DOING BUSINESS IN AUSTRALIA

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ABOUT
CORRS

CORRS CHAMBERS WESTGARTH IS A PREMIUM INDEPENDENT LAW FIRM BASED IN AUSTRALIA. OUR LAWYERS WORK ACROSS PRACTICE AREAS AS WELL AS GEOGRAPHIC BOUNDARIES TO HELP OUR CLIENTS ACHIEVE THEIR STRATEGIC BUSINESS GOALS.

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Corrs enjoys strong, enduring relationships with major clients, including more than half the top 50 ASX listed companies and a number of Global Fortune 500 companies. We value these relationships and work hard to continually earn our place as our client's most trusted adviser on their most significant challenges. We do this by continually evolving to extend our value and influence.

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AUSTRALIA'S GOVERNMENT AND LEGAL SYSTEM: AN OVERVIEW

GOVERNMENT

The Commonwealth of Australia is a federation of six States (New South Wales, Victoria, Queensland, South Australia, Western Australia and Tasmania), two internal Territories (Northern Territory and the Australian Capital Territory) and a number of minor external Territories.

A written Constitution divides power between the central Federal Parliament, located in Canberra in the Australian Capital Territory, and the eight State and Territory Parliaments. The Constitution gives the Federal Parliament the power to make laws relating to foreign investment, including legislation concerning corporations, taxation, trade and commerce, communications, banking, insurance, bankruptcy and insolvency, intellectual property, immigration and industrial disputes.

Each State has legislative power to make any laws it desires, except in relation to a few matters reserved to the Federal Parliament. Federal law prevails over State or Territory law to the extent of any inconsistency.

Any foreign investment proposal must comply with both Federal law and the law of the State or Territory in which the investment is located. In some cases, local Government law is also relevant, especially in relation to planning and building approvals.

LEGAL SYSTEM

There are two primary sources of law in Australia: statute law and common law.

Statute law is the body of legislation enacted by the various levels of Government, and includes subordinate legislation such as regulations, rules and by-laws. Common law is the body of law arising out of decisions of the various Federal, State and Territory courts.

Each State and Territory has its own court system, consisting of a Supreme Court and a number of minor courts. The Federal Government has its own court system consisting of the High Court, the Federal Court, the Family Court and the Federal Circuit Court. The High Court hears appeals (if leave is granted) in civil and criminal matters from the Federal Court and the State and Territory Supreme Courts. In addition, there are numerous panels and tribunals administering particular areas of law. The High Court also functions as Australia's superior constitutional court. Both the High Court and the Federal Courts may hear matters requiring the interpretation of the Australian Constitution.

Australia is also a party to various international treaties and conventions. However, these don't create rights or obligations for individuals in Australia unless they are given effect by an Australian statute. International law may be used by an Australian court as an interpretative aid should the court find a statute ambiguous.

BUSINESS ORGANISATION

BUSINESS IN AUSTRALIA MAY BE CONDUCTED THROUGH VARIOUS LEGAL STRUCTURES.

The range of legal structures in Australia include:

- Companies incorporated in Australia, including Australian subsidiaries of foreign companies
- Registered foreign companies
- Partnerships and limited partnerships
- Joint ventures
- Trust
- Sole proprietors

The *Corporations Act 2001* (Corporations Act) is the primary source of company regulation in Australia and is administered by the Australian Securities & Investments Commission (ASIC).

The following sets out how business is conducted in Australia via a company structure – either incorporated in Australia or overseas. We also consider some of the alternative structures.

COMPANIES INCORPORATED IN AUSTRALIA

Companies assume the rights and liabilities of their members and can hold property. They can sue and be sued in their own name. Generally, the liability of the members is limited to the amount (if any) on the shares respectively held by them. Actual management and control of a company is vested in the board of directors, who are appointed by the members.

Companies must, for the purposes of income tax legislation, appoint a public officer. The public officer is responsible for doing everything the company is required to do for income tax purposes. This person is liable to the same penalties which may be imposed on the company for any default, but is not personally liable for payment of the company's taxes. The Commissioner of Taxation may exempt a company from the requirement to appoint a public officer.

There are various types of companies, but by far the most common is a company limited by shares, being either a proprietary company (called a private company in many other countries) or a public company. A proprietary company must have at least one member, but may not have more than 50 non-employee members and may not raise funds from the public, whereas a public company has no limits on membership and may raise funds from the public. Public companies may be listed on the Australian Securities Exchange (ASX), in which

case they must also comply with the ASX Listing Rules.

Relative to public companies, proprietary companies are less tightly regulated and subject to less onerous reporting requirements. Areas in which this more relaxed regulatory approach is evident include the regulations and restrictions in relation to meetings, the appointment, qualification and removal of directors, the giving of financial benefits to directors and related parties, the power to allot shares and the required contents of annual reports.

A proprietary company is further classified under the Corporations Act as being either "small" or "large". Generally, large proprietary companies have more onerous reporting obligations than small proprietary companies. A proprietary company will be "large" for the purposes of the Corporations Act if it (together with its controlled entities) satisfies any two of the following criteria:

- consolidated gross operating revenue for the financial year is at least A$25 million;
- consolidated gross assets at the end of the financial year is at least A$12.5 million; and
- has 50 or more employees at the end of the financial year.

A company limited by shares must have the word "Limited" or "Ltd" at the end of its name (to indicate the limited liability of the company's members), whilst a proprietary company limited by shares must also have the word "Proprietary" or "Pty" as the second last word in its name. In addition, all companies must state their Australian Company Number (ACN) or Australian Business Number (ABN) on all their public documents.

Companies that are residents of Australia for taxation purposes will be taxed on income and gains from sources both in and outside Australia, reduced by any allowable deductions. Conversely, companies that are non-residents of Australia will generally only be taxed on income with sources in Australia and gains arising from dealing with certain assets that have the "necessary connection" with Australia.

Company groups are not regulated as groups and are treated as individual companies. However, some company groups may be treated as a single entity for income tax purposes.

REGISTERED FOREIGN COMPANIES

Companies that are incorporated outside of Australia that wish to carry on business in Australia must be registered with ASIC. Unincorporated bodies that do not have their head office or principal place of business in Australia must also register with ASIC if they wish to carry on business in Australia. A foreign company applying for registration must lodge an application accompanied by certain prescribed documentation, including a copy of its constitution or equivalent (if any) and a list of its directors, with ASIC. ASIC does not have discretion whether or not to grant registration.

A determination of whether or not a foreign company is "carrying on a business" in Australia requires an examination of all of the circumstances of the company's activities in Australia in light of several provisions of the Corporations Act and a body of common law principles. Specific advice should be sought in each case.

A registered foreign company is given the power to hold land in Australia under the Corporations Act. At common law, a foreign company may sue and be sued in its own name, however, a failure to register under the Corporations Act as a foreign company, when required to do so, may inhibit that company's right to sue.

Some of the more important obligations imposed upon foreign companies registered to carry on business in Australia are set out below.

NAME AND AUSTRALIAN REGISTERED BODY NUMBER

A registered foreign company may only trade under the specific name registered with ASIC. If the name of a registered foreign company changes, it must formally notify ASIC of the change within 14 days.

When a foreign company registers with ASIC, it is given an Australian Registered Body Number (ARBN). An ARBN is to be distinguished from an ABN, which is relevant for taxation purposes.

A foreign company must ensure that the ARBN (or, if the last nine digits of the body's ABN are the same as the last nine digits of its ARBN, the ABN) together with its name and place of origin, appear on all public documents and negotiable instruments published or signed by the company in Australia.

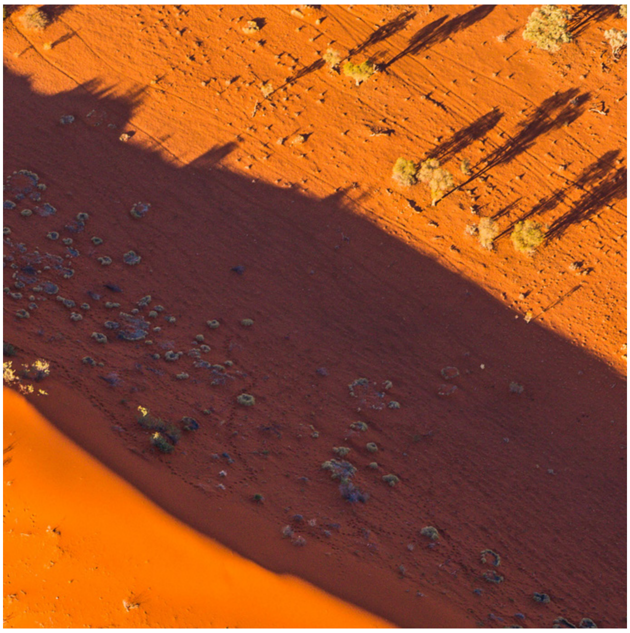
If applicable, such documents are also required to include a notice of the fact that the liability of the company's members is limited. Public documents include all business letters, cheques, invoices, receipts, orders for goods, orders for services, official notices, contracts, agreements, publications, websites and statements of account of the business. There are certain limited exceptions that may apply. For example, "authorised deposit taking institutions" (eg banks, buildings societies and credit unions) are exempted from certain requirements.

REPRESENTATION IN AUSTRALIA

A registered foreign company must have a registered office in Australia to which all communications and notices may be addressed and which must be open and staffed for certain prescribed hours. ASIC must be notified of the address of the registered office and must be notified of any change in address within seven days of the change.

Registered foreign companies must also have a formally appointed local agent, who may be either a natural person, or a company resident in Australia. The local agent is responsible for the company's compliance with the Corporations Act and is personally liable for any contraventions of the Corporations Act. ASIC must be notified of the name and address of the local agent.

As with Australian companies, registered foreign companies must, for the purposes of income tax legislation, appoint a public officer.



REPORTING

Subject to certain exemptions, registered foreign companies must annually lodge with ASIC a copy of their balance sheet, profit and loss statement and cash flow statement for the previous financial year, which must be prepared in accordance with the laws of the company's place of incorporation. These financial reports must be accompanied by any other documents that the company is required to prepare under the laws applicable in its place of incorporation.

ASIC may require registered foreign companies to provide further information if the accounts provided do not sufficiently disclose the company's financial position.

A small proprietary company controlled by a foreign company has to prepare a financial report and directors' report only if it was controlled by a foreign company for all or part of the year and it is not consolidated for that period in the financial statements for that year lodged with ASIC by a registered foreign company.

LISTING ON THE ASX

There are two ways a foreign company can list its equity securities on the ASX:

- as an ASX Foreign Exempt Listing; or
- as a standard ASX Listing.

Foreign entities listed on an acceptable overseas exchange may be admitted as an ASX Foreign Exempt Listing provided that, amongst other things, they have either net tangible assets or a market capitalisation of at least A$2,000 million at the time of admission, or, alternatively, operating profit before income tax of at least A$200 million for each of the previous three financial years. They are not required to comply with the majority of the ASX Listing Rules, but must continue to comply with the rules of their overseas home exchange. Companies with an ASX Foreign Exempt Listing are required to provide to the ASX a range of documents and reports on an ongoing basis.

Alternatively, a foreign company may seek admission to the general category. The entity must satisfy the same admission requirements as an Australian entity and will be required to comply fully with the ASX Listing Rules (subject to any specific waivers that the ASX may grant).

To be eligible for admission to the official list as either an ASX Listing or an ASX Foreign Exempt Listing, the foreign entity must establish an Australian securities register, appoint an agent for service in Australia and satisfy the ASX that it will observe the ASX Listing Rules. It is also required to be registered as a foreign company under the Corporations Act.

United States companies, in particular, may also take advantage of an ASX listing through the US offshore offering exemption under US securities laws (Regulation S). The ASX is one of only a few exchanges in the world to have received a no-action letter from the US Securities and Exchange Commission granting relief from some of the more onerous Regulation S requirements in favour of those of the local exchange.

PARTNERSHIPS

A partnership consists of two or more partners (to a maximum of 20 except in the case of certain professional partnerships) carrying on business in common with a view to profit. Partners may be individuals or companies. A partnership is not a separate legal entity from the partners themselves. Partners are jointly and severally liable for all liabilities of the partnership, and this liability is unlimited. Each State and Territory has its own partnership legislation which, together with the terms of any partnership agreement and the principles of equity and common law, governs the relationship of the partners.

