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Doing Business in Australia Guide

Welcome to Piper Alderman's Guide to Doing Business in Australia.
Our experience in providing cross-border legal services to international enterprises means that we understand the issues faced when entering the Australian market. We can advise on the best way to establish new operations in Australia as well as how to ensure businesses prosper.

Download the Doing Business in Australia Guide.

Why Australia?

Australia is a land of great natural beauty and boundless opportunity. Despite often turbulent global financial conditions, Australia's economy continues to be one of the world's most stable. Sound governance creates certainty for foreign investment and Australia's skilled workforce, ties to Asia and success in key industries makes Australia a great place for doing business.

Resilient economy

Australia's Gross Domestic Product (at purchasing power parity) is in the top twenty countries in the world. Australia's economy has performed better than expected during 2021 amid the COVIC-19 pandemic and real GDP has tracked at 4.5% in 2022. Until 2020, Australia had only experienced two years of negative growth during the previous 60 years.

Innovative and highly skilled

Australia is ranked 5th in the world for global entrepreneurship, with almost half of all Australian firms active in innovation. Our population is highly educated (with over 40% of the workforce having a tertiary qualification), culturally diverse and multilingual (where nearly 30% of the population was born overseas).

Global success in key industries

Australia is globally successful in key industries such as energy, resources, agribusiness, education, tourism and financial services. Australia is among the world's largest producers of gold, iron ore and uranium and a major producer of agricultural commodities.

Globally integrated

Australia has an open trading economy with strong business and cultural ties with Asia. Our top 5 trading partners are

China, USA, Japan, Republic of Korea and United Kingdom. Asia continues to dominate Australia's two-way trade flows with 65% of the market.

Ease of doing business

Australia is ranked 3rd in the world for economic freedom. Our sound governance and democratic institutions create certainty for foreign investment. We have an economy that is resilient to economic cycles and Australia is a great place to live and work, with five Australian cities ranked in the global top 30 for their quality of living.

About Australia?

First Nations

Since before the arrival of British colonisers in 1788, Australia has been inhabited by Aboriginal and Torres Strait Islander peoples, the First Nations of Australia. Theirs is the oldest continuous culture in the world, dating back over 60,000 years. There are over 250 language groups spread across the country.

Piper Alderman's five offices are located on the traditional lands of the Kaurna people (Tarndanya/Adelaide), the Whadjuk Nyoongar people (Boorloo/Perth), the Bunurong Boon Wurrung and Wurundjeri Woi Wurrung peoples (Naarm/Melbourne), the Gadigal people (Warrang/Sydney) and the Turrbal people (Meanjin/Brisbane).

Size, population and cities

Approximately 7.7 million square kilometres in size, Australia is an island continent located in the Asia-Pacific region. It is the sixth largest country in the world by area, with a population of approximately 25.9 million. Most people live in cities or towns with the majority concentrated in coastal areas, especially around the south east of the country. Major cities include Sydney, Melbourne, Brisbane, Adelaide, Perth, Canberra and Darwin.

Sydney is the largest and most well known city, but the capital of Australia and the seat of the national government is Canberra which is located in the Australian Capital Territory, around 300 kilometres south-west of Sydney and 650 kilometres northeast of Melbourne. Australia is a federation comprising six States (New South Wales, Victoria, Queensland, South Australia, Western Australia and Tasmania), two internal Territories (the Australian Capital Territory and the Northern Territory) and a number of external Territories.

Climate and landscapes

Australia's climate ranges from tropical in the north to temperate in the south, although in winter snow generally only falls on the mountains. In summer the average temperature for the major coastal cities ranges from approximately 15°C (minimum) to 30°C (maximum) and in winter the average temperature for the major coastal cities ranges from 6°C (minimum) to 20°C (maximum).

Australia's size gives it a wide variety of landscapes, with tropical rainforests in the north-east, mountain ranges in the southeast, south-west and east, and desert in the centre. Desert or semi-arid land (commonly "the outback") makes up by far the largest portion of land. Australia is also the driest inhabited continent with average annual rainfall over the continental area of less than 500mm.

Sport and recreation

A renowned sporting country, over 89% of Australians over the age of 15 regularly participate in sporting activities. At an international level, Australia has excelled at golf, track and field, swimming, cricket, field hockey, netball, rugby league and rugby union. Nationally, other popular sports include Australian rules football, horse racing, surfing, soccer and motor racing. The annual Melbourne Cup horse race and the Sydney to Hobart yacht race attract intense interest.

The majority of Australians live within the coastal zone, making the beach a popular recreation spot and an integral part of the nation's identity with water-based sports, such as swimming and surfing being extremely popular. The surf lifesaving movement originated in Australia, and the volunteer lifesaver is one of the country's icons.

Culture and ethnicity

Australia is widely known as one of the most multicultural nations in the world. English is the predominant language but migrants from more than 100 countries call Australia home. According to the Australian Bureau of Statistics, 30% of Australians were born elsewhere and nearly half of all Australians have at least one parent who was born overseas.

The five largest immigrant groups in 2020 according to the Australian Bureau of Statistics were those from:

- England
- India
- China
- New Zealand
- Philippines.

Currency

The unit of currency is the Australian dollar which comprises 100 cents and Australia uses the metric system for all measurement.

Economy & Infrastructure

Tony Britten-Jones

(Last Reviewed 12 April 2023)

Despite often turbulent global financial conditions, Australia's economy continues to be one of the world's most stable, with a resilient financial system.

Transport and logistics

Australia's major imports are cars, refined petroleum, telecom equipment, freight services and computers.

