



# Doing Business and Investing in Australia

A guide to legal issues



**Russell Kennedy**  
Lawyers

# Welcome

Welcome to Russell Kennedy Lawyers' 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 an Australian law firm offering a comprehensive range of commercial legal services, with a diverse list of clients operating in a range of industries and across many states and countries.

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 consists of more than 200 personnel. Our firm is the perfect size to effectively manage large or complex matters while delivering personal and prompt service.

We act 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, and private individuals. We serve clients in a number of sectors, including aged care and retirement living, all levels of government business services, healthcare, insurance, and real estate and property development.

## What this guide covers

### Australia in 2017

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A brief history of Australia and information on demographics. It also provides an overview of Australia's legal system and structure of government.

### How to conduct business in Australia

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How foreign persons can conduct business in Australia, including business structures and visa requirements.

### Foreign Investment Review Board

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### Other regulatory bodies

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### Corruption and bribery

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### Investing in property

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### Industrial relations & occupational health & safety

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### Competition and consumer law

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### Intellectual property

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### Privacy

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### Taxation

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*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 2017

## 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, Queen Elizabeth II remains the head of State, represented in Australia by the Governor General. A referendum for Australia to become a republic was defeated in 1988.

Australia has a population of approximately 24.7 million people. As a continent it covers 7,692,024 km<sup>2</sup>. In contrast China and the United States cover 9.5m km<sup>2</sup> while the United Kingdom covers 242,495 km<sup>2</sup>.

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 5,000,000 people), Melbourne, the State Capital of Victoria, (approximately 4,700,000 people), Brisbane, the State Capital of Queensland (approximately

2,400,000 people), Perth the State Capital of Western Australia (approximately 1,950,000 people) and Adelaide, the State Capital of South Australia (approximately 1,320,000 people).

The Nation's Capital is Canberra located in the Australian Capital Territory. Canberra has a population of approximately 390,000 people.

Australia has the world's 13th largest economy and ninth-highest per capita income. Australia has the world's ninth-highest immigrant population, with immigrants accounting for 26% of the population.

Australia is transitioning from a mining and housing boom to what is expected to be an infrastructure boom. Macquarie has estimated that the Federal and State governments will collectively spend around A\$323 billion over the next four years on planning and building infrastructure projects.

### 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 Queen (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.



### 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.

### 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.

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.

# 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 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. Merely being involved in legal proceedings, holding director meetings or maintaining a bank account in Australia is not, in itself, sufficient to require registration.

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.

## Alternatives

Alternatives to proprietary companies limited by shares include:

Other types of companies:

- 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 incorporators' guarantee.
- No liability company - This structure can only be adopted by mining corporations.

## 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.

## 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 trustee, who may be an individual or a corporation, 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.

## Office holders and personal liability

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 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, or if the company breaches particular laws such as occupational health and safety laws and environmental protection laws.

## Fundraising

Fundraising activities are regulated by the Corporations Act. 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 Products" are defined to include numerous types of financial instruments including shares and debentures.

Offers of financial products generally require disclosure in accordance with the Act. There are however a number of exceptions including rights issues, small scale personal offers and certain offers to sophisticated investors.