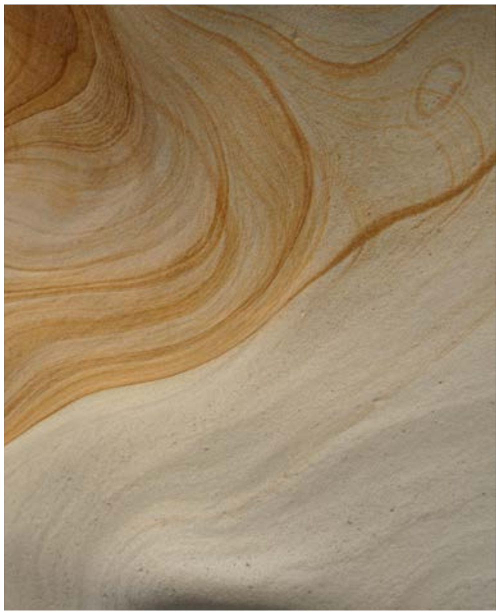
Partnerships are not required to file any financial information concerning the partnership on any public register. Accordingly, partnerships and partners (except corporate partners) are able to keep their financial performance confidential. A partnership need not be audited, but partners are bound to render true accounts and full information regarding all things affecting the partnership to all other partners or their legal representatives.

The income tax implications of a partnership are as follows:

- a partnership is not taxed as a separate entity;
- a partnership is obliged to file an annual tax return allocation to table the income or loss among the partners in their respective shares;
- each partner, in their own tax return for the same tax year, must include their own share of the taxable income or loss of the partnership; and
- the partners must adopt a uniform approach to the tax treatment of income and expenditure of the partnership business.

LIMITED PARTNERSHIPS

Legislation in all States provides for limited partnerships, which are partnerships consisting of at least one general partner and at least one limited partner. Limited partners contribute to the capital of the partnership and share in its profits but do not take part in its management. They cannot bind the firm and their liability to contribute to the debts or obligations of the partnership is limited to their capital contributions as recorded in the relevant register for each State or Territory. The obligations of general partners are similar to



those in an ordinary partnership and their liability remains unlimited.

Limited partnerships are formed upon registration as a limited partnership and they are generally taxed as if they are companies. Since 1 July 2002, certain classes of non-resident investors (eg certain tax exempt entities and taxable foreign residents of specified jurisdictions) investing in eligible venture capital investments through a limited partnership have been able to access the existing exemption for capital gains on venture capital investments.

JOINT VENTURES

In Australian commercial circles, the term "joint venture" is a label for a variety of forms of legal association between investors. Generally speaking, a joint venture is an agreement between two or more parties for the purposes of carrying on a business or undertaking. There is no settled statutory or common law definition of what constitutes a joint venture.

Three relatively common variations exist in Australia:

- an incorporated joint venture, where a separate legal entity is incorporated to pursue the interests of the joint venturers, who are shareholders in the company, in a specific project. The taxation implications of this form of joint venture (assuming it to be resident in Australia for tax purposes) are the same as for an Australian company;
- a unit trust, where the beneficial interest in the trust property is divided into units which can reflect the percentage of equity held by each participant and may be independently dealt with. Unit trusts normally have a corporate trustee; and
- an unincorporated joint venture, where the investors have a contractual association which lacks both corporate form and equity capital, and which may or may not be a partnership for taxation purposes or under partnership legislation. If it is not a partnership at law or for taxation purposes,

no partnership tax return is required and each joint venturer must lodge a separate tax return and may adopt a differing tax treatment for the income and expenses referable to its share of the joint venture.

Joint ventures are a common form of business association, especially in the energy and resources industries. For example, unincorporated mining joint ventures have been developed by the mining and petroleum industry in which several companies contract with one another to operate a mine or well but they each separately sell their share of the resources mined.

TRUSTS

A trust is a legal relationship whereby a trustee, being the legal owner of trust property, deals with that property for the benefit of some other person or persons (the beneficiaries) or for some object permitted by law, such as a charitable object. A trust is not a separate legal entity and does not enjoy limited liability, although it is common to use a company as the trustee and thereby limit the potential liability of the trustee.

A trustee owes a high standard of care to beneficiaries, and is subject to a number of duties. These include the duty to act in good faith, to avoid conflicts of interest, to make full disclosure to beneficiaries and not to make a secret profit or gain.

Trusts commonly used to carry on businesses are unit trusts or discretionary trusts. In a unit trust, the beneficial interests in the trust are divided into units, which may be transferred in similar fashion to shares in a company. The holder of a unit is entitled to a fixed share of the profit of the trust. In a discretionary trust however, the identity or interest of the beneficiary is not determined at the time the trust is created.

Trust income is usually taxed in the hands of beneficiaries according to their respective share of the net trust income, and the trustee is not normally taxed on it. It should be noted, however, that:

- depending on the ownership and business activities of the trust or the business activities of entities controlled by the trust, a unit trust may be taxed as if it is a company;
- the trustee of a trust can be liable for tax in a variety of situations (eg where there are non-resident beneficiaries); and
- tax losses are generally trapped within the trust and their future use is subject to satisfying certain complicated tests.

COMPANY FORMATION

A FOREIGN INVESTOR MAY EITHER INCORPORATE A NEW COMPANY OR PURCHASE A RECENTLY INCORPORATED "SHELF" COMPANY WHICH HAS NOT TRADED.

To incorporate a company, it is necessary to:

- select an available name;
- adopt a company constitution or choose to be governed by the replaceable rules set out in the Corporations Act or a combination of both;
- obtain written consents from each person who agrees to become a director, secretary or member of the company; and
- complete an application form and lodge it together with the prescribed fee with ASIC.

ASIC will register the company and issue a certificate of registration. The company will be given an ACN and may conduct business anywhere in Australia. The company will also need to apply to the Australian Taxation Office for a tax file number and should also apply for an ABN and register for GST where appropriate.

COMPANY ADMINISTRATION

PROPRIETARY COMPANIES MUST HAVE AT LEAST ONE DIRECTOR. THIS DIRECTOR MUST BE ORDINARILY RESIDENT IN AUSTRALIA (OTHER DIRECTORS OF A PROPRIETARY COMPANY MAY RESIDE OUTSIDE AUSTRALIA). PUBLIC COMPANIES MUST HAVE AT LEAST THREE DIRECTORS, TWO OF WHOM MUST BE ORDINARILY RESIDENT IN AUSTRALIA.

A public company must also have at least one company secretary ordinarily resident in Australia. A proprietary company is not required to have a company secretary, but may do so. If a proprietary company does have one or more secretaries, at least one of them must be ordinarily resident in Australia. All directors and company secretaries must be natural persons who are at least 18 years of age. Typically, the day-to-day management of a company is in the hands of a Managing Director or Chief Executive Officer.

Companies carrying on business in Australia must maintain a registered office in Australia.

For taxation purposes, a public officer who is responsible for the tax affairs of the company must be appointed. Notice of such appointment must be given to the Commissioner of Taxation.

Documents may be executed by a company without using a common seal if the document is signed either by two directors (or the director of a proprietary company whose sole director is also the company's sole secretary), or a director and secretary of the company (section 127(1) *Corporations Act*). Alternatively, if a company has a common seal, it may execute documents by fixing the seal to the documents, but this must be witnessed by either two directors (or the director of a proprietary company whose sole director is also the company's sole secretary) or a director and a company secretary.

Public companies must hold an Annual General Meeting (that is, a general shareholders' meeting) at least once in each calendar year and within five months of the close of each financial year. There is no such requirement in the Corporations Act for proprietary companies. The financial year of most Australian taxpayers ends on 30 June, although permission can be obtained from ASIC and the Commissioner of Taxation to align the year end with a foreign parent's year end. Accordingly, most Annual General Meetings must be held on or before 30 November.

The directors of a public company must lay before the Annual General Meeting the company's financial report, together with reports from the company's directors and auditors.

The constitutions of larger (particularly public) companies usually provide that a proportion of the directors (often one third) must retire by rotation each year. The resignation and appointment of directors is usually considered at the Annual General Meeting. Other meetings may be convened by directors or shareholders from time to time, in accordance with the company's constitution or the Corporations Act.

A register of certain company information is maintained by ASIC which may be accessed by the public. ASIC must be notified of, amongst other things, changes to officeholders, the issuance of shares and the passing of certain resolutions by the shareholders of the company.

Public and large proprietary companies must lodge annual (and in some cases half-yearly) financial, directors' and auditors' reports with ASIC within three months (for disclosing entities), or four months (for all other companies) after the end of the company's financial year. The reports include information such as financial statements, any required disclosures, information relating to the company's operations during the year, and any dividends paid, or shares issued during the relevant year.

Each year, ASIC provides companies with an annual statement of the company's details within two weeks of the anniversary of its registration date (or another date approved by ASIC (Review Date)). Companies will be required to review the statement of details and advise ASIC if any details are incorrect. In addition to the annual statements, companies must also advise ASIC of certain events (such as changes in members) as they occur. Further, companies are required to pay the review fee within two months of the Review Date.

Companies are required to maintain a register of members, a register of security interests affecting the company's property and, if relevant, a register of option holders and register of debenture holders. Anyone can inspect these various registers.

> **// Companies carrying on business in Australia must maintain a registered office in Australia. //**

TAKEOVER

THE CORPORATIONS ACT RESTRICTS A PERSON FROM ACQUIRING A "RELEVANT INTEREST" IN VOTING SHARES IN A LISTED COMPANY, LISTED MANAGED INVESTMENT SCHEME OR AN UNLISTED COMPANY WITH MORE THAN 50 MEMBERS. THIS RESTRICTION APPLIES IF, BECAUSE OF THE TRANSACTION, THAT PERSON'S OR SOMEONE ELSE'S "VOTING POWER" INCREASES FROM 20% OR BELOW TO ABOVE 20%. IT ALSO APPLIES IF THE STARTING POINT IS ABOVE 20% AND BELOW 90%.

The term "voting power" refers to the percentage of votes attached to voting shares or interests in the company or scheme, in which a person or an associate has a relevant interest. A person has a "relevant interest" in securities if, in broad terms, that person:

- is a holder of the securities;
- has the power to exercise, or control the exercise of, a right to vote attached to the securities; or
- has the power to dispose of, or control the exercise of, a power to dispose of the securities.

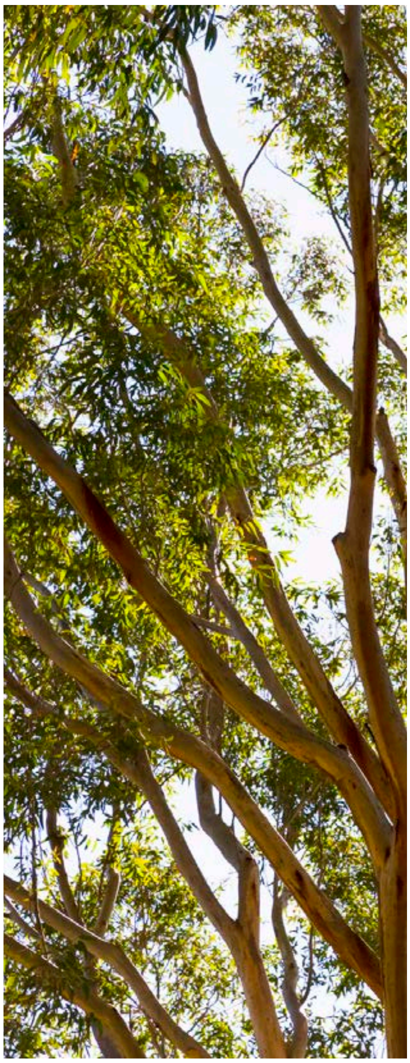
Acquisitions resulting in voting power of more than 20 per cent are only permitted in specific circumstances including:

- an acquisition under a takeover bid;
- an acquisition approved by a resolution of the members of the company or scheme;
- an acquisition resulting from a scheme of arrangement approved by the Court;
- an acquisition resulting from another acquisition of relevant interests in voting shares in a body corporate included (as a primary listing) in the official list of an Australian stock exchange or a foreign exchange approved in writing by ASIC (also known as a "downstream acquisition");
- an acquisition resulting from an issue or shares pursuant to a fundraising or an underwriting of a fundraising, in certain circumstances;
- an acquisition resulting from a buy-back or participation in a dividend reinvestment plan or bonus share plan; or
- an acquisition that does not result in a person's voting power being more than three per cent higher than it was six months earlier, if the person, or any other person, has had voting power in the company or scheme of at least 19 per cent throughout that six month period (the "creep rule").

