taxes. For example, in Victoria land tax is payable when the total value of the Victorian property owned by a person or entity as at 31 December (excluding any exempt land) is equal to or exceeds the threshold. The threshold is currently AU$300,000, however for trustees, the threshold is AU$25,000. Land tax is payable on a sliding scale, depending on the site value of the land.

Another example of a tax that may be applicable is the Victorian "Absentee owner surcharge". A 4% absentee owner surcharge on land tax applies to Victorian land owned by an absentee owner. In New South Wales this only applies to residential land rather than all land owned. There are particular tests that apply as to whether a person or entity is an absentee owner.

Capital gains tax

All dealings with Australian land where the price or market value is AU$750,000 or more are caught by the Foreign Resident Capital Gains Withholding regime (**Withholding Regime**). In short, the Withholding Regime requires that if a foreign resident disposes of certain taxable Australian property, the purchaser or transferee must withhold an amount equal to 12.5% of the price at settlement, and remit it to the ATO rather than the vendor of the property. Failure to do so may mean that the purchaser will be liable for a penalty equal to the amount that was to be withheld. There are clearance certificates and variations which can apply, so potential purchasers are encouraged to obtain specific advice regarding these matters.

Other taxes or requirements may apply, including income tax (for example, on rental income), and capital gains tax (on a gain after disposition of the property) and GST withholding requirements.

The Withholding Regime is not a final assessment of the capital gain payable by a tax payer, and so the actual capital gains tax payable may be an amount which is different to any funds withheld.

Foreign investors should do their due diligence

There are several ways in which a person may have (or be deemed to have) an interest in land. There are also several matters that can be searched or investigated via the different Registries and via the relevant authorities. Foreign persons are encouraged to engage with local consultants to carry out due diligence matters in these respects – we can assist with recommendations, if needed. There has been a recent push to embrace digital conveyancing of property transactions with settlement platforms such as Property Exchange Australia (**PEXA**) being developed to facilitate multi-faceted dealings, such that it is mandatory in many property dealings. Russell Kennedy has developed its own RK eContracts offering to enable cross-border signing of contracts of sale and to reduce its environmental footprint.

Leasing

Leasing of Commercial Property

Occupancy arrangements in Australia are normally documented by way of a lease or licence which contains detailed provisions setting out the rights and obligations of the landlord/licensor and tenant/licensee.

In Australia, the grant of a lease of a building and/or land gives a tenant a legal interest in the land demised, and the right to exclusive possession or control of the premises to the exclusion of all others (including the landlord, subject to any specific rights of access for the landlord set out in the lease). This interest runs with the land and is transferable, so the tenant is usually be permitted to assign or sublet their interest. In contrast, the grant of a mere licence does not give a licensee an interest in land. Rather, it gives a licensee a mere personal right or permission to lawfully use the land.

Investing in property

A tenant under a lease may be granted:

- a fixed term lease that has a defined commencement and expiry date;
- a periodic tenancy (eg weekly, monthly, yearly) that can be determined once the agreed period of notice is served by either party;
- a tenancy at will that is for an indefinite period of time and can be terminated at any time; or
- a tenancy at sufferance, which arises by implication of law.

Commercial leases will usually require the payment of a rental amount agreed by the parties, plus the payment of building outgoings. In that scenario, the rental is referred to as a "net rental". Where the rental amount includes a notional amount on account of building outgoings, the rental is referred to as a "gross rental".

The parties are free to agree on the length of the term of the commercial lease (subject to certain legislative requirements, including where the land is Crown land or owned by a local council). Often a tenant will be granted an initial term, plus an option to renew the lease for a further term.

There are specific legislative requirements that must be complied with in each individual state and territory of Australia. These requirements might affect the enforceability of, and obligations under, the lease. For example, in Victoria, the *Property Law Act 1958* (Vic) or *Crown Land (Reserves) Act 1978* (Vic) might apply to restrict or determine the obligations of parties under a lease. If the lease is a retail lease, the *Retail Leases Act 2003* (Vic) will also apply. Retail leasing legislation, and the definition of what constitutes a retail lease, differs throughout Australia's states and territories leading to a complex matrix of legal requirements.

Employment and occupational health & safety

Employment and occupational health & safety

Employment, industrial relations and workplace health and safety in Australia are governed by a complex statutory and regulatory framework, which includes federal and state legislation, regulations, industrial instruments and the common law. Australia's current national workplace relations system, the Fair Work system, commenced 1 July 2009, however a number of industrial instruments which commenced operating prior to 2009 remain in effect.

The Fair Work system creates a statutory "safety net" which establishes the minimum terms and conditions of employment, the rights of workers and the obligations of most employers. This includes the National Employment Standards (**NES**), the national minimum wage, and protection from "unfair dismissal". It also establishes industrial instruments, such as modern awards and enterprise agreements, discussed below.