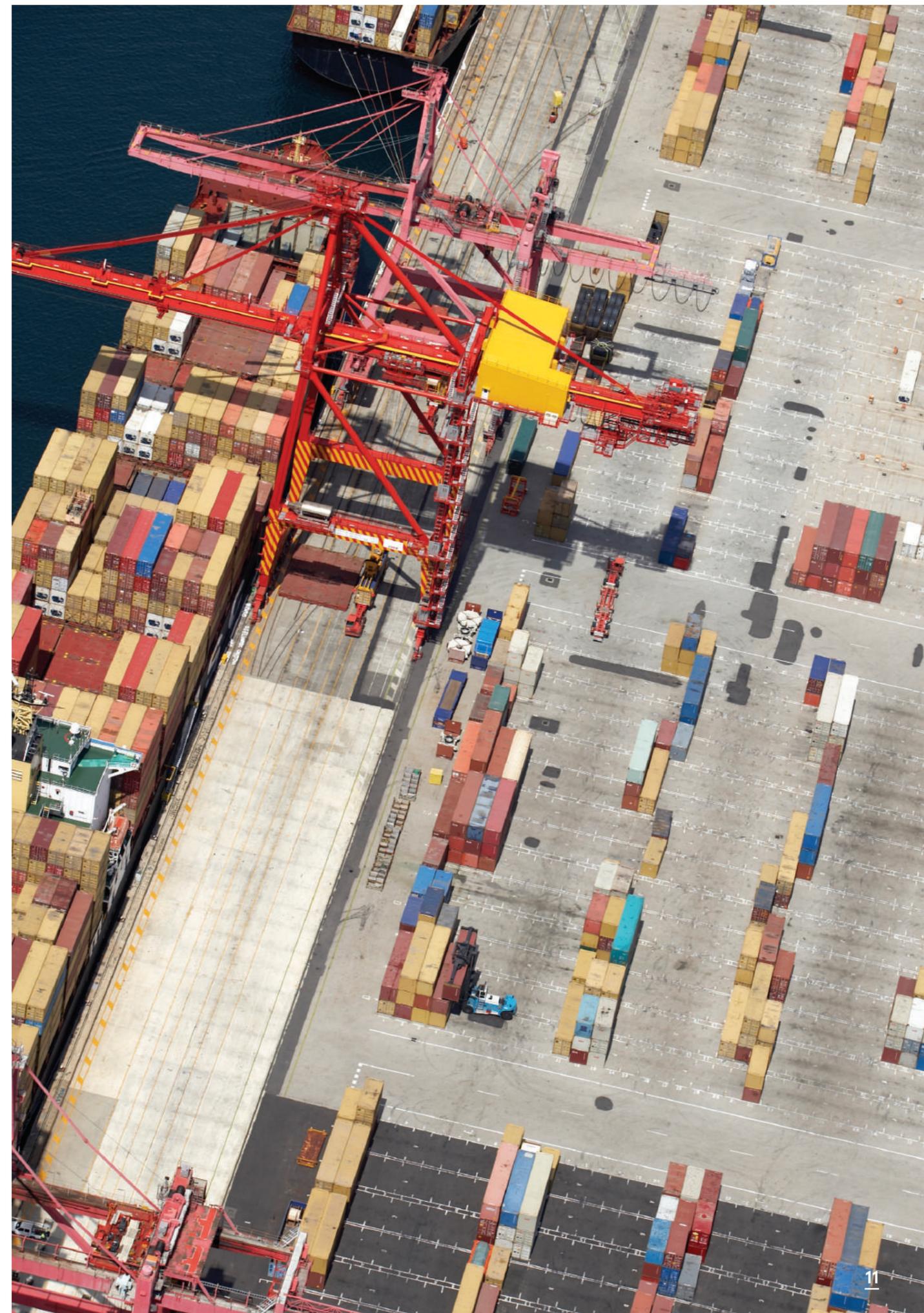
There are two main types of disclosure documents, prospectuses and offer information statements. Depending on the circumstances a requirement to prepare a prospectus may be satisfied by the preparation of a full prospectus, a short form prospectus or a transaction specific prospectus.

## 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 three 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 will be 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.



# 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)*.

## Notification requirements

Foreign investors may need to notify the Government of the proposed acquisition and seek approval from the Treasurer. Failure to comply with notification requirements can result in a fine or imprisonment. 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.

Fees are payable for FIRB approval. It is recommended that approval be sought in advance of any purchase of property or a foreign person bidding at an auction.

Notification thresholds vary for different countries and whether Australia has a treaty or free trade agreement with the specific country.