SUBSTANTIAL SHAREHOLDINGS DISCLOSURE

THE CORPORATIONS ACT REQUIRES A PERSON ACQUIRING (OR CEASING TO HAVE) A SUBSTANTIAL HOLDING, WHO MAKES A TAKEOVER BID, TO GIVE NOTICE TO THE LISTED COMPANY OR SCHEME AND THE ASX WITHIN TWO BUSINESS DAYS OF BECOMING AWARE OF THE INFORMATION.

THIS ALSO APPLIES IF THE PERSON ALREADY HAS A SUBSTANTIAL HOLDING AND THERE IS MOVEMENT IN THEIR INTEREST OF AT LEAST 1%, IN A LISTED COMPANY OR LISTED MANAGED INVESTMENT SCHEME. IN ADDITION, THE NOTICE GIVEN TO THE ASX WILL BE MADE PUBLIC.



A person will be taken to have a "substantial holding" in a listed company or scheme if the person and their associates together have a relevant interest[1] in 5% or more of the voting shares or interests in the listed company or scheme. A person will also be taken to have a "substantial holding" if they make a takeover bid.

Once a person becomes a substantial holder, any movement (up or down) of 1% or more in the person's holding must be notified to the listed company or scheme and the ASX within two business days after they become aware of the information. If the person's holding drops below 5%, and the person ceases to be a substantial holder, the listed company or scheme and the ASX must be notified within two business days.

If a person makes a takeover bid for a listed company or scheme, they must notify the listed company or scheme and the ASX of their holding in the listed company or responsible entity for the listed scheme (if any) upon making the bid, and on each trading day following any movement of 1% or more in the person's holding during the bid period.

1. For a further discussion of the meaning of the term "relevant interest", see "Takeovers".

APPLICATION OF FOREIGN LAW

CONSISTENT WITH THE FEDERAL GOVERNMENT'S ENCOURAGEMENT OF FOREIGN INVESTMENT, THE *FOREIGN CORPORATIONS (APPLICATIONS OF LAWS) ACT 1989* PROVIDES THAT ANY QUESTIONS RELATING TO THE FOLLOWING ISSUES ARE TO BE DETERMINED BY REFERENCE TO THE LAW OF THE PLACE OF A FOREIGN CORPORATION'S INCORPORATION:

- the validity of a foreign corporation's incorporation;
- the status of a foreign corporation;
- the foreign corporation's shareholders and officers, and their rights and liabilities in relation to the foreign corporation;
- the existence, nature or extent of any other interest in the foreign corporation;
- the internal management and proceedings of a foreign corporation; and
- the validity of a foreign corporation's dealings other than with outsiders.

The operation of this Act is unaffected by the Australian Government's recognition or otherwise of the foreign state (or the government of the foreign state) in which a corporation is incorporated, or whether Australia has or does not have diplomatic relations with that state.

Accordingly, foreign corporations can act with confidence that their legal rights in Australia will not be adversely affected by political considerations.

FOREIGN INVESTMENT

THE AUSTRALIAN GOVERNMENT WELCOMES FOREIGN INVESTMENT INTO AUSTRALIA AND RECOGNISES THE SUBSTANTIAL CONTRIBUTION IT MAKES TO THE DEVELOPMENT OF AUSTRALIA.

Foreign investment in Australia is regulated and notifiable foreign investment proposals must be approved by the Australian Treasurer.

In practice it is very rare for a proposal to be refused approval. However, foreign investors wishing to successfully navigate Australia's foreign investment regulatory regime need to understand not only the letter but the spirit of the regime. Adopting a clear commitment to Australia's foreign investment regime from the outset is critical to facilitate timely approval.

To facilitate the process, it is important that a foreign investor who is looking at a significant and potentially sensitive proposal:

- respect the process and consult with the Foreign Investment Review Board (**FIRB**) and the Treasurer prior to any public announcement;
- appreciate and manage community sensitivities as needed;
- develop a whole of stakeholder strategy which engages key political and community players; and
- proactively identifies and seeks to address potential national interest concerns (if any).

OVERVIEW OF FOREIGN INVESTMENT REGULATION

Australia's foreign investment regulatory framework comprises:

- legislative framework and in particular the *Foreign Acquisitions and Takeovers Act 1975* (Cth) (**FATA**) and the *Foreign Acquisitions and Fees Imposition Act 2015* (**Fees Imposition Act**) and their associated regulations.

  Under FATA foreign investors must submit foreign investment proposals that meet certain criteria to the Treasurer for approval. The Treasurer has the power to block foreign investment approvals that are contrary to Australia's national interest or apply conditions on the way in which a proposal is to be implemented to ensure it is not contrary to the national interest.

  The Fees Imposition Act sets the fees for foreign investment applications.

- *Australia's Foreign Investment Policy* (**Policy**) which is issued by the Australian Government. The Policy outlines the Government's approach to administering the foreign investment framework including national interest considerations.
- Guidance Notes which provide more specific information on how the foreign investment framework applies for different acquisitions and investors.

The Australian Treasurer is responsible for the foreign investment framework and reviews investment proposals against the national interest on a case-by-case basis.

When making foreign investment decisions the Treasurer is advised by FIRB which examines foreign investment proposals and advises on the national interest implications. Ultimate responsibility for making decisions rests with the Treasurer.

FIRB is supported by a secretariat located in Treasury and by the Australian Taxation Office (**ATO**). Treasury is responsible for the day-to-day administration of the framework in relation to business, agricultural land and commercial land proposals. The ATO administers foreign investment in residential real estate.

Foreign investors wishing to successfully navigate Australia's foreign investment regulatory regime need to understand not only the letter but the spirit of the regime.

WHO SHOULD CONSIDER THE REGIME?

FOREIGN PERSONS

FATA and the Policy apply to a "foreign person". Broadly, a "foreign person" means:

- a natural person not ordinarily resident in Australia;
- a foreign government or foreign government investor;
- a corporation, trust, partnership or fund where an individual not ordinarily resident in Australia, foreign corporation or foreign government holds a substantial interest of at least 20%; or
- a corporation, trust, partnership or fund in which two or more foreign persons hold an aggregate substantial interest of at least 40%.

A foreign government investor is a foreign government or separate government entity, trust, partnership or fund in which:

- a foreign government or separate government entity holds a substantial interest of at least 20%; or
- foreign governments or separate government entities of more than one foreign country hold an aggregate substantial interest of at least 40%.

FOREIGN INVESTORS FROM FTA COUNTRIES

Certain privately owned investors from countries with whom Australia has a free trade agreement including Canada, Chile, China, Japan, Korea, Mexico, New Zealand, Singapore, the United States and Vietnam are subject to certain higher monetary notification thresholds for acquisitions made directly by those investors. To take advantage of these higher thresholds the investment must come directly from the free trade agreement country and not through a subsidiary incorporated in another country (including Australia).

FOREIGN GOVERNMENT INVESTORS

All foreign government investors must obtain approval before acquiring a direct interest in Australia, starting a new business or acquiring an interest in Australian land in each case regardless of the value of the investment. Foreign government investors also require approval to acquire a legal or equitable interest in a tenement or an interest of at least 10% in securities in a mining, production or exploration entity.

A direct interest is:

- an interest of at least 10% in the entity or business;
- an interest of at least 5% in the entity or business if the person who acquires the interest has entered a legal arrangement relating to the businesses of the person and the entity or business (other than the supply of good or services on normal commercial terms); or
- an interest of any percentage in the entity or business if the person who has acquired the interest is in a position to:
  - participate or influence the central management and control of the entity or business; or
  - influence, participate or determine the policy of the entity or business (eg a nominee director).

APPROVAL

Whether notification of a proposed transaction requires foreign investment approval will depend on the identity of the investor, the type of investment, the industry sector and the value of the proposed investment. Importantly, the acquisition of a foreign company with Australian assets may require foreign investment approval.

All notifiable transactions require prior approval by the Treasurer and any agreement to undertake the transaction must be conditional on the approval being obtained. A fee must be paid for each foreign investment application.

A failure to comply with Australia's foreign investment regime has significant and serious consequences for a foreign investor and its officers. Substantial civil and criminal penalties are imposed for breach of the FATA. The Treasurer also has extensive powers to divest or unwind transactions that are subsequently found to be contrary to the national interest.

The following table sets out, at a high level, when foreign investment approval will be required. Various exemptions may apply and it is important that you obtain specific legal advice in relation to your particular transaction.

TYPE OF INVESTMENT	FOREIGN INVESTORS	FOREIGN GOVERNMENT INVESTORS	FTA COUNTRY INVESTORS
Land			
Agricultural land	A$15 million (cumulative threshold)	Any interest regardless of value	A$1,154 million for US, New Zealand and Chilean investors A$15 million for Singaporean, Japanese, Korean, Chinese, Canadian, Mexican and Vietnamese investors (cumulative) A$50 million for Thai investors
Developed commercial land (non-sensitive)	A$266 million	Any interest regardless of value	A$1,154 million
Sensitive commercial land including mines and critical infrastructure eg airports and ports[2]	A$58 million	Any interest regardless of value	A$1,154 million
Vacant commercial land	Any interest regardless of value Usually subject to condition to develop within 24 months of the acquisition	Any interest regardless of value	Any interest regardless of value
Production tenements (does not include exploration)	Any interest regardless of value	Any interest regardless of value	A$1,154 million for US, New Zealand and Chilean investors

2 The Critical Infrastructure Centre has been established separately to FIRB to assess and manage national security risks to key Critical Infrastructure assets.

TYPE OF INVESTMENT	FOREIGN INVESTORS	FOREIGN GOVERNMENT INVESTORS	FTA COUNTRY INVESTORS
Exploration tenement	Approval not required	Any interest regardless of value	Approval not required
Companies			
Acquisition of at least 20% in an Australian business or corporation which is not sensitive	A$266 million	Direct interest regardless of value	A$1,154 million for Singaporean, Japanese, Korean, Chinese, Chilean, Canadian, New Zealand, Mexican and Vietnamese and US investors
Acquisition of a direct interest in an agribusiness	A$58 million (based on value of investment)	Direct interest regardless of value	$1,154 million for US, New Zealand and Chilean investors
Proposal to invest 5% or more in the media sector[3]	Must be notified regardless of value	Must be notified regardless of value	Must be notified regardless of value
Acquisition of at least 20% in an Australian business or corporation which is sensitive	A$266 million	Direct interest notified regardless of value	A$266 million
Australian land corporation	Will depend on the underlying land held – see above	Any interest regardless of value	Will depend on the underlying land held – see above
Australian agricultural land corporation	A$15 million (cumulative)	Any interest regardless of value	A$1,154 million for US, New Zealand and Chilean investors. A$58 million for Singaporean, Chinese, Japanese, Korean, Canadian, Mexican and Vietnamese investors

Most threshold figures (excluding agricultural land) are indexed on 1 January annually against the Australian Consumer Price Index (the most widely accepted measure of inflation in Australia).

3 Foreign persons with exisiting (and future) interests of 2.5% or more in an Australian Media Company must notify the Australian Communications and Media Authority (ACMA). The ACMA will keep a public register to record these interests.