The Fair Work system covers the majority of workplaces in Australia. However, in some Australian states, state and some local government employees are covered by state regimes and not the national system.

Fair Work Act 2009

The Fair Work system was created under the *Fair Work Act 2009* (Cth) (**FW Act**) and associated Fair Work legislation and regulations. The FW Act primarily regulates the employee/employer relationship, but also contains provisions relating to trade unions, independent contractors and unpaid work arrangements.

A number of bodies established under statute make up the national workplace relations system. Disputes regarding matters regulated by the FW Act are heard in the Fair Work Commission (**FWC**) and federal courts. The FWC also reviews and approves enterprise agreements and awards.

The Fair Work Ombudsman (**FWO**) provides information about workplace laws and has investigative and enforcement powers to ensure compliance with workplace laws. Unions and other employer associations can register as industrial organisations under the FW Act. The FW Act regulates such organisations. In addition to the FW Act, a number of federal and state statutes regulate other employment related matters including work health and safety, long service leave, superannuation, workers compensation insurance, and equal opportunity and discrimination laws.

The key components of the FW Act are:

Minimum conditions

The NES are 12 minimum standards set out in the FW Act that apply to most employees covered by the Fair Work system. These minimum standards relate to working hours, leave entitlements, notice of termination, redundancy and flexible working arrangements. Non compliance with the NES may expose employers to financial penalties. The NES cannot be displaced by common law contracts or industrial agreements.

The national minimum wage is the minimum rate of pay for the ordinary hours worked by an employee if the employee is not covered by a modern award or enterprise agreement (which typically provide for higher rates of pay that the national minimum wage). The FWC reviews the minimum wage annually. From 1 July 2023, the minimum wage is AU$23.23 per hour or AU$882.80 per 38 hour standard working week (before tax).

Employees have a legal right to be a member of a union and to be represented by a union in relation to workplace issues and disputes. Registered unions have a right to enter workplaces covered by the FW Act in certain circumstances and can act as bargaining representatives for employees.

Industrial Instruments

Awards are legally binding industrial instruments created by the FWC which contain additional minimum terms and conditions of employment for many employees in particular industries and occupations that fall within the classifications. . Awards cannot be less beneficial to employees than the NES.

Employment and occupational health & safety

An enterprise agreement is an industrial instrument negotiated between an employer (or employers) and their employees. Like an award, an enterprise agreement contains minimum terms and conditions for employees in a particular organisation or workplace. An award will not apply to an employee when an enterprise agreement applies to them. Enterprise agreements must not exclude the NES. For an enterprise agreement to operate, it needs to be approved by the majority of the employees through a voting process, and then approved by the FWC. An enterprise agreement must leave employees "better off" than they would be under the relevant award.

Unfair dismissals

The FW Act provides remedies for unfair dismissal in circumstances where the dismissal is harsh, unjust, or unreasonable. The remedies may include reinstatement, and up to 6 months' pay in compensation.

The unfair dismissal laws do not apply to all employees. There are a number of circumstances where an employee may be excluded from the unfair dismissal system. While there are a number of exclusions, most commonly, this is because:

- the employee has not completed 6 months of employment (or 12 months if they are employed by a small business with fewer than 15 employees);
- the employee is not covered by an award or enterprise agreement, and their annual remuneration exceeds the high income threshold (AU$167,500 for the financial year ending 30 June 2024); or
- the employee was dismissed because of a genuine redundancy, and redeployment was not a suitable option.

Unfair dismissal claims are heard by the FWC.

General protections claims

The FW Act also contains a set of provisions which are intended to protect employees' rights in the workplace. These provisions give an employee a right to contest adverse action taken by their employer if the reason for the adverse action was unlawful which may or may not involve dismissal.

For example, if an employee believes that they have been dismissed or disciplined because they have exercised a workplace right, such as raising a concern about their pay, or they have been demoted because they took sick leave or because they are a member of a union, the employee could make a general protections claim.

The remedies for a general protections claim can include compensation for lost pay, damages for non-economic loss, reinstatement, and penalties of up to AU$18,780 for an individual and AU$93,900 for a company per contravention. Unlike an unfair dismissal claim, the damages that can be ordered for a general protections claim are not capped and can therefore result in substantial orders for compensation.

Where the claim involves dismissal, an employee will make an application in the FWC. Claims which do not settle at conciliation before the FWC will normally be heard by the Federal Circuit and Family Court of Australia or the Federal Court of Australia.

Underpayment claims

Employers must ensure all employees are paid at least their minimum rates of pay and entitlements, under either the FW Act, a modern award, an enterprise agreement and/or an individual contract of employment. The FW Act contains several provisions that impose significant penalties on employers who fail to correctly pay their employees. Furthermore, Victoria and Queensland have in recent years passed legislation in relation to 'wage theft', which introduce criminal offences relating to underpayment of wages and failure to keep adequate pay records. The federal government and other states and territories have indicated that they will also introduce similar legislation.