Australia has an extensive road and rail network which includes approximately 36,000 kilometres of rail track used in the haulage of freight such as coal, minerals, bulk agricultural produce, general freight and chemicals. Air transport is also an important mode of transport in Australia due to the large distances involved. Australia, being an island country, also utilises maritime transport.

Exports and imports

Australia has a significant resources sector and is a major exporter in a range of commodities. Major exports include iron ore, coal, natural gas, gold and beef. Australia has a natural advantage over many of its competitors in producing and processing primary products. This is largely due to advanced transport and telecommunications infrastructure which enables Australia to benefit from an abundance of natural resources.

Tourism

While COVID-19 had an impact on travel to and from Australia in recent years, over the last decade, Australia has been viewed increasingly as one of the world's most attractive tourist destinations. Annually, Australia has attracted millions of international tourists seeking Australia's natural beauty, relaxed lifestyle and friendly atmosphere whilst generating billions of dollars in tourism expenditure each year and contributing 3.1% to Australia's GDP. In the Economist Intelligence Unit's 2021 Liveability Survey, Australian cities occupied four of the top ten places in the world to live.

Strategic positioning

Australia is well positioned to provide a strategic portal to the Asia-Pacific region and this is one of the reasons why it is common for international businesses to locate their regional headquarters in Australia. International business is increasingly recognising the strong relationships Australia has with China, Japan, the United States, Singapore and the United Kingdom, amongst others. Australia's highly developed financial services sector functions in an efficient and transparent marketplace. The sector is supported by a modern infrastructure and regulatory regime. Australia is one of the key centres for capital markets activity in the Asia-Pacific region with liquid markets in equities, debt, foreign exchange and derivatives.

Over a period of 25 years, traditionally protectionist government policies have been replaced by policies which aim to encourage foreign investment and Australia has 15 Free Trade Agreements (FTAs) with 26 countries. The policy approach of the Australian Government is to encourage foreign investment that is consistent with community needs. Substantial opportunities exist for foreign investors interested in doing business in Australia.

Tourism contributes 3.1% to Australia's GDP each year

Simon Venus

(Last Reviewed 8 May 2023)

Foreign investment

The Australian Government recognises the substantial advantages of encouraging foreign investment. The Australian community benefits from the wealth created by its open economy and the engagement of Australian business in international trade and investment.

The Australian Government established the Australian Trade Commission (**Austrade**) in 1986 as a national investment agency designed to help international companies build their business in Australia. Austrade provides prospective foreign investors with information on the Australian business environment including specific information on Australia's capabilities across a wide range of industry sectors, assistance in identifying suitable locations and potential partners and advice on applicable industry development programmes and government approvals required for business.

The fundamental framework for foreign investment in Australia is predominantly governed by the *Foreign Acquisitions and Takeovers Act 1975* (Cth) (**FATA**) and the *Foreign Acquisitions and Takeovers Regulation 2015* (Cth) (**Regulations**). It is administered by the Australian Government through the Department of Treasury and the Foreign Investment Review Board (**FIRB**). Other legal instruments, such as certain legislative and regulatory instruments, as well as the government's policies on foreign relations and national security, are intertwined to form Australia's foreign investment regime.

The FIRB examines foreign investment proposals on a case-by-case basis and makes recommendations to the Australian Treasurer, who has the responsibility for making decisions on foreign investment proposals.

Foreign investment proposals are assessed to determine whether a proposal is contrary to the national interest and/or national security.

The national interest test involves a broader assessment of an investor's character, the impact on the economy and community, competition implications, implications for government policies and national security considerations.

Where a foreign investment proposal only concerns Australia's national security without invoking the broader national interest test, a narrower national security test is applied, which involves an assessment on the extent to which an investment affects Australia's ability to protect its strategic and security interests.

Investment is regulated for 'foreign persons', which generally includes:

- individuals not ordinarily resident in Australia
- corporations, trusts or limited partnerships in which:
- an individual not ordinarily resident in Australia, a foreign corporation or a foreign government investor hold a substantial interest (currently 20% or more)
- two or more individuals not ordinarily resident in Australia, foreign corporations or foreign government investors hold an aggregate substantial interest (currently 40% or more), and
- foreign government investors.

Regulated actions

The FATA provides for four categories of actions, each with different notification and assessment requirements. These are classed as:

- notifiable actions
- notifiable national security actions
- significant actions, and
- reviewable national security actions.

These categories of actions are not mutually exclusive in that a single proposed transaction could be categorised as more than one type of action.

Notifiable actions and notifiable national security actions fall into the compulsory notification regime and must be notified to the FIRB. It is an offence to take a notifiable action or a notifiable national security action without notifying the FIRB. It is also generally necessary to obtain approval by the issue of a no objection notification from the Treasurer (commonly referred to as FIRB approval) before proceeding with an action of this type.

Significant actions and reviewable national security actions fall into the voluntary notification regime and do not require compulsory notification to the FIRB. The Treasurer has the power (known as a 'call-in power') to review and make orders in relation to an action of this type taken by a foreign person within a 10 year period after the action occurs, on national security grounds. The Treasurer's call-in power is available for actions that:

- are taken or proposed to be taken on or after 1 January 2021
- have not been voluntarily notified to the FIRB (and approved), and
- may pose a national security concern.

For significant actions, the Treasurer also has a broad power to review and make orders in relation them at any time in the future where the Treasurer considers that the action was contrary to the national interest.

In addition, the Treasurer has a 'last resort power' which enables the Treasurer to re-assess and make orders in respect of a previously approved action where the Treasurer considers that national security concerns exist (or may exist) in relation to the action. There is no time limit for the exercise of the last resort power. This power may be exercised by the Treasurer where:

- a false or misleading statement was made in relation to the notification
- the business, structure, organisation or activities of the foreign person have materially changed, or
- the circumstances or markets relevant to the action have materially changed.