FEES

By way of overview, the fees payable to FIRB for an application are as follows[4]:

Fees for commercial land and entities and businesses*			
	Consideration for the acquisition is $10 million or less	Consideration for the acquisition is above $10 million and not more than $1 billion	Consideration for the acquisition is above $1 billion
Commercial land (vacant and developed)*	$2,000	$25,700	$103,400
• Acquiring an interest in securities in an entity or issuing securities in an entity • A foreign government investor acquiring a direct interest in an Australian entity or Australian business • Acquiring a direct interest in an Australian entity or Australian business that is an agribusiness • Acquiring interests in assets of an Australian business or a direct interest in an Australian business that is an agribusiness	$2,000	$25,700	$103,400
Fees for agricultural land			
	Consideration for the acquisition is $2 million or less	Consideration for the acquisition is above $2 million and not more than $10 million	Consideration for the acquisition is above $10 million
Agricultural land*	$2,000	$25,700	$103,400

* The fee for land acquisitions is based on the consideration of the highest title for all actions considered part of the one agreement rather than based on the total consideration for the entire property. For example, a foreign person is acquiring a $5 million agricultural land property with over 5 titles as part of the one agreement. The highest title has an apportioned consideration of $1.5 million. Hence the total fee for this acquisition is $2,000.

CONDITIONS

FATA allows the Treasurer to decide that the Commonwealth has no objection to the foreign investment subject to conditions to ensure that the action will not be contrary to the national interest. Foreign investors are generally given the opportunity to review and respond to these conditions.

The Treasurer considers the potential impact of an action on Australian tax revenues in determining whether the action is contrary to the national interest. The Australian Taxation Office (**ATO**) is consulted in determining the potential tax impact of every non residential foreign investment proposal. If, following consultation, the Treasurer considers the action may involve a risk to tax revenues, standard tax conditions may be imposed as conditions of a no objection notification, to ensure that the action will not be, or is not, contrary to the national interest.

4 Fees are indexed to CPI and changed as at 1 July each year.

NATIONAL INTEREST

Under Australia's foreign investment regime, the Treasurer assesses foreign investment proposals against Australia's national interest on a case-by-case basis.

The Government typically considers the following factors when assessing whether foreign investment proposals are in the national interest:

NATIONAL SECURITY	The extent to which the investment affects Australia's ability to protect its strategic and national interests.
COMPETITION	Whether investment may result in the foreign investor gaining control over market pricing and production of a good or service or affects diversity in ownership and competition within Australian or global industries.
GOVERNMENT POLICIES	The extent to which the investment is consistent with the Government's policy objectives and the impact the investment may have on Government revenues.
GENERAL ECONOMY AND COMMUNITY	A range of factors including the nature of funding of the investment, Australian participation in the target enterprise following investment and the interests of employees, creditors and other stakeholders.
CHARACTER OF THE INVESTOR	The extent to which the foreign investor operates on a transparent commercial basis and is subject to adequate and transparent regulation and supervision. The corporate governance practices of the foreign investor will also be considered.

TIMING

Approval can usually be obtained within 30 days of the payment of the application fee.

The Treasurer is required to make a decision within 30 days of receiving the correct application fee. It is sometimes not possible for the Treasurer to make a decision within the statutory time limit. The Treasurer may make an interim order within the decision period to extend the statutory timeframe for a further 90 days from publication of the interim order. An interim order is published in the Government Gazette, a publicly available document.

Rather than have the Treasurer make an interim order (which means confidentiality of the proposal is lost), a foreign person can agree with FIRB to extend the decision period.

RESTRUCTURING AND INSOLVENCY

AUSTRALIAN INSOLVENCY PROCESSES

The key insolvency-related processes relevant to Australian companies under Australian law are:

- Voluntary Administration;
- Liquidation; and
- Receivership.

A company is also able to use a Scheme of Arrangement to agree a compromise of its debts with its creditors. This can occur prior to any insolvency process or work in parallel with an insolvency process.

VOLUNTARY ADMINISTRATION

When a company is facing financial distress, voluntary administration gives a company 'breathing space' so that it can implement an arrangement with its creditors to continue to trade. This breathing space is achieved through a moratorium on enforcement action.

The trigger for the appointment of voluntary administrators will usually be cash-flow related; that is, the inability of a company to pay its debts as and when they become due and payable. Subject to certain defences (and subject to proposed new safe harbour laws to be introduced later this year), directors of Australian companies will be personally liable if they allow a company to trade whilst insolvent.

A voluntary administrator may be appointed by:

- a resolution of the board of directors that the company is insolvent, or is likely to become insolvent in the future;
- any secured creditor, with a security interest over all or substantially all of the assets of the company, who is entitled to enforce that security interest; or
- a liquidator, if he or she considers that the company is insolvent, or is likely to become insolvent in the future.

A voluntary administrator is an independent insolvency practitioner who is a registered liquidator. There is no Court involvement in the appointment process. In performing his or her functions, the administrator will act in the best interests of all creditors of the company, even if a secured creditor appointed the administrator. The administrator will take control of the company's business, property and affairs. This person will investigate the affairs of the company, including offences in relation to officers or employees of the company.

The objective of the administration is to maximise the chances of the company continuing to trade or, if that is not possible, providing a better return to its creditors and shareholders than in a winding up. An administrator is liable for the general debts of the company that he or she incurs in the performance or exercise of his or her functions as administrator, as well as lease payments on the company's assets.

The administrator has the benefit of a statutory indemnity against the company's assets for debts or liabilities incurred, or damages or losses sustained, in good faith and without negligence, by the administrator in the performance or exercise of his/her functions or powers as administrator. This indemnity takes priority over the company's unsecured debts, debts secured by a security interest registered on the Personal Property Securities Register and debts secured by a circulating security interest (subject to that secured party's consent). Such indemnity is secured by a statutory lien on the company's property.

Upon the appointment of the voluntary administrator:

- the company's directors will not be permitted to exercise any powers, except with the administrator's consent;
- legal proceedings in respect of all existing claims and new claims based on existing contracts will be stayed, except with leave of the Court or administrator's consent;
- enforcement actions against the company will be stayed, except with leave of the Court or administrator's consent;
- owners of property (other than perishable property used or occupied by the company), or lessors of such property, cannot recover their property;
- a creditor holding security over the whole or substantially the whole of the assets of the company has 13 business days from the date that the administrator is appointed to appoint a receiver (unless a consent from the administrator or court approval has been obtained to appoint a receiver at a later date).

It is very common in Australia for commercial contracts to contain terms allowing a party to elect to terminate the contract if another party suffers from some insolvency related event, including entering administration, liquidation or receivership. Note that these termination rights are subject to the restrictions set out above.

The insolvency laws in Australia are changing to restrict, subject to certain exceptions, a counterparty from terminating a contract by reason of insolvency alone (known as "ipso facto" clauses). These changes are expected to become effective on, and only apply to contracts entered into after, 1 January 2018 pursuant to the *Insolvency Law Reform Act 2016* (Cth). After an administrator finalises his or her investigations, he or she will prepare a report (called a section 439A report), under which he or she will present the following options to the creditors about the company's future for the creditors to approve:

- execute a deed of company arrangement, under which creditors will receive more than in a winding up (see "Deed of Company Arrangement" below);
- if the company is insolvent – wind up the company, which would become a creditors' voluntary liquidation process (see "Liquidation" below); or
- if the company is solvent – hand control of the company back to its directors (note that this rarely happens).

DEED OF COMPANY ARRANGEMENT

Creditors may resolve for a company to enter into a deed of company arrangement (**DOCA**) at the second creditors' meeting in an administration process. The DOCA requires approval by a majority of creditors in number and by value of the debt voting, in person or by proxy, at this meeting.

A DOCA is a flexible arrangement between a company and its creditors, which governs how the company's affairs will be dealt with, including those claims of the company's creditors which will be extinguished in exchange for some consideration.

A DOCA binds all creditors (unless any creditors are expressly excluded from its operation), including secured creditors. Although this will not prevent the secured creditors' ability to deal with their security, unless they voted in favour of the DOCA. The DOCA also binds the company, its officers, shareholders and the deed administrator. The DOCA will not affect third party guarantees and the rights of owners or lessors of property, unless they voted in favour of the DOCA.

LIQUIDATION

There are two types of insolvent liquidation processes:

- creditors' voluntary liquidation; and
- compulsory winding-up through a court ordered liquidation.

Creditors' voluntary liquidation

A creditors' voluntary liquidation process may occur if:

- the directors of the company resolve that it is insolvent and it should be wound up;
- a member's voluntary liquidation is initiated (i.e. a solvent voluntary liquidation process) where the liquidator forms the opinion that the company is insolvent; or
- after creditors have voted that the company enter into liquidation following a voluntary administration or termination of a DOCA.

In the first scenario above, where the directors determine that the company is insolvent, they must convene a meeting of shareholders. The shareholders will vote by special resolution (i.e. 75% of those present and voting) that the company be wound-up and appoint a liquidator.

A creditors' meeting is then called to either confirm the liquidator's appointment or appoint a liquidator of the creditors' choice (as well as appoint a committee of inspection).

Compulsory winding-up

The Court may make an order winding-up a company on the grounds of insolvency or other grounds including where it is just and equitable that the company be wound up. An application for such an order may be made by certain persons, including the company, a creditor, a shareholder or ASIC. It is usual for a creditor to serve a company with a statutory demand requesting repayment of an outstanding debt, given that if the demand remains unsatisfied for 21 days, a presumption of insolvency arises and the Court order will not be controversial.

Like voluntary administrators, liquidators will act in the best interests of all creditors of the company. The liquidators' objectives are to wind down the company's affairs in an orderly and equitable way, for the benefit of all creditors.

The liquidator will take control of the company and its assets to:

- collect and realise its assets;
- distribute the proceeds among creditors rateably; and
- distribute any surplus among members according to their entitlement.

A liquidator also investigates the company's affairs, including whether certain voidable transactions entered into prior to the appointment of the liquidator may be set aside (which includes unfair preferences, uncommercial transactions, unfair loans and unreasonable director-related transactions).

Upon appointment of a liquidator:

- the company's directors will not be permitted to exercise any powers, except with the liquidator's consent;
- legal proceedings or an enforcement process cannot be commenced or continued against the company or in relation to its property, except with leave of the Court; and
- the liquidator may decide to disclaim certain contracts and, in this case, the liquidator must apply to court for leave to disclaim such contracts except for an unprofitable contract or lease of land.

Note that contractual counterparties will be able to exercise any termination rights against the company in liquidation (subject to the rights of a liquidator to disclaim certain contracts and the changes to the insolvency laws mentioned under 'Administration' above). The appointment of a liquidator does not alter a secured creditor's rights to realise or otherwise deal with its security interest.

Once the liquidator has realised the assets of the company and finalised any duties and obligations, he or she will call for proofs of debt. Once these debts are admitted, there will be a distribution of the proceeds which the liquidators have obtained from the sale of the company's assets. The *Corporations Act 2001* (Cth) (**Corporations Act**) sets out the payments which rank ahead of unsecured creditors in a liquidation, which include liquidation expenses and employee entitlements.

RECEIVERSHIP

Receivership is not strictly an 'insolvency' process but often accompanies an insolvency process (eg, voluntary administration or liquidation). It is a remedy available to secured creditors to enable them to enforce a validly registered security interest.

There are two triggers which will entitle a secured creditor to appoint a receiver over the company and/or its secured assets:

- an event of default (not necessarily insolvency) under the terms of a security document; or
- where the secured creditor holds security over all or substantially all of a company's assets, within 13 business days after a voluntary administrator is appointed (see "Voluntary Administration").

A receiver must be a registered liquidator. The Court may also order the appointment of a receiver but this is not common. Receivers act as agents of the company with a primary duty to their appointor to recover the secured debt. They take their directions from their appointor and the appointor will generally provide an indemnity to the receivers (given the receiver's liability for debts incurred during the course of their appointment).

A receiver takes control of some or all of the company's secured assets, depending on which assets have been charged in favour of the secured creditor. The receiver will have the power to continue to trade the business and sell the assets that are subject to the security. These powers will be set out in the security and the Corporations Act.

Upon the appointment of receivers there is no stay of legal proceedings against the company. However, typically the appointment of a receiver follows the appointment of an administrator, such that the receiver will benefit from the moratorium from the appointment of administrators. The receivership and the administration process run in parallel with the receivership process typically being the dominant process. The receiver will collect and realise enough of the secured assets to repay the secured creditor. These assets will be sold by the receiver for market price, or, if no market exists, the best possible price in the circumstances.

SCHEME OF ARRANGEMENT

A scheme of arrangement is a versatile tool that can be used in either a solvent or insolvent restructuring scenario. It is a compromise or arrangement between a company and a specified class or classes of its creditors and is often used for the purpose of deleveraging the company's balance sheet.