Employers are also required to meet certain obligations under the FW Act in relation to the payment of wages such as providing payslips and making and keeping employee records.

The FWO has a broad range of powers in relation to underpayment of wages including the power to investigate employers, issue compliance notices and fines, in some circumstances against directors personally, and to commence legal proceedings against employers.

Orders to stop bullying and/or sexual harassment

The FWC also has jurisdiction to hear disputes and make orders regarding workplace bullying and sexual harassment. Where a person believes that they have suffered bullying or sexual harassment in the workplace, they can make an application to the FWC for orders to stop the bullying or sexual harassment. If the FWC is satisfied that bullying or sexual harassment has occurred and that there is an ongoing risk that this behaviour will continue, the FWC can make orders in relation to how the situation should be managed. The FWC cannot order financial compensation in a bullying claim. Recent amendments to the FW Act enable the FWC to make orders for compensation or lost wages where a dispute in relation to sexual harassment cannot be resolved by conciliation, mediation or by the FWC making a recommendation or expressing an opinion.

Industrial activity

The FW Act also regulates the circumstances in which industrial action (such as strikes) can occur, and the circumstances in which union representatives can enter an employer's premises.

Long service leave

Long service leave is an entitlement for employees who have completed a particular period of service. Each state and territory has its own long service leave legislation, and some awards and enterprise agreements contain long service leave provisions which either replace or operate alongside the legislation. There also is some sector-specific legislation, for example, portable long service leave schemes apply in certain industries in some states and territories.

While the legislation varies from one jurisdiction to another, in most jurisdictions an employee who has completed 10 years of continuous service with the one employer is entitled to take about 2 months of long service leave. In Victoria, employees are entitled to long service leave after 7 years continuous service, with the amount of leave typically being 6 weeks leave.

Most states allow a pro-rata payment of long service leave on termination of employment after 7 years of service. In some states the pro-rata payment depends on the circumstances of the termination.

Superannuation

The superannuation system requires employers to make contributions towards a fund which will support the employee with income in their retirement. The federal superannuation legislation applies in all states and territories. The minimum superannuation contribution is based on a percentage of the employee's earnings (for the 2023-2024 financial year, 11%).

Employers are not required to make superannuation contributions on the portion of an employee's earnings that exceeds the 'maximum superannuation contribution base' (currently AU$62,270 per quarter).

The minimum superannuation contribution is set to rise to 11.5% from 1 July 2024 and increase to 12% from 1 July 2025.

Businesses can also be required to make superannuation payments in respect of payments to some independent contractors.

Employment and occupational health & safety

Employment contracts

Employers can enter into written or verbal contracts with employees. These may provide benefits beyond the NES and/or impose additional obligations on the parties. Employment contracts must not contain clauses that displace the NES or any applicable modern Award or enterprise agreement.

Work Health and Safety laws

Across Australia, all persons involved in a workplace must take reasonably practical steps to protect the health and safety of employees, volunteers, contractors and any other person who may come into contact with that workplace.

Different laws exist in each state and territory. However, all states, with the exception of Victoria, have adopted a set of harmonised laws (the *Work Health and Safety Act 2011*). The legislation is therefore very similar in the jurisdictions which have adopted this uniform law, though some states and territories have made some specific amendments which are not identical.

The source of the obligations regarding work health and safety laws is the state's legislation that is supported by more specific obligations set out in regulations, codes of practice and other documents including the Australian Standards. Each jurisdiction has its own regulator to oversee and enforce work health and safety and to administer workers' compensation schemes.

Criminal penalties may apply for a breach of health and safety laws.

Victoria, Western Australia, Queensland, Australian Capital Territory and the Northern Territory have 'industrial manslaughter' laws that create a specific criminal charge for employers whose negligent conduct or omissions result in the death of a worker. New South Wales and South Australia are expected to adopt similar industrial manslaughter laws in the future. Generally, the laws do not create additional workplace health and safety obligations on employers but introduce tougher penalties for breaches of existing obligations.

All states in Australia, have passed new laws in respect of employers managing psychosocial hazards in the workplace. Employers were already required to eliminate or minimise, so far as is reasonably practicable, these types of hazards, but the new laws provided clearer obligations on employers to identify, assess and control risks, as well as to review control measures relating to psychosocial hazards.

Employers are required to consult with employees and others in the workplace about managing OH&S risks.