When assessing an application relating to a proposed action, the Treasurer may approve the proposed action by the issue of a no objection notification, or make an order prohibiting the proposed action (in whole or in part). The Treasurer can also impose conditions on an approval if the conditions are considered necessary to ensure that the proposal is not contrary to the national interest and/or national security.

When assessing an action that has already been taken, the Treasurer may (as relevant) impose conditions, vary existing conditions, or make a disposal order.

Actions with a $0 threshold

Irrespective of the value of the investment or nationality of the investor, **all foreign persons** must notify the FIRB of all proposed acquisitions of:

- vacant commercial land
- residential land
- national security land (which includes land owned or occupied by Defence agencies or Defence prohibited areas and land in which an Australian intelligence agency has an interest)
- mining and production tenements
- an interest of 5% or more in a media business
- an interest of 5% or more in an Australian land entity (being an entity where the value of its interests in Australian land exceed 50% of the value of its total assets) and where 10% or more of the value of the entity's total assets comprise residential land, vacant commercial land or mining or production tenements (subject to some exemptions)
- an interest in a national security business (which are in essence endeavours that if disrupted or carried out in a particular way may create national security risks). They generally include businesses that have a connection with critical infrastructure, telecommunications, defence or intelligence agencies.

Further, irrespective of the value of the investment or nationality of the investor, all **foreign government investors** must notify the FIRB of all proposals to:

- acquire an interest of at least 10% in an Australian entity or business, including as a result of an offshore transaction (although lower thresholds can apply)
- establish new businesses in Australia
- acquire interests in land or an exploration, mining or production tenement (or an interest of 10% or more in a mining, production or exploration entity).

These all represent notifiable actions with a $0 monetary threshold.

Other actions

For all notifiable actions other than the types of transactions listed above, foreign persons must notify the FIRB where the target is valued at or above the applicable monetary thresholds provided for by the Regulations.

The relevant monetary thresholds are often higher for investors from countries with which Australia has free trade agreements in place, although the application of these higher thresholds is narrowly applied and will generally only be available for investments made directly by those qualifying investors.

Lower thresholds also apply to proposals concerning sensitive sectors and proposals including land on which critical infrastructure is located (such as such as energy, food, water, transport, communications, health and banking and finance), noting that proposed transactions in these types of sectors should be analysed carefully as the target may have an interest in national security land or operate a national security business and could be subject to a $0 threshold.

Notably, offshore transactions (for example an increase in a foreign holding company's ownership of a foreign subsidiary with an Australian connection), can be captured by the FATA and Regulations and therefore it is important to consider Australian foreign investment regulatory requirements where a target has an Australian connection.

Current monetary thresholds

For all non-government foreign persons (excluding foreign persons from a country that is party to a free trade agreement with Australia and entitled to higher monetary thresholds), the following monetary thresholds generally apply:

- $310 million threshold for:
- the acquisition of an interest in an Australian business, having regard to the value of the consideration
- the acquisition of an interest of 20% or more in an Australian entity (and in some cases, in an offshore entity that holds Australian assets or conducts a business in Australia, where the Australian assets or businesses of the target company are valued above such threshold), having regard to the value of the target
- the acquisition of an interest in developed commercial land (excluding certain sensitive low threshold land, such as mines and public infrastructure), having regard to the value of the consideration
- $67 million threshold for:
- the acquisition of an interest in an Australian agribusiness, having regard to the value of the foreign person's existing and proposed investments in the target, including interests of its associates
- the acquisition of sensitive low threshold land (such as mines and public infrastructure)
- $15 million cumulative threshold for agricultural land, having regard to the value of the consideration and the value of agricultural land that the foreign person (and any associate) already holds, or is likely to hold immediately following a proposed acquisition.

These monetary thresholds are indexed annually, and figures are current as at January 2023.

Investors from countries that have a free trade agreement in place with Australia and are entitled to higher thresholds for particular investment proposals currently include those from Canada, Chile, China, Hong Kong, Japan, Mexico, New Zealand, Peru, Singapore, South Korea, United States and Vietnam, as well as investors from any country for which the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (TPP-11) subsequently comes into force.

Example of visual: (taken from PowerPoint slide)

Application process & fees

Applications for FIRB approval, in the form of a no objection notification, must be submitted online and must contain basic information about the applicant and the nature of the proposed transaction. Applications must be accompanied by a cover letter setting out the details of the proposed transaction addressing the information requirements prescribed by the FIRB. The content requirements of the application depend on the proposed transaction but generally include:

- an analysis of the application of the FATA and Regulations to the proposed transaction and the relevant significant, notifiable, national security or reviewable action
- information about the acquirer and the target
- details of all investors holding an interest of 5% or more in the acquirer and ultimate beneficial owners
- existing investments and assets in Australia held by the acquirer or its associates
- information concerning the source of funding for the proposed transaction and the flow of funds through to the acquirer
- particulars concerning the acquirer's commercial rationale for the transaction and its future intentions for the target business, land or entity.

A fee is payable in respect of each application filed with the FIRB. In some cases, one application can cover a number of proposed actions or transactions. The fee is calculated by reference to the type of transaction and the consideration payable. Fees can range from $1000 to as high as $1,045,000.

A statutory 30 day decision period and additional 10 day notification period applies to FIRB proposals. The decision period does not commence until the correct fee has been paid. The decision period can be extended at the request of the applicant (in order to avoid a public interim order being made) or unilaterally by the Treasurer for up to 90 days.

Prior to the expiry of the decision period, the Treasurer may make an interim order (which is registered and publicly published on the Federal Register of Legislation), which provides the Treasurer with up to a further 90 days to consider the application.