The scheme of arrangement must be approved by each "class" of creditor by at least:

- 75 per cent by value (i.e. 75 per cent of the value of the relevant class of debt); and
- 50 per cent in number, voting, in person or by proxy, at the meeting.

Where these thresholds are met and the scheme is subsequently approved by the Court, the scheme will be binding on all creditors (including secured creditors, whether they consented or not). A creditors' scheme of arrangement is typically used to implement a debt-for-equity swap to transfer ownership of a company from the incumbent shareholders to those stakeholders that have the most senior economic interest in the company.

EMPLOYMENT, INDUSTRIAL RELATIONS AND WORK HEALTH AND SAFETY

EMPLOYMENT OF WORKERS IN AUSTRALIA IS GOVERNED BY INTER-RELATED FEDERAL, STATE AND TERRITORY LEGISLATION AND BY THE COMMON LAW.

The *Fair Work Act 2009* (Cth) (FW Act) is the principal source of industrial relations regulation for companies operating in Australia, and applies to all employees in private sector employment (with the exception of Western Australia, where it applies to all employees employed by companies).

The FW Act contains ten minimum employment conditions known as the National Employment Standards (NES) which apply to all employees (including executives) in respect of matters such as paid leave (annual, personal and long service leave), unpaid parental leave, notice of termination and redundancy pay, reasonable maximum working hours and flexible working arrangements. The NES are minimum standards, and cannot be excluded by the terms of a modern award, enterprise agreement or common law contract. There are also statutory provisions dealing with paid parental leave.

Supplementing the NES is a system of modern awards that covers employers and employees in certain industries and occupations. For example, there are specific modern awards which cover the mining industry, road transport and manufacturing. Modern awards are intended to only cover those employees who have traditionally been regulated by awards, which in most contexts excludes managers or senior employees. Modern awards contain a number of further minimum employment conditions including, minimum wages, hours of work, overtime, allowances and leave.

A further layer of industrial regulation is enterprise agreements. Enterprise agreements are collective agreements made with employees. In most instances agreements are made by 'single business' employers, although there is scope for the making of single business agreements involving joint venturers or related corporations, and for multi-employer agreements.

If an enterprise agreement does not cover all employees of the employer, it must be shown to cover a "fairly chosen" group of employees taking into account whether the group is geographically, operationally or organisationally distinct.

The FW Act promotes bargaining for enterprise agreements, and reinforces the role of trade unions in that process. In particular:

- employers may be required collectively to bargain for an enterprise agreement with their employees where the majority of their employees wish to do so;
- employees have the right to appoint a bargaining representative (including themselves) to undertake bargaining. A union is the default bargaining representative for its members, although they can be dis-endorsed by a member if they so choose; and
- employers and trade union or employee representatives are required to bargain "in good faith", and there are a broader range of "tools" that parties to a bargaining process may use when a dispute arises in the bargaining process.

An enterprise agreement may contain terms relating to the employment relationship and the relationship between an employer and a union. An employee must generally be "better off overall" under an enterprise agreement when compared to the otherwise applicable modern award. Once approved by the employees to whom it will apply, and by the Fair Work Commission (FWC) an enterprise agreement will exclude the application of a modern award in relation to the employees to whom it applies. As noted above, however, an enterprise agreement cannot exclude the NES – although it can improve upon them.

Employers establishing a new business in Australia may be able to enter into an agreement with one or more unions prior to employing employees needed to conduct the business. This type of enterprise agreement is known as a "greenfields agreement".

Enterprise agreements must specify a 'nominal expiry date' which must not be more than four years after commencement. Importantly, however, enterprise agreements continue to operate after their expiry, unless or until formally terminated or replaced.

During negotiations for an enterprise agreement (other than a greenfields or multi-employer agreement), employees may take 'protected industrial action' in support of claims for the proposed agreement. Their capacity to do so is subject to meeting a range of procedural and substantive

requirements, including securing approval for the proposed action in a secret ballot.

Employers who are faced with unprotected industrial action can obtain orders from the FWC to require that the action cease or not occur. Such orders can be enforced through the courts. Employers may also be able to obtain injunctions and damages at common law or under statute in respect of unprotected industrial action.

Officials of unions that are eligible to represent the industrial interests of employees in a workplace have the right to enter that workplace to hold discussions with employees, to investigate suspected breaches of legislation or awards or agreements, and to deal with work health and safety (WHS) issues. There are strict requirements that need to be observed where a union official seek to exercise his or her "right of entry".

The FW Act provides protection from unfair dismissal in certain circumstances, including if a modern award or enterprise agreement covers the employee and the employee has over six months' service (12 months' service if the employer has fewer than 15 employees). Executive employees, or high income earners, generally cannot access remedies for unfair dismissal, unless they are covered by an enterprise agreement or modern award.

Employers establishing a new business in Australia may be able to enter into an agreement with one or more unions prior to employing employees needed to conduct the business.

'Unfairness' in this context will be assessed by reference to whether the employer had reason to terminate the employee's employment on grounds of performance or conduct, and whether the employer observed appropriate standards of procedural fairness in deciding to terminate the employment.

The FW Act also contains a range of protections relating to taking 'adverse action' against employees and others (including prospective employees and independent contractors) because of a person's workplace rights (which is broadly defined and includes the capacity to make (or not make) an enterprise agreement or a complaint in relation to employment); industrial activity (including union membership or non-membership); and a broad range of discriminatory grounds (including race, ethnicity, gender, religion, political affiliation). Prohibitions on discrimination in employment are also to be found in other Federal and State legislation.

The FW Act contains rules relating to situations where there is a "transfer of business" such as when there is an asset transfer between the old employer and new employer. Generally speaking, if there is a transfer of business, the industrial instruments that applied to an employee who transfers his or her employment will continue to apply to the employee and bind the new employer, although this can be subject an order from the FWC on application by an employer, employee or union.

WHS is largely regulated by State legislation, although the Commonwealth and all States and Territories apart from Victoria and Western Australia have now adopted harmonised laws which provide an extensive degree of uniformity as between the participating jurisdictions. Generally speaking, WHS legislation requires employers (and certain other persons) to take all reasonably practicable measures to protect the health, safety and welfare of their workers and other persons whose health, safety or welfare may be affected by the conduct of their business. The legislation provides significant penalties (including fines or imprisonment) for non-complying companies and their "officers" (such as directors and managers).

All employers must provide workers' compensation insurance coverage for their employees. They must also make superannuation contributions for their employees and, in some circumstances, independent contractors. Unlike some European countries, the social security system in Australia is funded out of general revenue, rather than employer and/or employee contributions.

OVERVIEW OF TAXATION ISSUES

THE AUSTRALIAN TAXATION SYSTEM IS COMPLEX. IT HAS UNDERGONE, SIGNIFICANT REFORM WHICH IS LIKELY TO CONTINUE.

The Australian taxation implications of doing business in Australia will depend on the specific circumstances. For example, the type of entity established in Australia to conduct operations will have a significant bearing on the Australian taxation profile (see the overview in the Business Organisation section of this publication). Accordingly, the following should only be used as a guide to a range of tax imposts that are commonly relevant in conducting business operations in Australia. Foreign investors also need to consider the tax regime in their home jurisdiction and any double taxation agreement (DTA) between Australia and that jurisdiction.

TAXATION IN AUSTRALIA

Each level of Government (Federal, State and Territory, and Local Government) imposes its own taxes. The Federal Government imposes the most significant taxes such as income tax, Fringe Benefits Tax (FBT), Goods and Services Tax (GST), customs duties and excise duties. There are no gift, death or succession taxes. The Federal Government also imposes resource rent taxes on some industries (eg the Petroleum Resource Rent Tax (PRRT)).

State and Territory Governments don't impose taxes on income or capital gains. However, each State and Territory Government raises revenues by imposing various charges such as stamp duty, pay roll tax and land tax. Each Local Government levies annual charges (rates) on the owners of real estate in its jurisdiction.

INCOME TAX

The Federal Government imposes income tax.

Non-residents of Australia (including foreign companies) are, ordinarily, only taxed on income derived from sources in Australia and capital gains made from dealing with certain assets that have a substantial connection with Australia, such as the sale of Australian real property (directly and in some cases indirectly), resource interests and business assets (see the section on Tax on capital gains below).

Residents of Australia (including Australian companies) are taxed on their worldwide income (that is, from sources both in and outside Australia). Certain incomes of individuals that are temporary residents of Australia may be exempt from Australian income tax (eg foreign source income and some capital gains).

A company incorporated in Australia, or which carries on business in Australia and has its central management and control in Australia, or its voting power is controlled by shareholders who are residents of Australia, will be a resident of Australia for tax purposes.

Income tax is levied on "taxable income". Taxable income is the product of a taxpayer's assessable income less allowable deductions. Assessable income includes "ordinary income" (eg. business and investment income) and "statutory income" (eg. capital gains). In broad terms, allowable deductions include any expenditure incurred in gaining or producing assessable income or in carrying on a business for that purpose. Where allowable deductions exceed assessable income for a year of income, a taxpayer incurs a tax loss. In general, tax losses from prior years can be carried forward indefinitely. In determining the future taxable income of a company, a tax loss may only be deducted against future taxable income if the company satisfies the "continuity of ownership" test or, in some cases, the "same business" test. Amendments to the "same business" test are currently being considered by Parliament and, if passed, should make it easier for companies to carry forward losses. Capital losses can only be offset against capital gains arising in the same or future tax years (but not carried back).

Most trusts are unable to carry forward tax losses for future recoupment unless they satisfy the tests in the complex trust loss measures. For example, the "50% stake test" requires the same individuals to directly or indirectly hold fixed entitlements to more than 50% of the income and capital of the trust at the requisite times - usually where some form of abnormal trading has occurred. Unlike for companies, the same business test is only available as an alternative (ie where the 50% stake test is failed) for "listed widely held trusts".

The utilisation of tax losses may also be impacted by a group's entry into the tax consolidation regime (see below).

TAX CONSOLIDATION REGIME

Wholly-owned groups of Australian resident entities (including companies, partnerships and trusts, but excluding branches) may elect to form a consolidated group for Australian income tax purposes. The election is a "one-in-all-in" election, meaning that each wholly-owned subsidiary will automatically become a member of that group, and is irrevocable. The formation of a tax consolidated group will not have any impact on the status of the group members for the purposes of other Australian taxes (eg FBT).

The principal benefits of forming a tax consolidated group include the lodgement of only one Australian income tax return on behalf of the group, the ability to effectively disregard (for income tax purposes) any intra-group transactions (eg asset transfers, loans, payments of dividends, returns of capital) and the effective offset of losses attributable to the operations of a group member against income generated by other group members.

There are special rules that give foreign-owned groups with entry points into Australia via multiple Australian holding companies flexibility in defining the consolidated group (known as multiple entry consolidated or MEC groups).

The Australian head company for the tax consolidated group is responsible for the lodgement of the group's income tax return and for paying the group's income tax liability. However, other members can be jointly and severally liable for the income tax liability of the group if the head company defaults in making a payment to the Australian Taxation Office (ATO). A group may mitigate the risk of joint and several liability arising by each member of the group entering into a valid tax sharing agreement which (notionally) allocates the tax liabilities of the group to each of its members on a reasonable basis. In such circumstances, an individual member's liability if the head company defaults will be limited to its allocation of the income tax liability of the group as determined under the tax sharing agreement.

INCOME TAX ADMINISTRATION

The Australian income tax system is administered on a "self-assessment" basis. Under this system, companies lodge an income tax return (discussed further below) and the Commissioner of Taxation is deemed to have issued an assessment in respect of the income tax payable (if any) disclosed in the return. The Commissioner of Taxation has wide ranging powers to conduct audits and to amend assessments (subject to time limits) to ensure that companies prepare their income tax returns appropriately.

Company income tax is normally assessed on income derived in the year ending 30 June. However, a company can apply for a substituted 12 month accounting period. Normally, subsidiaries and Australian branches of overseas companies are permitted to balance on the same date as their overseas parents.