Workers' compensation laws

Each state and territory has its own laws regarding compensation for workers who suffer injuries in the workplace. The schemes differ significantly from one jurisdiction to another, but essentially, they require all employers to maintain an insurance policy to cover workplace injury claims. When a worker suffers an injury arising from their work, the worker can make a claim on the employer's policy. That may include be a claim for weekly payments to cover absence from work, for medical expenses, or a lump sum claim for a person who has suffered a more serious injury.

The legislation (for each state) also imposes obligations on employers and their workers to address the employee's return to work after an injury.

Competition and consumer law

Competition and consumer law

Competition and Consumer Act 2010 (Cth)

The main objective of the *Competition and Consumer Act 2010* (Cth) (**CCA**) is to enhance the welfare of Australians by promoting fair trading and competition, and through the provision of consumer protections. The Act broadly covers:

- product safety and labelling;
- unfair market practices;
- price monitoring;
- industry codes;
- industry regulation – airports, electricity, gas, telecommunications; and
- mergers and acquisitions.

The CCA is administered by the Australian Competition & Consumer Commission (**ACCC**), an independent Commonwealth statutory authority.

Regulation of takeovers

Takeover bids are administrated by the Corporations Act and the ASX listing rules. Takeovers may require foreign investment approval or competition clearances. Competition clearance may be required where a proposed acquisition is likely to have the effect of substantially lessening competition within a market. Merger parties are encouraged to consult with the ACCC well before completing a merger if:

- the products of the merger parties are either substitutes or complements; and
- the merged firm will have a post-merger market share of greater than 20% in the relevant markets.

Competition and consumer law

The Australian Consumer Law

The Australian Consumer Law (**ACL**) is the national law for fair trading and consumer protection. Legislative provisions are set out in Schedule 2 of the CCA. The ACL is administered and enforced jointly by the ACCC and state and territory consumer protection agencies. ASIC may also be involved if circumstances require.

The ACL applies nationally and in all states and territories, and to all Australian businesses. The ACL includes:

- national unfair contract terms law covering standard form consumer and small business contracts;
- a national law guaranteeing consumer rights when buying goods and services;
- a national product safety law and enforcement system;
- a national law for unsolicited consumer agreements covering door-to-door sales and telephone sales;
- simple national rules for lay-by agreements; and
- penalties, enforcement powers and consumer redress options.

Intellectual property

Intellectual property

Craig Venter, a well-known geneticist and a member of the first group of scientists to sequence the human genome, stated “intellectual property is a key aspect for economic development”. Australia’s laws in respect of intellectual property are stringent and work towards protecting productive new ideas in accordance with international standards.

Some forms of intellectual property require registration before ownership rights are established, most notably patents, registered designs, registered trade marks and plant breeder’s rights. Others do not, for example copyright and common law trade marks.

Trade marks

Australia is considered to be a “first to use” rather than “first to file” country when it comes to trade marks. In other words, if a business can establish that it was the first to use a trade mark for particular goods and services in Australia, that may take precedence over a trade mark registration filed by a third party at a later date. However, registration provides a broad statutory monopoly in all states and territories, and is the preferred method of protection.

Any person or legal entity can apply to register a trade mark in Australia. The registration process includes the following steps:

- A trade mark application is filed with IP Australia setting out an appropriate representation of the trade mark, and the goods and services in regard to which protection is claimed. The goods and services are separated into 45 classes according to the international Nice Classification.
- Once submitted, a trade mark application can take a number of months for examination. If any grounds for rejection are identified, the examiner will issue an Adverse Examination Report, which allows the applicant a period of 15 months to take various steps to overcome the issues raised by the examiner, if possible.
- If no grounds for rejection are identified, the application will be accepted and advertised in the *Australian Official Journal of Trade Marks*. If no oppositions or request for extension of time to oppose are filed within 2 months of advertisement, the trade mark is registered and will remain on the register for 10 years and may be renewed indefinitely.

A trade mark can be used without being registered and action can still be taken to prevent other businesses from using a similar mark. However, the business cannot take action under the *Trade Marks Act 1995* (Cth), and will instead have to rely on other laws, such as the tort of passing off or the prohibitions on misleading or deceptive conduct pursuant to section 18 of the Australian Consumer Law, for example.

Patents

A patent is a legally enforceable right for a device, substance, method or process, which may be granted by IP Australia upon application pursuant to the *Patents Act 1990* (Cth). For an application to be successful, an invention must be new, useful and inventive. Australia has three main types of patents:

- Standard patents – last 20 years.
- Innovation patents – lower threshold for registration but protection only lasts 8 years. Innovation patents have now been phased out, and the last day for filing was 25 August 2021. Existing innovation patents filed on or before 25 August 2021 will continue in force until their expiry.
- Pharmaceutical patents – last 25 years.

Patents convey on the registrant a commercial monopoly over a new invention. As a result, applications are subject to stringent examination requirements and applicants should be assisted by patent attorneys to ensure the invention is protected. Foreign businesses seeking to expand their patent protection to Australia may consider filing a Patent Cooperation Treaty (**PCT**) application for their invention.