The FIRB broadly consults and shares information pertinent to the proposed transaction with other government departments during the assessment and consultation period. The Australian Taxation Office and the Australian Competition and Consumer Commission are often consulted, as well as agencies that are involved with a particular subject matter.

Approval of a proposed transaction will be given unless the proposal is considered to be contrary to the national interest and/or national security (as relevant). There is a presumption that foreign investment is generally in the national interest.

As noted above, the Treasurer can impose various types of conditions on an approval, if the Treasurer considers that the imposed conditions are necessary to ensure that the proposal is not contrary to the national interest and/or national security.

It is quite common for standard tax conditions to be imposed as part of a no objection notification for many notifiable actions. These standard tax conditions, by their nature, require compliance with Australia's tax laws, co-operation with the Australian Taxation Office by producing information in a timely and complete manner, payment of outstanding tax debts and reporting on compliance with the conditions and the holding of the asset. Conditions can also be more specific to the proposed transaction, for example conditions imposing a requirement that a proposed development of land be commenced and completed within a certain period of time.

Penalties for non-compliance

Penalties for non-compliance with Australia's foreign investment legislation include:

- criminal penalties of up to $8,250,000and/or ten years' imprisonment for individuals and up to $82,500,000for companies
- civil penalties which vary depending on the nature of the breach and value of the transaction but can include penalties of up to $687,500,000 for individuals and companies.

The FATA also provides for civil and criminal liability of officers of companies involved in a breach in certain circumstances and can extend liability to third parties who knowingly assist a breach.

In enforcing compliance with Australia's foreign investment regime the Treasurer has a wide range of powers that allow for conducting investigations and monitoring persons and entities, giving directions to persons and entities, as well as an ability to impose enforceable undertakings and/or to revoke a no objection notification approval.

Competition & Consumer Law

Tom Griffith

(Last Reviewed 4 April 2023)

The *Competition and Consumer Act 2010* (Cth) (the Act) regulates and promotes competition, fair trading and consumer protection. The Act incorporates the Australian Consumer Law (schedule 2 of the Act). The Act is a revision of the *Trade Practices Act 1974* (Cth).

A significant amount of litigation is commenced under provisions of the Act in comparison to other Australian legislation. The principal administrator of the Act, the Australian Competition & Consumer Commission (ACCC), is an active and high-profile regulator. The ACCC works cooperatively with State and Territory consumer law regulators and with the Australian Securities and Investments Commission (ASIC), industry bodies and the legal profession in relation to competition law and consumer law issues.

Competition (Anti Trust)

The Act prohibits a range of anti-competitive conduct including:

- cartel (collusive) conduct;
- resale price maintenance;
- misuse of market power;
- exclusive dealing;
- price fixing; and
- arrangements (including mergers takeovers and acquisitions) which have the purpose or effect of substantially lessening competition in a market for goods or services in Australia.

The ACCC regulates processes and enforces competition law in Australia.

Cartel conduct

There are various specific prohibitions in the Act on entering or giving effect to a contract, arrangement or understanding that contains a cartel provision. A cartel provision is a provision between competitors which has (or is likely to have) the purpose or effect of:

- fixing, controlling or maintaining prices for goods and services;
- restricting outputs in the production or supply chain;
- allocating customers, suppliers or geographical areas between competitors; or
- rigging bids made by the competitors for the supply or acquisition of services.

There are some limited exceptions to the prohibitions relating to cartel conduct, including:

- joint ventures;
- the buying and selling activities of joint buying and selling groups (including cooperatives);
- the joint advertising and resupply of collectively acquired goods or services; and
- genuine recommended price arrangements. That is, there is some scope to recommend resale prices but only if there is a statement on the goods or an advertisement that the resale price is a recommendation only. Generally, a supplier cannot arrange with, persuade or influence a person below it in the distribution chain to maintain a minimum price for goods.

Nevertheless, if a matter falling within an exception has the purpose or effect of substantially lessening competition, it may still be prohibited.

The ACCC administers an immunity policy for companies and individuals who alert the ACCC to cartel conduct. The policy is quite detailed and subject to many conditions. The policy favours those who first alert the ACCC and the timing of any notification to the ACCC can be of considerable significance.

Cartel conduct in Australia is capable of attracting criminal liability. The ACCC has in recent years commenced investigations and instituted criminal proceedings (through the Commonwealth Director of Public Prosecutions) against both individuals and companies for alleged cartel conduct.

Anti-competitive arrangements

The Act prohibits a contract, arrangement or understanding which has the purpose or effect of substantially lessening competition. This includes competitors seeking to divide up markets or to provide goods for particular prices. Corporations are also prohibited from entering into contracts, arrangements or understandings among themselves to boycott any supplier or customer or to only trade with selected suppliers or customers on certain terms.

Concerted practices

The Act prohibits any form of cooperative behaviour or communication between two or more businesses (or persons) that have the purpose, effect or likely effect of substantially lessening competition. This offence is designed to capture anti-competitive conduct that falls short of being a “contract, arrangement or understanding” and may involve a single instance of information being provided by one person.

Misuse of market power

A corporation that has a substantial degree of power in a market is prohibited in certain instances from taking advantage of that power in that or any other market. The corporation must not use its power for the purpose of:

- eliminating or substantially damaging a competitor in that or any other market;
- preventing the entry of a person into that or any other market; or
- deterring or preventing a person from engaging in competitive conduct in that or any other market.

Further, a corporation cannot have any one of these purposes when supplying goods or services below cost for a sustained period (predatory pricing).