A company or branch must file an annual tax return. A branch is required to prepare financial statements relating to the branch's activities which underlie its tax return. Instalments of income tax are remitted by companies to the ATO under the Pay-As-You-Go (PAYG) instalment system. Under the PAYG instalment system, most companies are required to make quarterly income tax payments throughout the year of income to which they relate. From 1 January 2014, over a four year period, certain large taxpayers are being progressively transitioned to monthly PAYG instalments. A final payment of tax (or refund) is made on lodgement of the annual tax return after taking into account the PAYG instalments.

RATES OF INCOME TAX

The current headline rate of tax for both resident and non-resident companies is 30%.

The Federal Government has proposed a ten year plan to reduce the corporate tax rate to 25%. The plan involves gradual reductions in the applicable rate over time until it reaches 25%. The current timetable involves a 27.5% corporate tax rate applying to companies with:

- an aggregated turnover of less than A$10 million for income years commencing on or after 1 July 2016;
- an aggregated turnover of less than A$25 million for income years commencing on or after 1 July 2017; and
- an aggregated turnover of less than A$50 million for income years commencing on or after 1 July 2018.

The timetable for further reductions in the tax rate is yet to be passed as law and should be monitored.

IMPUTATION OF DIVIDENDS

An imputation system applies to the taxation of companies resident in Australia and their shareholders.

Under this system, the payment of income tax gives rise to credits in the company's "franking" account. These credits can be attached to dividends paid by the company. Australian shareholders in receipt of these franked dividends can generally claim the credits against their own income tax liabilities and in some circumstances may be entitled to a refund of any excess credits.

Non-resident shareholders are not entitled to any credit or refund of the imputation credit in respect of franked dividends, but the fact that a dividend is franked does impact on whether Australian dividend withholding tax would apply to the payment of that dividend to non¬resident shareholders (see below).

WITHHOLDING TAX

Australian withholding tax can be imposed on dividends, interest and royalties paid by residents of Australia to non-residents. Under domestic law, the withholding rates are generally 30%, 10% and 30% respectively. However, no withholding tax applies to the extent a dividend paid to a non-resident is franked under the Australian imputation system (see above) or to interest paid on debt interests which were offered in a way that satisfies certain public offer tests.

Where Australia has a DTA with the country in which the non¬resident resides, any lower rate specified in the DTA applies. Australia has a comprehensive DTA network covering most of its major trading partners. Under most DTAs, the rate on dividends/ royalties is reduced to 15% or lower where the non-resident's interest in the company exceeds certain thresholds. Australia has entered DTAs with some countries (eg the United Kingdom, the United States and Japan) which reduce the rate of Australian interest withholding tax to zero in respect of interest derived by governments or governmental agencies of, and certain financial institutions that are a resident in, those countries.

In addition to dividend, interest and royalty withholding tax, taxable distributions by Australian trusts to non-resident companies are subject to withholding tax payable at 30%. "Fund payments" (eg distribution of rent derived from real property investments) by "managed investment trusts" to most non-resident investors are subject to a final withholding tax of 15%.

A non-final capital gains withholding tax applies to foreign residents disposing of certain taxable Australian property (see the section on tax on capital gains below). The purchaser of the relevant property is required to withhold and remit ten per cent of the purchase price of the sale (subject to some de minimis exemptions for certain direct real property sales). It is currently proposed that the withholding rate will increase to 12.5% from 1 July 2017.

There is no branch profits remittance tax in Australia.

Certain other payments made to foreign residents that do not have a permanent presence in Australia are subject to withholding tax obligations. These include payments for entertainment, sports activities and construction, installation and upgrade of buildings, plant and fixtures.

Employers must also make PAYG withholding deductions from salaries or wages paid to employees (which may include contractors in some circumstances), which are then remitted to the ATO. PAYG withholding may also be required in certain circumstances where a supplier to a business does not quote an Australian Business Number (ABN) or where an investor does not quote a Tax File Number (TFN).

TRANSFER PRICING

Australia's transfer pricing regime has recently undergone considerable reform and is broadly aligned with the OECD transfer pricing guidelines. Taxpayers need to self-assess how the transfer pricing rules apply in respect of their dealings with foreign counterparties, which will require analysis of whether those arrangements are on arm's length terms. Where the Commissioner of Taxation considers that an Australian taxpayer is not dealing with a foreign party (related or unrelated) at arm's length (including as to pricing), the transfer pricing rules allow reconstruction to replace all or part of the actual arrangements with an arm's length arrangement which may require an adjustment to the profits of the taxpayer. The transfer pricing rules can apply to international agreements for the supply or acquisition of property (including intellectual property), good and services, insurance or finance (eg loans). Importantly, taxpayers cannot have a "reasonably arguable position" – which is relevant to the application of penalties – unless they have appropriate transfer pricing documentation in place before the time by which the taxpayer lodges its tax return.

There are special rules allowing adjustments to be made to interest deductions under the transfer pricing rules, even where the level of debt is within the thin capitalisation safe harbour (see below). Adjustments can also be made under a DTA, particularly in relation to the allocation of income and expenses as between the head office and Australian branches of foreign companies.

THIN CAPITALISATION

Deductions for interest incurred by inbound investment vehicles (which can include Australian entities "controlled" by non-residents such as where 40% or more of the shares in a company are owned by a non-resident) and outbound investment vehicles (Australian entities investing overseas) may be limited under what are known as the Australian thin capitalisation rules.

Broadly speaking, a portion of interest (and related expenses) is denied as a deduction if the average debt of the Australian entity or operations exceeds 60% of the average assets of that entity, or the entity's Australian operations, that is, a 1.5:1 debt to equity ratio (the "safe harbour" test). However, deductions relating to debt in excess of this level may be allowed if the entity can establish that an arm's length lender would have lent a higher amount to the entity, considered on a stand-alone basis (the "arm's length debt" test) or the entity is geared up to 100% of the actual gearing of its worldwide group (the "worldwide gearing" test). Different tests apply to non-bank financial entities and Authorised Deposit-taking Institutions. It is important to note that even if the level of debt satisfies the safe harbour test, interest deductions may still be denied under the transfer pricing rules if the interest rate is not arm's length (see above).

DEBT/EQUITY RULES

Complex rules affect the taxation treatment of a variety of financial instruments. Under these rules, taxpayers are required to apply certain tests to determine whether an instrument will be classified as debt or equity for taxation purposes. The rules are designed to replicate the economic characterisation of an instrument and may, in some circumstances, differ from the accounting treatment of an instrument as being debt or equity.

Instruments which take the legal form of debt may be classified as equity for Australian tax purposes and, as a result, payments of interest could be treated as dividends and may not be tax deductible. There may also be implications under the rules relating to the imputation of dividends (see above).

Alternatively, instruments which take the legal form of equity might be classified as debt for Australian tax purposes. In such circumstances dividends paid will be treated as interest (and potentially tax deductible), but will not be able to be franked (see above section on imputation of dividends).

The debt/equity rules are likely to be an area subject to further reform.

Although yet to be legislated, the Federal Government has proposed implementing action item 2 from the OECD BEPS Action plan to cancel any tax benefits from cross-border arrangements with countries that recognize a common financial instrument differently for income tax purposes from 1 January 2018.

TAXATION OF FINANCIAL ARRANGEMENTS (TOFA)

The TOFA regime governs the taxation treatment of gains and losses from "financial arrangements" (subject to certain exceptions). Where applicable, such gains and losses are generally recognised over the life of the financial arrangements.

A financial arrangement is an arrangement under which a person has a cash settlable legal or equitable right to receive, and/or an obligation to provide, a financial benefit. In general terms, a right or obligation is cash settlable if the relevant financial benefit is money or a money equivalent. Broadly, a financial benefit is defined as anything of value (including property and services).

The TOFA rules contain a number of methods to bring gains and losses from financial arrangements to account, the default methods being the accruals method and the realisation method. Subject to satisfying certain conditions, there are also four elective methods (hedging financial arrangements, financial reports, fair value and foreign exchange retranslation methods).

TAX ON CAPITAL GAINS

The capital gains tax (CGT) rules set out prescribed events that may give rise to a capital gain or a capital loss. Net capital gains (after offsetting any available capital losses) are included in assessable income.

A capital gain will generally arise if the capital proceeds from the relevant CGT event exceed the cost base of the underlying asset. A capital loss will arise if the capital proceeds are less than the asset's reduced cost base (effectively the cost base of an asset excluding certain items, such as deductible expenditure). Capital losses can only be offset against capital gains arising in the same year or carried forward to offset capital gains in future tax years (but not carried back) subject to satisfying certain conditions.

One event that may give rise to a capital gain or a capital loss is the disposal of a CGT asset. However, non-residents will only be subject to tax in Australia on capital gains derived from the sale of a limited class of assets known as "Taxable Australian Property".

In broad terms this includes Australian real property, leases of real property and mining, quarrying or prospecting rights and Australian business assets. The disposal of shares in a company or units in a unit trust by a non-resident investor may also be taxable in Australia if the investor (together with its associates) has a greater than 10% interest in the company/trust (for at least 12 months within the preceding two years) and more than 50% of the value of the company/trust is attributable to Taxable Australian Property.

Australian residents are generally subject to tax on capital gains derived in relation to their worldwide assets. However, the CGT rules will not apply to capital gains on shares held in non-resident companies, to the extent that the non-resident company has an underlying active business.

Generally, resident individuals and trustees of trusts (other than a trust that is a complying superannuation entity) may be entitled to discount the amount of their capital gain from a CGT event (ie. after taking into account current year or carry forward capital losses) by 50%. A complying superannuation entity may reduce net capital gains by 33.3%. However, the CGT discount will only be available if the eligible entity has held the relevant asset for at least 12 months. Companies are not entitled to apply the discount. An additional discount of 10% has been recently proposed to apply to capital gains realized by resident individuals from the disposal of eligible affordable housing.

As the CGT rules operate to include net capital gains in assessable income, companies are assessed on their capital gains at ordinary income tax rates (ie currently 30% or 27.5% where applicable – refer above).

DOUBLE TAXATION AGREEMENTS

Australia has a comprehensive network of DTAs with most of its major trading partners, including China, Korea, India, Japan, the United States and the United Kingdom. A notable exception is Hong Kong which is not covered by the agreement with China.

GST

In general, the supplier of goods or services is required to remit GST to the ATO equal to 10% of the value of the goods or services supplied. An "input tax credit" is generally available to a business that purchases goods or services for the GST component of the purchase price where both the recipient and supplier of the goods or services are registered for GST and a "tax invoice" has been provided to the recipient.

A business is required to register for GST if it has an annual turnover of A$75,000 or more. A branch of a foreign company is entitled to be registered for GST purposes. Businesses are required to account for GST to the ATO by lodging a Business Activity Statement monthly or quarterly (depending on the turnover of the business).

The liability for paying the GST is generally imposed on the supplier. Therefore, the supplier should determine its prices to take account of GST, or there should be a GST clause in all contractual arrangements which allows the supplier of a taxable supply to collect an additional amount from the recipient of the supply to account for the supplier's own GST liability.

Some supplies are "GST-free" and do not give rise to a GST liability to the supplier. Subject to satisfying prescriptive conditions, examples of supplies that may qualify as being GST-free include the export of goods or services from Australia, the supply of a business as a "going concern" and supplies of some farm land. Other supplies may be "input taxed" (eg financial supplies such as loans and the transfer of shares) such that no GST liability arises for the supplier but there are limitations on the supplier's ability to claim input tax credits on acquisitions it makes in order to make the supply.

Groups of related entities may be eligible to form a GST group and nominate a "representative member" to be responsible for recognising the GST liabilities and input tax credits in respect of supplies and acquisitions to and from entities outside the GST group. The representative member for the group is primarily responsible for the group's GST liability. Other members can be jointly and severally liable for the GST liability of the group if the representative member defaults in making a payment to the ATO. A group may mitigate the risk of joint and several liability arising by each member of the group entering into a valid indirect tax sharing agreement.

GST is also payable upon the importation of goods into Australia (usually by the importer) subject to certain de minimis thresholds (currently A$1,000).

However, the Federal Government has proposed new laws removing the de minimis thresholds such that GST would apply to all goods imported into Australia, even where the sale of those goods takes place outside Australia. While this proposed law was scheduled to apply from 1 July 2017, its introduction may be deferred for a further 12 months if certain recommendations are adopted. This issue should be monitored for any changes in the proposed implementation timetable.