Intellectual property

The process for registering a patent can take a number of years and even if accepted by the Patents Office, a patent can be opposed or invalidated at a later date.

Copyright

The *Copyright Act 1968* (Cth) protects original works, such as a literary, artistic, musical and dramatic works, and 'neighbouring rights' such as sound recordings, film, published editions and broadcasts, against unauthorised use or reproduction. Unlike some other jurisdictions, Australia does not have a system for registering copyright. Rights arise as soon as a particular work is written down or recorded, and generally vest in the author of that work (subject to certain exceptions). Copyright does not protect ideas, concepts, styles, techniques or information.

Privacy

Privacy

The *Privacy Act 1988* (Cth) (**Privacy Act**) regulates the collection, use and disclosure of individuals' personal information in Australia. It applies to entities that have an annual turnover in excess of AU$3 million and some other entities.

Various state and territory legislation has also been enacted, but this primarily deals with privacy obligations imposed on state and territory governments, private sector entities that contract with government departments, and organisations that provide "health services" or collect "health information".

Key areas of legal risk

The Privacy Act applies to entities with an annual turnover in excess of AU$3 million. Entities with an annual turnover less than AU$3 million are exempt from the Privacy Act unless they fall into one of the specific categories of small businesses that are covered by the Privacy Act, including entities who:

- are related to another business that has an annual turnover exceeding AU$3 million;
- provide a "health service" or hold "health records"; or
- sell or purchase personal information.

"Personal information" is information or an opinion, regardless of its truth and regardless of how it is recorded, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion.

An entity may collect personal information in a variety of ways, and it is essential that the entity understands the circumstances in which it collects personal information about an individual from that individual or from a third party. Typically, entities collect personal information when entering into a contract for the provision of goods or services, answering queries or dealing with complaints.

A subset of "personal information" is "sensitive information", which is information about an individual that is personal information and is also sensitive. It includes (for example) information about an individual's criminal history, memberships of trade associations or trade unions, religious belief, sexual preferences or practices, health information, biometric information and genetic information. Generally "sensitive information" should only be collected from an individual with the individual's consent.

Where the entity is bound to comply with the Privacy Act, the entity should develop and make easily accessible (including via the entity's website) a privacy policy that sets out how the entity complies with the Australian Privacy Principles.

The Australian Privacy Principles are summarised as follows:

- APP 1 (open and transparent management of personal information) requires organisations to have ongoing practices and policies in place to ensure that they manage personal information in an open and transparent way.
- APP 2 (anonymity and pseudonymity) sets out requirements for organisations to provide individuals with the option of dealing with them by a pseudonym (in addition to dealing with them anonymously).
- APP 3 (collection of solicited personal information) outlines when and how an organisation may collect personal and sensitive information that it solicits from an individual or another entity.
- APP 4 (dealing with unsolicited personal information) creates obligations in relation to the receipt of personal information which is not solicited.
- APP 5 (notification of the collection of personal information) specifies matters about which an organisation must generally notify an individual, at the time, or as soon as practicable after, the organisation collects their personal information.

Privacy

- APP 6 (use and disclosure of personal information) outlines the circumstances in which an organisation may use or disclose the personal information that it holds about an individual.
- APP 7 (direct marketing) states when an organisation may use or disclose personal information for direct marketing purposes, which is generally where the individual has either consented to their personal information being used, or has a reasonable expectation that their personal information will be used, for the purpose of direct marketing. It also sets out conditions relating to opt-out mechanisms.
- APP 8 (cross-border disclosures) introduces an accountability approach to organisations' cross-border disclosures of personal information and provides that before an organisation discloses personal information to an overseas recipient, the organisation takes reasonable steps to ensure that the overseas recipient does not breach the APPs (other than APP 1) in relation to that information.
- APP 9 (adoption, use or disclosure of government related identifiers) prohibits organisations from adopting, using or disclosing a government related identifier unless an exception applies.
- APP 10 (quality of personal information) provides than an organisation must take reasonable steps to ensure that the personal information it collects is accurate, up-to-date and complete.
- APP 11 (security of personal information) requires an organisation to take reasonable steps to protect the personal information it holds from interference, in addition to misuse and loss, and unauthorised access, modification and disclosure.
- APP 12 (access to personal information) requires an organisation to give an individual access to the personal information that it holds about that individual (subject to any exceptions).
- APP 13 (correction of personal information) requires an organisation to take reasonable steps to correct personal information to ensure that, having regard to a purpose for which it is held, the personal information is accurate, up-to-date, complete, relevant and not misleading, in particular in circumstances where an individual requests that their personal information be corrected.