Exclusive dealing/supply chain tying arrangements

The Act contains provisions regarding exclusive dealing. Arrangements which involve a supplier refusing to supply goods or services unless the proposed purchaser agrees to certain restrictions, for example, not to buy goods of a particular kind from a competitor, may contravene the Act if they have the effect of substantially lessening competition in the relevant market.

Another example of exclusive dealing is third line forcing, which involves the supply of goods or services on condition that the purchaser buys goods or services from a specified third party, or a refusal to supply because the purchaser contravenes that condition. That practice breaches the Act even if there is no substantial lessening of competition.

Anti-competitive mergers and acquisitions

The Act prohibits a corporation from acquiring shares in a body corporate or assets from a body corporate or individual if the effect would be a substantial lessening of competition in a market for goods or services.

A list of matters to be taken into account when determining the effect on competition are outlined in the Act, including:

- the actual and potential level of import competition;
- the barriers to entry;
- whether the acquisition would result in the acquirer being able to significantly and substantially increase prices or profit margins; and
- whether the acquisition would result in the removal of certain competitors.

The ACCC has published guidelines with respect to mergers. While it is not necessary to consult the ACCC with respect to such transactions, in certain circumstances the ACCC may grant clearances of a proposed merger or acquisition. The ACCC also has the power to commence proceedings to prevent a contravention or to seek a divestiture of shares or assets.

Penalties

For corporations, penalties for contravening competition provisions of the Act will be the greater of: $50 million; or if the court can determine the value of the benefit obtained from the offence by the corporation (and any related bodies corporate) – three times the value of the benefit; or if the court cannot determine the value of the benefit – 30% of the turnover corporation's turnover during the period it engaged in the conduct the subject of the breach.

In some instances, penalties of up to $2.5 million can also extend to directors and employees. In addition, in certain instances of cartel conduct, not only may significant fines apply but also jail terms of up to 10 years or fines of up to $550,000 per criminal cartel offence.

The Act provides for a range of orders which may be made including:

- pecuniary penalties;
- injunctions;
- divestiture (in the case of a breach of the merger provisions);
- damages;
- non-punitive orders (such as a community service order or probation orders, in relation to a breach of the cartel provisions);
- punitive orders for adverse publicity;
- orders disqualifying persons from managing corporations;
- orders in favour of non party consumers; and
- enforceable undertakings.

Consumer protection

Australia has an extensive regime of consumer law that seeks to establish fairness in trade or commerce and generally amongst consumers. The Act incorporates the Australian Consumer Law (ACL), national legislation which on 1 January 2011 was also adopted by all the States and Territories of Australia.

The ACL is concerned with conduct and representations in relation to goods and services, as well as standards. It contains far reaching provisions for the protection of consumers as well as business to business transactions including:

- prohibiting conduct that is misleading or deceptive;
- prohibiting unconscionable conduct in connection with the supply of goods or services to a person;
- prohibiting the making of false or misleading representations;
- in relation to contracts, in particular, prohibiting unfair contract terms in standard form small business and consumer contracts;
- guarantees;
- product safety and standards; and
- The ACCC and state based regulators regulate processes and enforce consumer law in Australia.

Misleading or Deceptive Conduct and Unconscionable Conduct

Section 18 of the ACL states that "A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive". This section is one of the most often referred to sections of law in Australia.

It should be noted that a person includes a corporation.

Further, the ACL contains prohibitions on engaging in unconscionable conduct in trade or commerce, picking up concepts developed in the common law as well as supplementing them with ACL defined concepts of unconscionability. Unconscionable conduct includes:

- the exploitation by a stronger party of a weaker party;
- a party taking advantage where there is a significant difference in the relative bargaining positions; or
- the exertion of pressure or undue influence over a vulnerable party.

In addition to damages, a person may seek a wide variety of remedies under the ACL for misleading or deceptive conduct or unconscionable conduct. The ACL contains some wide ranging and powerful remedies so as to ensure fairness is achieved.

Further, the ACCC and other regulators can also seek damages, pecuniary penalties, injunctions and other orders in favour of consumers for breaches of these provisions.

Significant ACL contract provisions

Certain types of contracts and documents in business to consumer and business to business transactions are regulated and certain unfair contract terms may contravene the ACL. The ACL has specific implications for:

- standard form contracts;
- suppliers of goods and services;
- guarantees and warranties;
- invoices, statements and receipts;
- leases and other documents relating to interests in land;
- unsolicited (door to door) agreements; and
- lay-by and hire purchase type agreements.

Unfair Contract Terms

From 10 November 2023, it will become illegal for corporations to include unfair contract terms in standard form contracts with consumers or small businesses.

Consumer contracts are defined as contracts for the supply of goods or services or a sale or grant of an interest in land to an individual whose acquisition of the goods, services or interest is wholly or predominantly for personal, domestic or household use or consumption.

Small business contracts are defined as contracts for the supply of goods or services, or a sale or grant of an interest in land with a business that employs fewer than 20 persons, in circumstances where the upfront price payable as part of the transaction is under $300,000, or $1 million for contracts lasting more than 12 months.

From 10 November 2023, the definition of a small business contract will change to coincide with the introduction of the new unfair contract terms regime. Agreements will be deemed to be small business contracts if a business:

- has 100 or fewer employees; and
- has a turnover of less than $10 million per annum.

Terms that could be considered "unfair" are terms that:

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

Representations and the Supply of Goods and Services

The ACL includes prohibitions on making false or misleading representations in relation to but not limited to:

- a particular standard, quality, value or grade of goods or services;
- bait advertising;
- employment;
- unsolicited goods or services;
- testimonials (where a person endorses goods or services);
- guarantees and warranties (where a requirement to pay for a contractual right is claimed which is wholly or partly equivalent to any condition, warranty, guarantee, right or remedy a person has under law);
- land and interests in land; and
- timeframes and delays (where it is claimed goods or services will be provided within a certain time).