FBT

The Federal Government imposes FBT on employers in respect of non-cash benefits and reimbursements provided to their employees, their employees' associates and, in some circumstances, contractors. Any benefits on which FBT is paid are not assessable to the employee.

The FBT year is from 1 April to 31 March. The FBT rate for the year ending 31 March 2018 is 47%. FBT is calculated on the grossed-up value of fringe benefits (the calculation of which differs depending on the type of benefit and the availability of input tax credits for GST) but employers may claim a deduction for the payment of the FBT. This results in the similar tax treatment of salary and wage income and fringe benefit remuneration provided to employees on the top marginal tax rate, except for certain concessionally taxed benefits (eg motor vehicles).

SUPERANNUATION GUARANTEE CHARGE (SGC)

Under the SGC scheme, a charge is imposed on all employers who fail to provide a prescribed minimum level of superannuation support (ie retirement income) for employees, including certain foreign employees working in Australia. The superannuation contributions must be paid to a superannuation fund which complies with complex Australian legislation. The minimum level is now 9.5% of the employee's taxable remuneration (up to a ceiling). There are long term proposals to incrementally increase this rate until it reaches 12%. If employers fail to provide the minimum level of superannuation support to their employees, they will then be liable for an SGC amount equivalent to the shortfall plus an interest charge and an administration fee that is non-deductible. Foreign employees are able to withdraw any Australian superannuation (net of tax) upon their permanent departure from Australia.

STAMP DUTY

Stamp duty is levied in each State and Territory on certain transactions, such as:

- the purchase of business assets in WA, Qld and the NT, ie business transfer duty;
- in some jurisdictions, the purchase of interests in partnerships and trusts where the partnership or trust holds certain property located in that jurisdiction; and
- in all States and Territories, the direct transfer of land and interests in land and certain goods.

In addition, an indirect transfer of an interest in land may be subject to landholder duty. In general terms, landholder duty is imposed on the acquisition of shares or units in entities that hold (either directly or indirectly through related entities) land assets of a particular value in that State or Territory. Landholder duty is effectively a "look through" tax that is imposed on an acquirer's proportionate indirect interest in the value of the underlying land (and, in some jurisdictions, also goods) held by the target entity. The tests and thresholds that apply for determining when an entity is a landholder and when a liability is triggered varies between each jurisdiction, as well as by entity type.

PAYROLL TAX AND WORKERS' COMPENSATION

Payroll tax is levied at varying rates by each State and Territory Government on the gross wages (including fringe benefits) paid by an employer to its employees in that State or Territory in excess of certain threshold levels. The threshold level is determined in respect of the total wages an employer pays to all employees in Australia and varies between the States and Territories. In some circumstances, payments to contractors are also deemed to be wages.

The States and Territories also require employers to obtain workers' compensation insurance for their employees, which covers them for workplace injuries. Again, the rates and regimes differ considerably between the various States and Territories.

OTHER TAXES

Customs duty is levied by the Federal Government on goods imported into Australia. The rate of customs duty varies depending on the type of goods being imported. Certain importations may be exempt from duty (eg under Enhanced Project By-Law Scheme where the goods are to be used in certain industries) or may otherwise be eligible for concessional rates (eg imported goods for which there are no substitutable goods made in Australia under the Tariff Concession System administered by the Australian Customs and Border Protection Service).

Excise duty is levied by the Federal Government on certain products manufactured in Australia such as alcohol, tobacco and petroleum products. Excise is generally levied on a per unit basis (eg per litre). The rates of excise on alcohol and tobacco are increased in February and August each year according to the consumer price index. Broadly speaking, customs duty is applied to the importation of goods that would otherwise be subject to excise duty at an equivalent rate.

The Federal Government also imposes the PRRT at 40% on the "resource rents" enjoyed by companies operating in the petroleum sector. In broad terms, the resource rent is determined as the extracted or upstream value of the relevant resource less the costs involved in exploration and extraction. Value added by processing and other downstream activities is not taken into account. State based royalties can also apply to coal and iron ore. The PRRT is currently the subject of a review by the Federal Government, the outcomes of which should be monitored.

Each State and Territory (with the exception of the Northern Territory) imposes land tax on the owner of land located in the relevant jurisdiction, although the rules differ between each jurisdiction. Land tax is generally assessed according to the unimproved value of land and is subject to various exceptions depending on the ownership and/or use of the land. Broadly speaking, land that is used as a principal place of residence will be exempt from land tax.

Local Governments (ie municipal councils) also impose council rates on land located in their municipality. The levying of council rates is governed by legislation in each State and Territory and is subject to various exemptions. For example, land used for public or municipal purposes may be exempt from council rates.

INTELLECTUAL PROPERTY

Australia has intellectual property protection and enforcement systems of a standard consistent with those of the United States, Europe and other developed economies. Australia's intellectual property laws are enacted through Federal statutes effective nationally. The statutes are interpreted by decisions of the Federal Court of Australia (and, to a lesser extent, the courts of the states and territories), and of Australia's ultimate appellate court, the High Court of Australia.

The government agency responsible for registering patents and trademarks and for administering other aspects of IP in Australia is called IP Australia, and is based in Canberra. While there are many differences of details, IP Australia's practices and procedures are generally consistent with those of jurisdictions of the kind referred to above. IP Australia's systems are now largely wholly electronic and its databases are generally of a high quality.

The main features of Australia's laws relating to patents, trademarks, copyright, designs and confidential information are as follows:

- **Patents** – the term of a standard patent is 20 years from filing date with a further five year extension of term possible for pharmaceutical patents based on regulatory delay. Innovation patents are also available (term is 8 years from filing date in Australia). Patents may be granted for a device, substance, method or process which is new and inventive, and grant of a patent gives the patentee the exclusive right to "exploit" an invention for the term of the patent. Australia's standards of novelty, inventive step and other requirements for patentability are generally consistent with international standards.
- **Trademarks** – a trademark is a "sign" (such as a word, logo, colour, shape, sound, scent, aspect of packaging) which is used to distinguish goods or services provided in the course of trade from those of other traders ie use as a "badge of origin". The terms of a registered trademark is 10 years and may be extended for further 10 year terms, subject to the requirement to use the mark to avoid removal on grounds of non-use. Registration requires that marks meet standards of sufficient distinctiveness and not be substantially identical or deceptively similar to a prior registered mark for similar goods or service. Australia is a member of the Madrid Protocol and other relevant international conventions. An Australian trademark or application will be sufficient qualification for a .com.au domain name. The common law tort of passing off and the Australian Consumer Law, which prohibits misleading and deceptive conduct, can also be used to protect both registered and unregistered trade marks.
- **Copyright** – copyright protection automatically arises, without registration, in original literary, dramatic, musical or artistic works and other subject matter such as sound recordings, films or broadcasts with a sufficient Australian connection. Australia is a member of the Berne and other international copyright conventions, and accords reciprocal protection to works connected with other member countries. The term of protection of an original work is for the life of the author plus 70 years or, if published after the death of the author, 70 years after first publication. Creators of copyright works also enjoy personal non transferrable rights in those works that protect the reputation and integrity of authors and their works.
- **Designs** – a "design" refers to features of shape, configuration, pattern or ornamentation which can be judged by the eye in finished articles. Design registration protects the visual appearance of new and distinctive designs for manufactured products, with a maximum term of protection of ten years.
- **Confidential information** – the law of confidential information recognises an obligation to keep information secret in circumstances where a person communicates confidential information to another on the express or implied understanding that the information is confidential, in addition to confidentiality obligations that may be imposed by contract. This law provides remedies, including pecuniary remedies, where there has been unauthorised disclosure or use of confidential information. Publication, not expiry of time, destroys confidentiality.

In relation to enforcement of IP, Australia has sophisticated systems whereby a full range of relief including injunctions (urgent interim injunctions are also available in appropriate cases), pecuniary remedies (additional damages for flagrant conduct are also available) and ancillary relief. Site blocking procedures are available for websites that facilitate copyright infringement.

OTHER KEY ISSUES:

THERE ARE A NUMBER OF OTHER LAWS THAT REGULATE ENTITIES CARRYING ON BUSINESS IN AUSTRALIA. THESE GENERALLY APPLY IRRESPECTIVE OF WHETHER A FOREIGN COMPANY CARRIES ON BUSINESS IN AUSTRALIA THROUGH A SUBSIDIARY COMPANY, OR DIRECTLY AS A REGISTERED FOREIGN COMPANY.

CONTRACT LAW

Contract law is one of the most important elements of the Australian legal framework. It underpins almost all commercial interactions.

Australian contract law is primarily based on common law and equitable principles developed by the Australian courts. These legal principles are supplemented and, in some cases, altered by Commonwealth, State and Territory legislation (for example, the *Competition* and *Consumer Act 2010* (Cth). International instruments (for example, United Nations Convention on Contracts for the International Sale of Goods) may play a role in the interpretation of the law in some matters. Generally speaking, the principles of Australian contract law govern the formation, performance and discharge of legally enforceable promises made by the parties to a contract. These principles are complex and need to be carefully considered by parties which are negotiating a contract or seeking to enforce the terms of a contract which is governed by the laws of the Commonwealth or any State or Territory.

ANTI-TRUST

The *Competition and Consumer Act 2010* (CCA) prohibits anti¬competitive practices such as cartel conduct, misuse of market power, anticompetitive exclusive dealing and resale price maintenance.

The CCA also prohibits an acquisition of shares or assets which will have the effect or likely effect of substantially lessening competition in a market in Australia. As a result, the CCA regulates mergers, takeovers and the acquisition of assets in Australia, as well as mergers effected outside Australia, which have an effect on competition in Australia.

Contravention of the CCA can lead to substantial fines for companies and individuals, injunctions and other Court orders, including orders for divestiture. Following amendments to the CCA, making or giving effect to an agreement containing a cartel provision is now a criminal offence, punishable with fines of up to A$10 million for corporations and prison sentences of up to ten years for individuals.

The Australian Competition & Consumer Commission is the body responsible for administering the CCA and is a vigorous and well-resourced enforcement body.

> The AFS Licence regime applies to a range of financial products and services including securities, derivatives, superannuation, deposit taking, managed investments and insurance.

PRIVACY AND SPAM

PRIVACY

The *Privacy Act 1988* (Privacy Act) regulates the handling of personal information in both the private sector and the Commonwealth public sector in Australia, and the rights of individuals to access information held about them.

Specific rules exist in relation to credit providers and credit reporting agencies and the handling of tax file numbers.

Certain types of organisation are exempt from the Privacy Act, most notably small businesses with an annual turnover of less than A$3 million who do not handle health information. However, this exemption does not apply to small businesses related to larger organisations, which trade in personal information, or which obtain personal information through a Government contract.

Organisations carrying on business in Australia must comply with privacy principles under the Privacy Act, relating to use and disclosure of personal information for appropriate purposes or with consent. As well, this includes having a clearly expressed and up-to-date privacy policy about the management of personal information, and complying with privacy principles dealing with sending personal information outside Australia. The Privacy Act also contains stringent rules for sensitive information, which includes information about a person's racial or ethnic origin, religious beliefs or affiliations, sexual preferences or practices, or health.

Privacy reforms introduced by the Commonwealth Government also mean that the Privacy Commissioner has been given greater investigatory and enforcement powers, including the ability to seek civil penalties of up to A$2.1 million for a serious or repeated privacy breach. The Privacy Commissioner has power to initiate "own motion" investigations.

22 February 2018 sees mandatory data breach notification requirements become effective in Australia. Notification to the Privacy Commissioner's office AND affected individuals will be required for data breaches which are likely to result in serious harm. Serious harm is not just financial or economic harm; it could extend to things like reputational and emotional harm.

SPAM

The *Spam Act 2003* (Spam Act) prohibits the sending of unsolicited commercial electronic messages, which have an Australian link, whether to businesses or individuals. The Act relates to commercial email, instant messaging, SMS and MMS, but not faxes, internet pop ups or voice telemarketing or non-electronic messages (such as ordinary mail, paper flyers etc).