These thresholds also differ based on the type of investment in Sensitive Businesses, Non-Sensitive Business, Media Sector, Agribusiness and land investments and if the investor is a government entity.

A sensitive businesses include investments in 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. These have different thresholds.



## Thresholds for business investments (not including investments in land)

Investor Nationality	Investment Type	Threshold – more than:
From FTA partner countries that have the higher threshold (being Chilean, Chinese, Japanese, New Zealand, South Korean and United States investors) except foreign government investors.	Acquisitions in non-sensitive businesses	\$1,094 million
	Acquisitions in sensitive businesses	\$252 million
	Media sector	For investment in the media sector, a holding of at least five percent requires notification and prior approval regardless of the value of investment.
	Agribusinesses	For Chile, New Zealand and United States, \$1,094 million.
		For China, Japan, and South Korea, \$55 million (based on the value of the consideration for the acquisition and the total value of other interests held by the foreign person [with associates] in the entity)
<b>Other investors</b>	Business acquisitions (all sectors)	\$252 million
	Media sector	For investment in the media sector, a holding of at least five percent requires notification and prior approval regardless of the value of investment. For investment in the media sector, a holding of at least five percent requires notification and prior approval regardless of the value of investment.
	Agribusinesses	\$55 million (based on the value of the consideration for the acquisition and the total value of other interests held by the foreign person [with associates] in the entity)
<b>Foreign government investors</b>	All direct interests in an Australian entity or Australian business	\$0
	Starting a new Australian business	\$0

## Thresholds for investments in land

Investor Nationality	Investment Type	Threshold – more than:
All investors	Residential land	\$0
Privately owned investors from FTA partner countries that have the higher threshold (being Chilean, Chinese, Japanese, New Zealand, South Korean and United States investors, except foreign government investors.	Agricultural land	For Chile, New Zealand and United States, \$1,094 million
		For China, Japan, Korea, \$15 million (cumulative)
	Vacant commercial land	\$0
	Developed commercial land	\$1,094 million
	Mining and production tenements	For Chile, New Zealand and United States, \$1,094 million
		Others, \$0
Privately owned investors from non-FTA countries and FTA countries that do not have the higher threshold	Agricultural land	For Singapore and Thailand, where land is used wholly and exclusively for a primary production business \$50 million (otherwise the land is not agricultural land)
		Others \$15 million (cumulative)
	Vacant commercial land	\$0
	Developed commercial land	\$252 million
		Low threshold land (sensitive land, being mines, public infrastructure eg. Airport or port), \$55 million
	Mining and production tenements	\$0
<b>Foreign government investors</b>	Any interest in land	\$0

# Other regulatory bodies

## Australian Taxation Office (ATO)

The Australian Taxation Office (ATO) is the regulator of the federal tax system. It provides each registered company and individuals with a Tax File Number (TFN), used to assess income and capital gains tax payable.

The ATO is responsible for administering the Australia's tax legislation, in particular the various Income Tax Acts and related legislation.

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 has significant enforcement power and can initiate court proceedings against companies and individuals to enforce compliance with Australia's tax laws.

## Australian Securities and Investments Commission (ASIC)

Corporations in Australia are regulated by ASIC under the *Corporations Act 2001*. 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 ABN for tax purposes. Australian common law allows companies the capacity to sue within Australian courts, where they have registered their name with ASIC.

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

A company must maintain a registered office within Australia. The existence of this registered office must be communicated to ASIC. Businesses are able to own land under the Corporations Act. 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 is responsible for ensuring the company adheres to the relevant legislation.

## Australian Stock Exchange (ASX)

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

This 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 and Consumer Commission (ACCC)

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

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

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

## Environment Protection Authority (EPA)

Responsibility for protection of the environment is shared between Commonwealth 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 the Victorian environment and administering a number of Acts, including the *Environment Protection Act 1970 (Vic)*. Similar regulatory bodies exist in other States and Territories.

## State Revenue Offices (SROs)

The various states and territories collect state based taxes through revenue offices established in those states and territories.