In relation to the supply of goods and services the ACL also covers topics including pricing and harassment and coercion.

Guarantees (previously warranties)

The consumer guarantee provisions of the ACL create a number of standards with respect to the supply of goods or services to a consumer. The definition of consumer transactions includes transactions where the price of the goods or services does not exceed $40,000. These statutory causes of action arise independently from the law of contract.

By application of the ACL, when providing goods or services, a supplier provides certain guarantees with respect to those goods or services.

Guarantees in relation to goods include:

- acceptable quality;*
- matching description;*
- express warranties;*
- fitness for any disclosed purpose;
- matching a sample or demonstration model;
- title;
- undisturbed possession; and
- undisclosed securities.

* these apply to manufacturers also.

Manufacturers may also be required in certain circumstances to provide a guarantee as to repairs and the availability as to spare parts.

Guarantees in relation to services include:

- due care and skill; and
- fitness for particular purpose.

A breach of any of these guarantees is actionable pursuant to provisions of the ACL which sets out the available remedies. This may include a right to return goods (a right generally not available at common law) and to recover any loss or damage that was reasonably foreseeable as a result of breach of a consumer guarantee.

The ACL also regulates the manner in which warranties against defects are communicated to consumers, including the type of information that must be provided to consumers. Often such information is included on goods packaging and warranty cards supplied with goods.

Product Safety

The ACCC has the power to make and implement product safety standards and bans on services in relation to consumer goods.

It is mandatory for suppliers (and those providing product related services) to advise the ACCC within 48 hours of becoming aware of an incident involving the death, serious injury or illness that was caused by or may have been caused by the foreseeable misuse of consumer goods provided by the supplier. Penalties apply for failure to provide the requisite notification.

Remedies

The Act and the ACL include a number of sections that outline the remedies available to parties. This includes general provisions relating to injunctions, damages, compensation and other orders for relief. The Act and the ACL contain a wide array of remedies that may be available to a party taking action against another and who proved that a contravention has taken place. The Act and ACL is appealing to litigants given the flexibility a Court has in customising a remedy specific to a given breach.

Penalties

Non-compliance with provisions of the ACL may result in action by the ACCC or state-based regulators. Criminal penalties for corporations and for other persons apply for breaches of the ACL. The ACL also outlines statutory defences which are available to persons. Provisions relating to timeframes for the prosecution, compensation for victims and penalties are also outlined in the ACL.

Following amendments introduced in 2011, civil pecuniary penalties also exist in the ACL, and can be sought by regulators for conduct where criminal sanction may not be appropriate. Following further amendments to the ACL in 2018 and 2022, the maximum civil pecuniary penalties for breach of the ACL provisions include, for corporations, the greater of: $50 million; or if the court can determine the value of the benefit obtained from the offence by the corporation (and any related bodies corporate) – three times the value of the benefit; or if the court cannot determine the value of the benefit – 30% of the corporation's turnover during the period it engaged in the conduct the subject of the breach. The maximum civil penalty for individuals is $2.5 million.

Infringement notices may also be issued by regulators for certain breaches.

The ACCC and other regulators have a range of powers available to them without the need to go to Court. This includes the power to:

- obtain enforceable undertakings;
- issue substantiation notices;
- issue public warnings notices; and
- undertake searches and seizures.

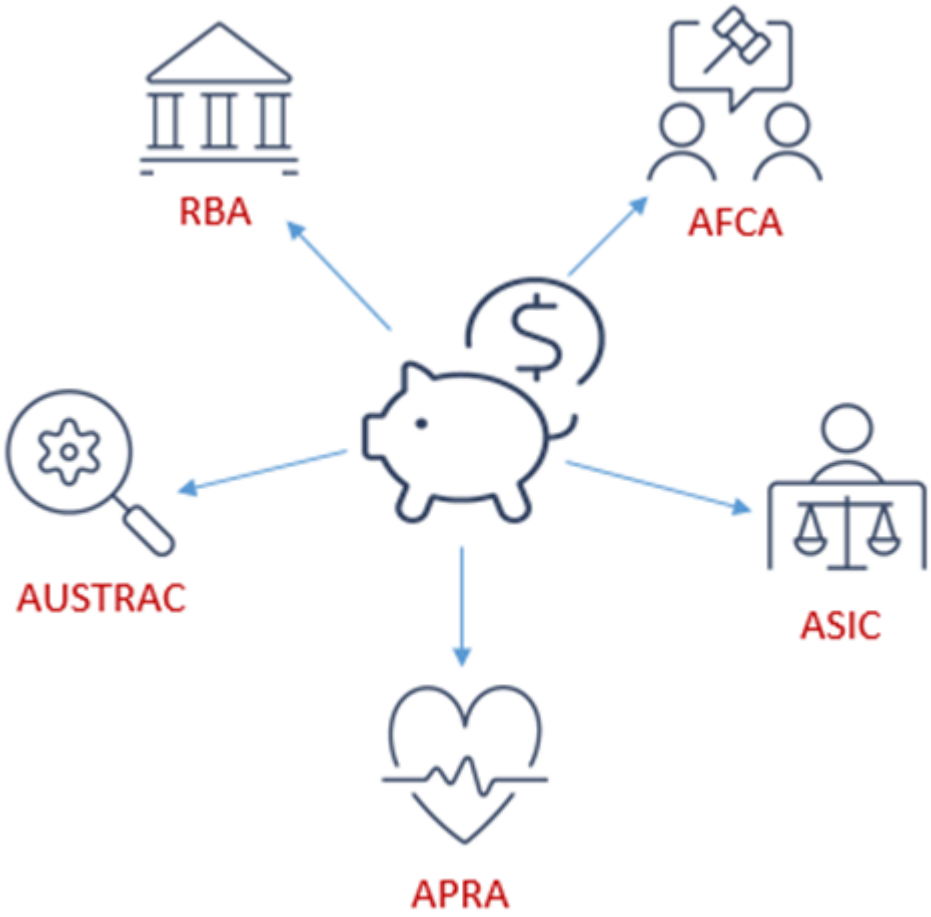
Regulators can also apply to the Court to seek the following for breaches of the ACL:

- disqualification orders;
- non punitive orders;
- adverse publicity orders;
- injunctions/declarations;
- damages; and
- compensatory orders (this can be done by consumers or by a regulator on behalf of consumers).