Commercial electronic messages may be sent with the consent of the recipient (which can be express or inferred), however they must clearly identify the sender and contain a functional unsubscribe facility.

The Australia Communications and Media Authority (ACMA) is responsible for enforcing the Spam Act and it has the power to issue warning and infringements or prosecute breaches in the Federal Court. Civil penalties of up to A$1.1 million per day may apply to repeat corporate offenders.

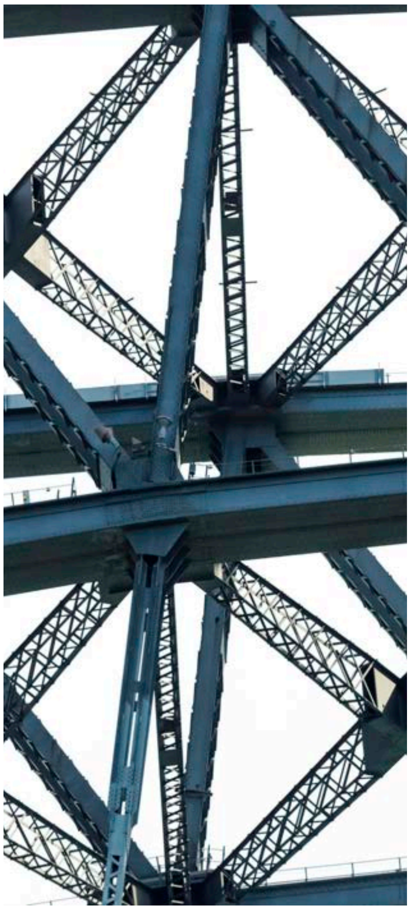
DO NOT CALL REGISTER

The Do Not Call Register Act 2006 establishes a register, listing the telephone numbers of individuals who have opted out of receiving telemarketing calls. In most cases, it is an offence to make an unsolicited telemarketing call to a number on the register.

Australian laws regulating the importation and exportation of goods are extensive and becoming increasingly more complex.

FINANCIAL SERVICES

A person who wishes to carry on a financial services business in Australia is required to have an Australian Financial Services Licence (AFS Licence), or be appointed as an authorised representative, unless an exemption applies. This requirement falls under Chapter 7 of the *Corporations Act 2001* (Cth) (Corporations Act).



The legal tests applied to determine whether a financial services business is being carried on in Australia are broad and an entity may need an AFS Licence even if it has no physical presence, such as an office or employees, in Australia. For instance, an AFS Licence may be required where the entity deals with, manages or administers property situated in Australia or has Australian clients.

ASIC is the principal regulatory authority having responsibility for administering and enforcing the financial services regulatory regime and for issuing AFS Licences. In order to obtain a licence, a number of criteria need to be satisfied and ASIC can require extensive proofs to substantiate an application for an AFS Licence. The foreign financial service provider must have (among other things):

- adequate financial resources for the performance of the proposed activities;
- competence, skills and experience to provide the relevant services; and
- adequate systems for training and supervision of representatives.

There are a number of licensing exemptions available under the Corporations Act, Corporations Regulations and under statutory instruments issued by ASIC. In particular, the following licensing exemptions may be available to certain foreign financial service providers:

- custody and dealing situations involving property located in Australia where the clients are offshore;
- services offered to Australian wholesale clients by foreign financial services providers who are regulated by an offshore regulator recognised by ASIC as having an equivalent supervisory regime;
- provision of certain services to Australian clients where the services are arranged by an AFS Licence holder; and
- provision of services to Australian clients where the service is provided from outside Australia and either the foreign financial services provider did not induce people in Australia to use its services, or the service relates to a financial product which was issued to the client following an application by or inquiry from the client or while the client was not in Australia.

The exemptions are generally subject to conditions and in some instances, an application to ASIC is required. A foreign financial services provider should enquire about the applicability of relief before relying on it.

The Corporations Act distinguishes between retail clients and wholesale clients. Generally, an AFS Licence is required whether financial services are being provided to wholesale or retail clients. However, there are significant additional disclosure and conduct requirements that apply where a person provides a financial service to retail clients. For example, a financial services provider must provide a Product Disclosure Statement when issuing, selling or recommending a financial product. There are also bans on certain types of remuneration for persons who provide financial services such as personal financial product advice to retail clients.

Strict conditions and obligations are imposed on entities affected by the Australian financial services regulatory regime. A breach of the AFS Licence regime can lead to criminal sanctions and give rise to other adverse consequences.

A foreign financial services provider wishing to operate in Australia should enquire about the impact of the Australian financial services regime on its business.

EXPORTS AND IMPORTS

Australian laws regulating the importation and exportation of goods are extensive and increasingly more so. These laws are designed with community protection, industry assistance and revenue raising front of mind. The importation or exportation of all goods into and out of Australia must be reported to the relevant authorities, usually prior to importation or exportation.

Imports may be subject to customs duties. However, concessional relief is available for certain goods providing the relevant regulatory requirements are met. Duties aren't imposed on exports.

Importation and exportation of certain goods is either prohibited or restricted. Further, to give effect to UN sanctions and those autonomously imposed by Australia, the export of certain goods and services to a number of countries and entities within those countries is prohibited.

Dual-Use Goods and Technologies

Regulatory approval is required for the export of certain dual-use goods and technologies, that is, goods and technologies having both a civilian and military application, as well as goods and technologies having sole military applications. Significant penalties can apply for breach of such restrictions and prohibitions, or for failing to accurately report importations and exportations, including forfeiture of the goods and fines.

As a member of the World Trade Organisation, Australia is a frequent user of a variety of trade measures, including the imposing of anti¬dumping duties and countervailing duties on imported goods found to have been exported to Australia at dumped or subsidised prices. In addition, quarantine restrictions apply to a wide range of agricultural, food and other similar products.

FINANCIAL TRANSACTION REPORTS AND FOREIGN EXCHANGE

While there are no limits on the amount of funds that can be transferred into and out of Australia, certain transactions are subject to reporting requirements. These come under:

- The *Financial Transaction Reports Act 1988* (Cth) (FTR Act)
- *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) (AML/CTF Act)

The AML/CTF Act and its associated rules, brings Australian laws in line with the recommendations on money laundering and counter terrorist financing standards established by the international Financial Action Taskforce on Money Laundering (FAFT).

Designated Service

The AML/CTF Act applies to those reporting entities who provide a "designated service". Financial services that are "designated services" include lending, providing custodial services, finance leasing, issuing interests in managed investment schemes, trading in securities and remittance services. It also includes gambling services and bullion dealing.

Generally, the AML/CTF Act regulates "designated services" when they are carried on through a "permanent establishment" in Australia, including a place in Australia where the entity carries on a business through an agent.

Reporting entities are required to (among other things):

- have in place an AML/CTF compliance program;
- conduct ongoing customer due diligence; and
- report certain types of matters and transactions to the Australian Transaction Report and Analysis Centre (AUSTRAC) including international fund transfer instructions, suspicious matters and threshold transactions (being currency transactions in excess of AUD 10,000).

Cash Dealers

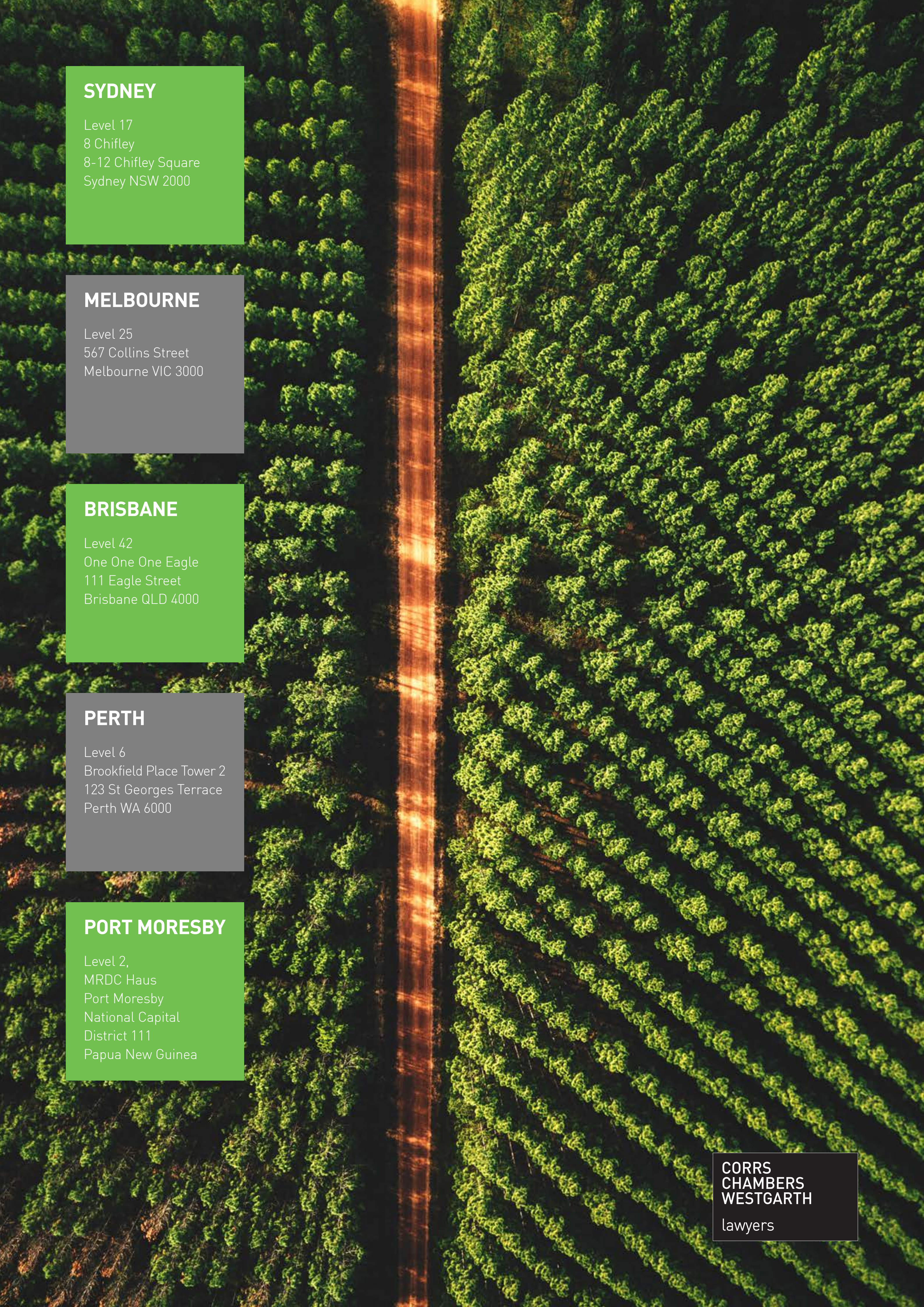
The FTR Act and the AML/CTF Act have many overlapping provisions. In such cases the AML/CTF Act provisions apply. As a result, the obligations under the FTR Act mainly apply to "cash dealers" who do not provide a designated service as defined in the AML/CTF Act. Cash dealers include trustees of unit trusts, financial corporations and derivatives dealers.

The FTR Act requires, (amongst other things):

- cash dealers to formally report cash transactions of A$10,000 or more;
- cash dealers to report suspect transactions (eg transactions suspected of being relevant to tax evasion and criminal activity); and
- compulsory verification procedures for persons opening or operating accounts with financial institutions.

Some transactions between financial institutions and other persons qualify for exemption from the reporting requirements, subject to the keeping of an exemption register.

There are substantial fines and in certain cases criminal penalties for failure to comply with obligations imposed by the FTR Act and AML/CTF Act.



SYDNEY

Level 17
8 Chifley
8-12 Chifley Square
Sydney NSW 2000

MELBOURNE

Level 25
567 Collins Street
Melbourne VIC 3000

BRISBANE

Level 42
One One One Eagle
111 Eagle Street
Brisbane QLD 4000

PERTH

Level 6
Brookfield Place Tower 2
123 St Georges Terrace
Perth WA 6000

PORT MORESBY

Level 2,
MRDC Haus
Port Moresby
National Capital
District 111
Papua New Guinea

CORRS
CHAMBERS
WESTGARTH

lawyers