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 tax liabilities they may incur in relation to state or territory based taxes.

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

## A global perspective

Countries across the globe are enacting new laws and placing a greater on the enforcement of anti-bribery and corruption laws and Australia is no exception.

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 Bribery.

Each jurisdiction in Australia has different laws to deal with corruption and bribery. There are also a number of independent commissions at both the Federal and State level that are responsible for investigating allegations of corruption of public officials, including members of the police force and politicians.

## Bribery of public officials

It is an offence under the Commonwealth Criminal Code to dishonestly provide or offer to someone (directly or indirectly) a benefit with the intention of influencing a Commonwealth public official in the exercise of their duties, or where the receipt of the benefit would tend to influence a Commonwealth public official in the exercise of their duties. Penalties are substantial. For individuals penalties include up to ten years' imprisonment and/or a fine of up to A\$1.8 million. For corporations fines can be imposed up to the greater of A\$18 million, three times the value of the benefit attributed to the dishonest conduct and 10% of the annual turnover of the corporate group.

It is an offence under State and Territory laws to corruptly give or offer to an agent, as an inducement or reward, to do or refrain from doing something relating to the affairs of the agent's principal.

In 2016 the Commonwealth Criminal Code was amended to introduce false accounting offences. These offences are directed at criminalising intentional or reckless acts or omissions in respect of accounting records.



# 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 earlier section on how to conduct business in Australia).

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 1989 (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 licenses.

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 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.

## 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 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.

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

Dutiable value range	Rate
\$0 - \$25,000	1.4 percent of the dutiable value of the property
\$25,001 - \$130,000	\$350 plus 2.4 percent of the dutiable value in excess of \$25,000
\$130,001 - \$960,000	\$2,870 plus 6 percent of the dutiable value in excess of \$130,000
More than \$960,000	5.5 percent of the dutiable value

## 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, and have only relatively recently been introduced and increased. Potential purchasers should obtain advice in advance as to the application of any surcharge rates of duty which will apply to the foreign purchaser.

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 7% of the price or market value of the property (whichever is greater).

## Vacant property tax

The most recent federal budget included a proposal regarding a proposed new 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 six months per year, the annual charge would apply. The amount of the charge is to be equivalent to the relevant foreign investment application fee imposed on the property at the time it was acquired by the foreign person. This annual charge will apply to foreign persons who make an application to FIRB in relation to residential property from on or after 9 May 2017.

There are also State-based regimes which apply in addition to the federal charge. For example, in Victoria, on and from 1 January 2018 residential properties in the inner and middle suburbs of Melbourne are subject to an annual “vacant residential land tax” equal to 1 percent of the capital improved value of the property if the property was “vacant” (i.e. being unoccupied) for more than six 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 at 31 December (excluding any exempt land) is equal to or exceeds the threshold. The threshold is currently \$250,000, however for trustees, the threshold is \$25,000. Land tax is

payable on a sliding scale, depending on the site value of the land.

There are also other forms of land tax, such as special land tax, which may apply to particular properties.

Another example of a tax that may be applicable is the Victorian “Absentee owner surcharge”. From 1 January 2017, a 1.5 percent absentee owner surcharge on land tax applies to Victorian land owned by an absentee owner. 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 \$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 percent 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 may apply, including income tax (for example, on rental income) and capital gains tax (on a gain after disposition of the property).

## 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. 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. Russell Kennedy has developed its own RK eContracts offering to enable cross-border signing of contracts of sale and to reduce its environmental footprint.



# Industrial relations and occupational health & safety

Employment and industrial relations 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, began on 1 July 2009.

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 awards and enterprise agreements, which are discussed below. The Fair Work system covers the majority of workplaces in Australia. However, in some Australian states, state and 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. *The Independent Contractors Act 2006 (Cth)* also regulates independent contractor relationships.