Financial Regulation

Andrea Beatty

Australia has a sophisticated financial system which is primarily regulated by three entities which oversee the various laws that govern this system. The entities include the RBA, APRA and ASIC. These regulators, alongside entities such AFCA and AUSTRAC, are responsible for the regulatory oversight of the Australian financial system and regulation of the entities that operate within that system.



Banking

Banking in Australia is dominated by four major banks: Australia and New Zealand Banking Group Limited (commonly referred to as ANZ), Commonwealth Bank of Australia (CBA), National Australia Bank Limited (NAB) and Westpac Banking Corporation (Westpac), as well as Macquarie Bank which is the largest investment bank in Australia. There are 53 Australian banks, 14 of which are owned by the government.

A significant number of global banks and non-bank financial institutions such as credit unions, building societies, friendly societies and finance companies also operate within Australia's financial system. Collectively, these institutions provide Australian businesses and consumers with a comprehensive array of banking and financial services and products.

Reserve Bank of Australia (RBA)

The RBA is Australia's central bank. Its role is set out in the Reserve Bank Act 1959. The Bank conducts Australia's monetary policy and issues its currency. The Reserve Bank is not a commercial bank and so does not provide banking facilities to the general public. It is the obligation of the RBA to maximise the beneficial effects of its monetary and banking policy, to keep the financial system stable and to ensure the efficiency of Australia's payments system. It is the duty of the RBA Board, within the limits of its powers, to ensure that the monetary and banking policy of the Bank is directed to the greatest advantage of the people of Australia and that its powers are exercised in such a manner, in the opinion of the RBAF Board, that will best contribute to:

- the stability of Australian currency;
- the maintenance of full employment in Australia; and
- the economic prosperity and welfare of the people of Australia.

Australian Prudential Regulation Authority (APRA)

APRA is the regulator that licences and supervises banks, insurance companies, superannuation funds, credit unions and building societies. The primary focus of APRA is to act to protect the interest the interest of depositors, policyholders and superannuation fund members.

APRA's regulatory scope includes oversight of banks, credit unions, building societies, friendly societies, general insurance, health insurance, reinsurance and life insurance companies and most members of the superannuation industry.

APRA's main tasks include establishing and enforcing prudential standards and practices and ensuring that organisations in the banking and financial services sector manage their risk appropriately. APRA achieves its objectives by:

- establishing the standards to be followed by financial institutions;
- regulating the licensing of financial institutions;
- assessing the financial soundness of the institutions it governs; and
- when applicable, undertaking remediation, crisis response and enforcement activities.

Australian Securities and Investments Commission (ASIC)

ASIC is Australia's corporate, market, financial services and consumer credit regulator. It plays an important role in maintaining, facilitating and improving Australia's financial systems and the various entities that function within that system.

The role of ASIC includes ensuring that financial services, including credit unions, banks and finance brokers, meet legal standards, such as those within the *National Consumer Credit Protection Act 2009.*

As part of their compliance initiatives, ASIC exercises a range of facilitative, regulatory and enforcement powers to ensure that consumer interests are at all times protected. In fulfilling its role in the financial services sector , ASIC's primary focus is on:

- supervising entities on an ongoing basis;
- undertaking risk-based surveillances that target specific incidents or transactions;
- undertaking reviews focusing on issues across a particular sector;
- commissioning reports;
- enforcing the law.

Australia's licensing requirements

All banks, insurance companies, building societies, credit unions, friendly societies and trustees of superannuation funds that operate in Australia are required to be licensed by APRA.

Participants in Australia's banking and financial system may be required to hold one or more licences to conduct different aspects of their business.

. Generally, if an organisation provides financial services (e.g. dealing in or advising on a financial product for example interests in managed investment schemes or shares), they will be required to hold an Australian Financial Services Licence.

If an organisation engages in consumer credit activities (for example. lending or related activities such as broking, loan management and debt collection) with individuals it will be required to hold a credit licence. A person who engages in commercial credit activities should not be required to hold an Australian Financial Services Licence or credit licence. The demarcation between financial services, commercial credit and consumer credit activities is not always clear and often requires detailed analysis in the context of the particular business. Financial services and Australian financial services licences and credit activities and credit licences are explained further below.

Financial services licenses

When assessing the need for an Australian Financial Services Licence it is important to carefully consider whether a person is carrying on a "financial services business" in Australia. A person provides a financial service if the person provides financial product advice, deals (including assisting a person to deal in) a financial product, makes a market for a financial product, operates a registered investment scheme, provides custodial or depository services, provides a crowd-funding service or provide claims handling or settling services.

A financial product includes such things as shares, derivatives, interests in managed investment schemes and life insurance policies. However, a financial product does not include the provision of consumer or commercial credit facilities and credit related products like mortgages securing obligations under a credit contract and guarantees of obligations under credit contracts.