If the entity acts contrary to, or inconsistent with, an APP, then the entity is taken to have breached the relevant APP and has therefore interfered with the privacy of an individual.

The Office of the Australian Information Commissioner (**OAIC**) has the power to investigate interferences with privacy (including alleged interferences with privacy the subject of a complaint made by an individual to the OAIC) and make declarations as to how the entity should address the complaint (including any compensation that may need to be paid for the loss and damage suffered by the complainant) which may be enforced in court.

Additionally, the Privacy Act deals with the collection and use of "credit information". If the entity is not in the business of providing commercial or consumer credit but (for example) has payment terms in excess of seven days, then it is deemed to be a credit provider. The entity must have in place a credit reporting policy that deals with how the entity collects, uses, holds and disposes of "credit information".

For the purposes of the Privacy Act, "credit information" includes information received from a credit reporting body about the credit worthiness of an individual.

As of 22 February 2018, entities are required to report serious data breaches to the Privacy Commissioner and to affected individuals. A data breach will be regarded as serious if it is likely to cause serious harm to an individual. Such harm does not need to be financial.

There are a number of factors that will need to be considered when determining whether a data breach must be notified, including the nature and sensitivity of the information concerned, the nature of the actual or potential harm and whether security measures protect the information.

Reporting will not be required when action is taken to prevent the serious harm from occurring, and the reporting obligation will be reduced if the action prevents the serious harm to some, but not all, of the affected individuals.

If more than one entity is affected by the data breach, then the entities' obligation to report will be discharged when one entity makes the report. It is the responsibility of the affected entities to determine – between themselves – which entity will make the report.

Entities required to report a data breach will need to include particular information, and must take reasonable steps to notify the affected individuals directly.

On 16 February 2023, the Attorney-General released the Privacy Act Review Report (**Report**), which contained 116 proposals for reforming the Privacy Act. The Report provides that the proposals aim to 'better align Australia's laws with global standards of information privacy protection and properly protect Australians' privacy.' Some proposals include the requirement to act fairly and reasonably, amending the definition of 'consent', a direct right of action for individuals and tighter timeframes for notifiable data breaches.

The Government requested feedback on the Report from both the public and private sectors by 31 March 2023 and published its formal response (**Response**) to the Report on 28 September 2023. The Response "agreed" with 38 of the 116 proposals and "agreed-in-principle" to 68 proposals. The Government is committed to introducing legislative amendments in 2024. Entities doing business in Australia should ensure they stay abreast of these amendments.

Risk management strategies

Entities doing business in Australia should consider the following risk management strategies to deal with Australian information privacy requirements:

- The entity should consider and determine whether the entity is bound to comply with the APPs. In any event, good business practice probably means that it is the interests of all entities to comply with the legislation, even if it does not currently apply to them.
- If the entity is bound to comply with the Privacy Act, the entity should promptly prepare a privacy policy that addresses its legal obligations and make the policy publicly available (it is common for the policy to be available to be downloaded from the organisation's website).
- If the entity has a privacy policy in place, it should carefully consider the privacy policy to ensure it complies with the APPs that commenced on 12 March 2014. Privacy policies that were drafted prior to the commencement of the APPs will most likely not comply.
- If the entity is bound to comply with the Privacy Act, the entity must appoint a senior officer as the privacy officer. The role of the privacy officer would be to handle inquiries and complaints on behalf of the entity in relation to the entities handling of personal information and compliance with the Privacy Act, and have responsibility for supervising the preparation and maintenance of the entity's privacy policy, and the implementation of internal compliance procedures and processes.
- Where the entity contracts with external contractors (for example, transport and logistics providers) who are likely to have access to personal information held by the entity, the terms of the contract should require the contractors to comply with the Privacy Act and adhere to the terms of the entity's privacy policy and procedures in relation to personal information held by the entity, where applicable.
- Additionally, entities doing business in Australia that are bound by the Privacy Act should ensure they are in a position to comply with their obligations around notification of data breaches. We recommend taking the following steps:

    1. Take steps to delete or de-identify information no longer required;
    2. Review and update privacy policy and procedures;

Privacy

3. Undertake staff training on the importance of privacy;
4. Assess contracts with key suppliers with respect to privacy; and
5. Develop and test a data breach response plan.

Taxation

Taxation

Taxation in Australia is levied by both the federal and state and territory governments.

The federal government imposes taxes on income, capital gains, fringe benefits, superannuation, goods and Services (**GST**) (the Australian equivalent to Value Added Tax or **VAT**) and indirect taxes on goods such as petrol, tobacco, alcohol and customs duties. The federal government also levies the Petroleum Rent Resource Tax, which is a tax on profits generated from the sale of marketable petroleum commodities.

State and territory governments are responsible for, amongst other things, taxes on land, gambling, employers' payrolls, motor vehicles and stamp duty, which is a tax on property transactions.