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 tribunal ("FWC") and Federal Courts. The FWC also reviews and approves industrial agreements and provides a safety net of minimum conditions, described below.

The Fair Work Ombudsman ("FWO") provides information about workplace laws and has investigative and enforcement powers to ensure compliance with workplace laws. The Australian Building and Construction Commission regulates the building industry, with a focus on unlawful conduct by employers and unions. Unions and other employer associations can register as industrial organisations under the FW Act. The Registered Organisations Commission and the FWC jointly regulate 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.

## The key components of the Fair Work Act are:

### Minimum conditions

The NES are 10 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. An employer must comply with the NES or risk financial penalties. The NES cannot be displaced by common law contracts or industrial agreements.

The national minimum wage is an employee's base rate of pay for the ordinary hours they work. It typically depends on the industrial agreement that applies to their employment. The FWC reviews the minimum wage annually. The minimum wage is currently \$18.29 per hour or \$649.90 per 38 hour standard working week (before tax).

Employees have a legal right to be a members 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 under the FW Act. They provide additional minimum terms and conditions of employment for employees in particular industries and occupations. However employees earning more than the annual high income threshold (currently, \$142,000 per annum) may be excluded from their coverage. Awards cannot be less beneficial to employees than the NES.

An enterprise agreement is an agreement negotiated between an employer (or employers) and their employees. An award will not apply to an employee when an enterprise agreement applies to them. Enterprise agreements must not exclude the NES. Enterprise agreements must be approved by the FWC and must leave employees better off overall than they would be under the relevant award.

### Unfair dismissals

The FW Act provides remedies for dismissal in circumstances where the dismissal is harsh, unjust, or unreasonable. The remedies 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 business with fewer than 15 employees);
  - the employee is not covered by an award or enterprise agreement, and their guaranteed annual remuneration exceeds the high income threshold (\$142,000 for the financial year ending 30 June 2018); 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 employee's rights in the workplace. These provisions give an employee a right to contest actions taken by their employer if the reason for the action was unlawful.

For example, if an employee believes that they have been dismissed or disciplined because they raised a concern about their pay, the employee could make a general protections claim. If an employee believes that 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 \$54,000 per contravention.

General protections claims are normally heard by the Federal Circuit Court or the Federal Court, but in limited circumstances they can be heard by the FWC.

### Bullying claims

The FWC also has jurisdiction to hear disputes and make orders regarding workplace bullying. Where a person believes that they have suffered bullying in the workplace, they can make an application to the FWC for orders to stop the bullying. If the FWC is satisfied that bullying has occurred, and that there is an ongoing risk that bullying 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.

### Long service leave

Long service leave is a form of leave which only applies to employees who have completed a particular period of service. Each state and territory has its own long service leave legislation, and many 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, the construction industry portable long service leave scheme in Victoria).

While the legislation varies from one jurisdiction to another, in most cases an employee who has completed 10 years of service with the one employer is entitled to take 2 months of long service leave. Some employees have a different rate of accrual (for example 6 months of leave after 15 years).

Most states allow a pro-rata payment of accrued 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 all 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 (currently 9.5%), up to a cap (currently \$211,040 per annum).

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

### Employment contracts

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

### 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 but two states (Victoria and Western Australia) have adopted a set of harmonised laws (the *Work Health and Safety Act 2011*), so the legislation is almost identical in all of those states and territories.

In each jurisdiction, general duties regarding work health and safety are found in a primary piece of legislation that is supported by more specific obligations set out in regulations, codes of practice and other documents such as 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.

### Worker's 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 might be a claim for weekly payments to cover absence from work, or for medical expenses, or a lump sum claim for a person who has suffered a more serious injury.

The legislation also imposes obligations on employers and their workers around returning to work after an injury, and rehabilitation.

# Competition & 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
- mergers and acquisitions.

The Act is administered by the Australian Competition and Consumer Commission (ACCC), an independent Commonwealth statutory authority.