A business' scale, type and nature, as well as where a business entity resides, will determine what the tax obligations are, or will be in Australia.

A subsidiary that is incorporated in Australia is an Australian resident for tax purposes. Generally, a foreign owned subsidiary will have Australian tax obligations on its worldwide income and gains. Some exceptions do apply. For example, income from business operations conducted through an overseas branch may be exempt from income tax obligations.

Tax Periods

Income and gains taxes are ordinarily collected in the 12 month period ending 30 June. However, it is possible to adopt a different accounting period (called a Substituted Accounting Period or **SAP**) ending on another date with the approval of the ATO. The ATO commonly gives approval where a foreign parent company has a tax year ending on another date.

Tax Treaties

Australia has tax treaties with more than 40 countries, including all of its major trade and investment partners. Tax treaties are also referred to as tax conventions or double tax agreements. Broadly, Australia's tax treaties operate with the objective of:

- reducing or eliminating double taxation;
- provide a level of certainty about the rules that apply to particular international transactions; and
- prevent avoidance and evasion of taxes between treaty partners.

Capital Gains Tax (CGT)

A capital gain or capital loss is the difference between the cost of an asset and what you receive when that asset is disposed of. If you make a capital gain, ie you receive more for the asset when you dispose of it than what you paid for it, you will need to pay tax on the gain.

If you make a capital loss you cannot claim it against your income but you can use it to claim for a reduction on the CGT you otherwise owe.

For foreign residents, CGT applies if you make a capital gain to an asset that is taxable Australian property. All assets acquired since 20 September 1985 are subject to CGT unless specifically excluded. Most personal use assets are exempt from CGT.

Owning real property in Australia

If you are a foreign resident and acquire an interest in Australian real property, you are required to obtain a tax file number and you must report any income from renting or selling the property in an Australian tax return. The nature of your investment will affect what kind of taxes you must pay. Refer to our Investing in property section on page 26) for more information on investing in Australian property.

Taxation

Employing people in Australia

If you employ a worker in Australia, as an employer, you will likely have a number of taxation obligations in relation to your employees, including:

Pay-As-You-Go Withholding tax (**PAYG**)

PAYG is an employer withholding tax obligation which requires you to pay incremental amounts on behalf of your employee to the ATO to assist the employee in meeting their projected income tax obligations.

Payroll Tax

Payroll tax is a tax imposed on employers, and is calculated based on the total of the employees' wages. As each state has its own payroll tax legislation, the obligations and exceptions vary from state to state.

Fringe Benefits Tax (**FBT**)

FBT is a tax which employers are required to pay in relation to certain benefits which they provide to employees, or to employees' families. Common fringe benefits include the provision of a vehicle, or a reimbursement of accommodation expenses.

Superannuation

While superannuation is not a tax, it is managed by the Australian Taxation Office.

Depending on the circumstances, you may also have these taxation obligations in relation to independent contractors engaged in Australia.

Please refer to our Industrial relations and occupational health & safety section on page 32 for more information.

GST

The GST is a consumption tax imposed at 10% as a standard rate. It applies to most goods and services, as well as to information, imports, rights and real property that have a connection to the Indirect Tax Zone (**ITZ**). The ITZ refers to Australia, but does not include external territories and certain offshore areas. GST applies to the ITZ, in addition to the import of wines and luxury cars.

As of 1 July 2017, GST applies to international sales of services and digital products provided to Australian consumers, meaning that overseas business are required to pay GST on their sales to Australians. Further, as of 1 July 2018, GST will apply to the sale of low value goods (goods with a value of AU$1,000 or less) imported by consumers into Australia. A purchaser of such goods is a consumer if they are either not registered for Australian GST, or are registered for GST but do not purchase low value imported goods for use in their business in Australia.

Corporations and persons must register to pay GST in Australia if they accumulate a GST turnover from sales connected with Australia of AU$75,000 or more (or AU$150,000 for not for profit organisations).

Generally, exported goods are GST free if they are exported from Australia within 60 days of the supplier receiving any payment for the goods or the supplier issuing an invoice for the goods.

Family law

Family law

Implications for Foreign Investors Seeking to Invest in Australia under the *Family Law Act 1975* (Cth)

Under the *Family Law Act 1975* (Cth), parties to a Family Law Property Dispute have specific financial disclosure obligations. Rule 6.01 of the *Federal Circuit and Family Court of Australia (Family Law) Rules 2021* provides that parties must make full and frank disclosure of their respective financial circumstances. This is inclusive of the party's total direct and indirect financial circumstances. It requires disclosure of all sources of earnings, interests, income, property (vested or contingent interests) and other financial resources a party may have either domestically or internationally.

This disclosure obligation can have implications for foreign investors seeking to explore the Australian market irrespective of whether they are a party to the dispute or not. For example, in circumstances an Australian business owner becomes involved in a Family Law Property Dispute, any investor that has an interest in that business may be affected by the disclosure obligations under the *Family Law Act 1975* (Cth). More often than not, sensitive financial materials related to a party's business are sought in requests for financial disclosure. Such requests can include a business's annual earnings as well as profit and loss statements.

Typically, the Family Law jurisdiction is a 'show and tell' jurisdiction and not a 'hide and seek jurisdiction', however, there are two ways business owners can circumvent the provision of sensitive information. The first is by claiming the materials sought are privileged. A party that makes this claim must however still disclose the existence of the materials which they assert are privileged. The second is by allowing the party seeking the disclosure to inspect the sensitive material only, as opposed to having possession of it.

A party to the dispute may still issue a subpoena in the event a disclosure request is not facilitated to their liking. An objection to the subpoena can be made either by a party to the dispute or a person affected by the subpoena, in this case a business investor. Some of the common grounds for an objection to a subpoena include the following:

1. The materials requested are irrelevant;
2. The materials are privileged;
3. The terms of the subpoena are vague or non-specific;
4. There was insufficient time given to comply with the subpoena, and/or
5. The subpoena issued did not have a legitimate forensic purpose.

Judicial officers in the Australian family law system have broad discretionary powers and may in certain circumstances elect to override or undo contracts or agreements made in foreign jurisdictions, or proceed as if those agreements did not exist. Judges determining the division of matrimonial property under the *Family Law Act 1975* (Cth) will give consideration to the whole of the parties' circumstances as relevant, including any assets or interests a party may hold in another country.

A person does not need to be an Australian citizen to commence family law proceedings in Australia, and the jurisdictional threshold is quite broad. Australian Courts will have jurisdiction to determine family law matters in the event one party to a relationship (not necessarily both) is an Australian citizen, domiciled in Australia, or ordinarily or habitually resides there.

Estate planning and Estate administration

Estate planning and Estate administration

Business succession planning

When investing in Australia, consideration should be given to succession planning for the business and the key persons involved in the business.

On the death of a shareholder, director or trustee, company and Trust succession is not automatic and active steps, whether through company constitution, trust deed or through personal estate planning (and usually the combination of these steps) is required.

Consideration should be given to who is to inherit and/or control the business on the death of the business owner as well as (and perhaps more importantly) who should control the business in the event that the business owner becomes incapacitated.

It is also important to note that although companies are regulated by Federal legislation, Trusts are subject to State legislation. The rules surrounding the delegation of Trustee duties can vary greatly across the States. Trusts in all Australian States and Territories, with the exception of South Australia, can operate for up to 80 years. South Australia does not impose limits on Trust longevity.

Although there is always a way to resolve lack of appointments through applications to various State tribunals, this process can be long and costly. There is also no guarantee that the result/appointment will be the one that the Investor would have wanted.

Personal succession planning

Unlike some jurisdictions, personal succession planning in Australia is based on the presumption of freedom of testamentary disposition. Effectively, the testator (Will maker) can dispose of his or her property (located in Australia only, in limited jurisdictions or globally) as they see fit.

Unfortunately, testamentary freedom does not eliminate challenges to a Will completely. However, appropriate estate planning can significantly minimise the risk of a successful challenge. Eligibility to make a claim on the estate varies from State to State. Also, in New South Wales (but not other States or Territories) a claim on notional estate can be made. Notional estate includes, but is not limited to, any transfer for less than market value or gifting of assets shortly prior to death, the transmission of jointly owned assets to the surviving joint owner, proceeds of superannuation and life insurance policies or assets which the deceased does not own directly but may control (such as trust assets).

Powers of Attorney

The incapacity of a decision maker is an often overlooked business and personal risk. Apart from the administrative difficulty and delay, if decisions cannot be made and actions are stalled, financial loss can occur. Having appropriate power of attorney arrangements in place avoids a situation where no one has authority to make decisions on behalf of the individual or the company and also allows you to select the appropriate person(s) in advance.

Taxation of Estates

Whilst Australia does not have an inheritance or gift tax, beneficiaries may still be required to pay stamp duty and capital gains tax in some instances. The assets of the deceased, if disposed of as part of the administration of the deceased's estate may also be subject to capital gains tax.

Important considerations

- Consider the application of the Australian jurisdiction on your existing succession arrangements and vice versa.
- Review your Trust Deeds, Company Constitutions, Wills and Powers of Attorney.
- Seek appropriate legal, taxation and financial advice.

Key contacts at Russell Kennedy

We ensure that our clients have a dedicated team to collaborate with on all aspects of their legal requirements.

The core team will be supported by our specialist lawyers and support staff, selected based on the best people with the appropriate experience and expertise to support our clients' requirements.

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