## Regulation of Takeovers

Takeover bids are administered 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 percent in the relevant markets.

## The Australia 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 Competition and Consumer Act 2010. 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

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 trademarks and plant breeder’s rights. Others do not, for example copyright and common law trademarks.

## Trademarks

The process for registering a Trademark includes the following:

- The submission of a trademark application must meet certain requirements to be accepted by IP Australia. First the phrase, design, words, image or other details of the mark must be clearly displayed as part of the trademark application. This must be accompanied by the classes in which the trademark will be used. This will assist in demonstrating the uniqueness and distinctiveness of the trademark.
- Once submitted a trademark application can take a number of months for examination, at which point the trademark is either accepted or rejected with grounds for amendment. The Examiner’s Report will be either approving the application or specifying grounds for rejection. Where the Report contains grounds for rejection, there is a requirement for resubmission and amendment.
- If registration is accepted the trademark will be advertised in the Australian Official Journal of trademarks. If no opposition occurs after 2 months a trademark is registered and will remain on the register for ten years and may be renewed indefinitely.

- There are alternatives to registering a trademark. A trademark can be used without being registered and common law action can be taken where there is evidence of infringement i.e. tort law of Passing off and Section 18 of the Australian Consumer Law.

## Patents

Patents are a monopoly right for certain types of device, substance method or process. Patents are a legally binding commercial monopoly over a new invention. As a result patent applications are subject to a high threshold for successful applications, and should be assisted by the relevant professionals to ensure the invention is protected.

In addition to being novel and inventive, a patent must not have been secretly used. This requirement reflects the principle behind patent law, in that a patent monopoly is granted in return for publication of the invention. If publication is not acceptable then the invention can only be protected by confidentiality.

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

## Copyright

Copyright is a right that does not have to be registered in Australia, and seeks to protect unauthorised reproduction of a work, such as a literary, artistic, musical and dramatic works, and also ‘neighbouring rights’ such as sound recordings, film, published editions and broadcast.

Copyright seeks to prevent an unauthorised reproduction of a work, rather than an idea or concept, and therefore is mainly applicable in books, film and software.

# 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 \$3 million.

Various State and Territory legislation has also been enacted, but this primarily deals with privacy obligations imposed on State and Territory governments and private sector entities that contract with government departments, and organisations which 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 \$3 million. Entities with an annual turnover less than \$3 million are exempt from the Privacy Act unless:

- the entity is related to another business that has an annual turnover exceeding \$3 million;
- the entity provides a "health service" or holds "health records";
- the entity discloses personal information for a "benefit service or advantage";
- the entity provides someone else with a "benefit, service or advantage" to collect 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 means, and it is essential that the entity understands the circumstances in which personal information about an individual is collected 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 professional, 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 of, at the time, or as soon as practicable after, the organisation collects their personal information.

- 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 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 that 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 if the organisation is satisfied that it needs to be corrected or 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.

With effect from 22 February 2018, entities will be 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.

## 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, while the data breach notification obligation is not yet effective, entities doing business in Australia that are bound by the Privacy Act must prepare for the obligation. This could be done using the following steps:
  - 1 Take steps to delete or de-identify information no longer required;
  - 2 Review and update privacy policy and procedures;
  - 3 Undertake staff training on the importance of privacy;
  - 4 Assess contracts with key suppliers with respect to privacy;
  - 5 Develop and test a data breach response plan.



# 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, i.e 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 for further details of taxes and duties applicable to property.

## 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 earlier section Industrial relations and occupational health & safety 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, from 1 July 2018 (pending legislative procedure formalities being finalised) 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.

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Andrew Chalet is a Principal in Russell Kennedy's Corporate & Commercial team specialising in intellectual property. Andrew is an active member of the International Trademark Association (INTA) with over 25 years of experience, gained working at a number of well-respected firms in the United Kingdom and Australia. He has been recognised every year since 2014 for his expertise in Biotechnology Law.

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