A person will conduct a financial services business within Australia if the person intends to convince people in Australia to use the financial service. This will be the case irrespective of whether or not the person providing the financial service is

actually located in Australia. With increased use of the internet, it is more likely than ever that the provision of financial services may have multi-jurisdictional effects.

Managed investment schemes (also known as collective investment schemes) can have various legal forms. A managed investment scheme is a scheme in which investors contribute funds to a collective pool which is then invested on their behalf to produce financial benefits for the investors. Investors do not have day-to-day control over the operation of the scheme which is usually undertaken by a professional funds manager. There are a wide variety of arrangements, including;

- cash management trusts;
- property schemes;
- Australian equity (share) schemes;
- mortgage schemes;
- agricultural schemes (e.g. horticulture, aquaculture, viticulture);
- time-sharing schemes, and most recently; and
- litigation funding schemes.

In most cases, an Australian Financial Services Licence is required in order to operate a managed investment scheme. In addition certain managed investment schemes must be registered with ASIC.

Credit licenses

The National Consumer Credit Protection Act 2009 (Cth) (NCCPA) and the code established under it provides for the regulation of consumer credit activities in Australia. Regulation of credit activities is based on a two-tiered regime. The first tier creates a licensing scheme (the Australian credit licence) and the second tier manages the relationship between the persons that engage in consumer credit activities and their customers.

A person may engage in a credit activity if they provide or carry on a business of providing consumer credit or leases, take the benefit of a mortgage or guarantee securing consumer credit or perform a credit service (for example . acting as a an intermediary).

Providers of debt management services must also hold a credit licence with an authorisation that covers these services, which can include assisting consumers to apply for changes to a credit contract for which the consumer is a debtor.

The NCCPA only governs credit activities in relation to credit (or leases) provided to natural persons or strata corporations for personal, domestic or household purposes, or in respect of the purchase, renovation or improvement of residential property for investment purposes, or to refinance credit provided for those investment purposes (up to the value of $5 million). It does not govern or regulate the provision of commercial credit and related mortgages or guarantees.

All persons who engage in consumer credit activities in Australia, unless exempt, must hold a credit licence and comply with the conditions and business standards applicable to that licence. Credit licences are issued and regulated by ASIC. Persons who wish to engage in credit activities in Australia need to carefully consider their licensing obligations under the NCCPA.

Financial products and services (including credit facilities) are also regulated by the Australian Securities and Investments Commission Act 2001 (Cth) (ASIC Act), which applies some of the key consumer law provisions to financial products and services (including, in some cases, where the financial products and services are not being provided to consumers or retail clients). This includes prohibitions on misleading or deceptive conduct and unconscionable conduct and the avoidance of unfair terms in standard-form consumer and small business contracts.

ASIC has also recently been granted a power to intervene in financial product and credit markets and order persons to do things, or refrain from doing things, in order to prevent significant detriment to consumers or retail investors. ASIC's design and distribution obligations (DDO) are also applicable to credit products and financial products, and those products do not need to fall within a licensing regime to be captured by the DDO regime.

Privacy

Regulation of Australia's banking and financial systems includes compliance with Australia's privacy laws. Businesses that deal with or obtain personal information are required to comply with the provisions of the Privacy Act 1988 (Cth) which includes the Australian Privacy Principles (APPs). The APPs deal with the gathering, use, dissemination and storage of personal information obtained from individuals. The APPs also impose requirements on businesses to develop privacy policies and to include privacy statements in their documents when collecting personal information from individuals. The Privacy Act also regulates the way in which credit information and credit reporting information about individuals may be dealt with.

These principles are administered by the Office of the Australian Information Commissioner (**OAIC**). The OAIC is the independent national regulator for privacy and freedom of information.

The OAIC is responsible for privacy functions that are conferred by the Privacy Act and other laws. Under the Privacy Act, a person can make a complaint to the Privacy Commissioner about the handling of their personal information by federal government agencies and private sector organisations regulated by the Privacy Act. The OAIC promotes the right to access government-held information and have personal information protected.

More information can be found in the Privacy section on page 73.

Anti-Money Laundering

There are few restrictions on dealing with Australian currency since Australia operates a deregulated floating exchange rate. The few restrictions which do apply are present to address the risk of money laundering and the financing of terrorism. The Anti-Money Laundering and Counter Terrorism Financing Act 2006 (Cth) was designed to bring Australia into line with international money laundering and counter terrorism financing standards established by the Financial Action Task Force.

That legislation requires “reporting entities” (for example businesses operating in the financial services sector, bullion dealers and providers of gambling services) to comply with various reporting obligations to AUSTRAC. Obligations on reporting entities include:

- collecting information about and verifying a customer’s identity before a designated service is provided;
- reporting certain transactions and suspicious matters;
- reporting cross border movements of physical currency above a threshold amount; and
- keeping accurate records.

This process enables AUSTRAC to collect and analyse financial reports and information from reporting entities to generate financial intelligence. This strengthens national security and law enforcement investigations. Consequently, AUSTRAC is empowered to share intelligence with other financial intelligence units and regulators internationally.

Other regulation

Voluntary codes of conduct have been developed to self-regulate the financial services industry. These codes of conduct are typically incorporated into contracts with customers pursuant to a condition of membership of the industry body. Notable examples include the Australian Banking Association’s Banking Code of Practice, General Insurance Code of Practice, Insurance Brokers Code of Practice, the Customer Owned Banking Association’s Customer Owned Banking Code of Practice, ASIC’s ePayments Code and the Australian Financial Industry Association ‘Buy Now Pay Later’ Code.

Australian Financial Complaints Authority (AFCA)

Credit licensees and Australian Financial Services Licensees who are financial services providers or financial firm are required to be members of the AFCA under law or license conditions. The AFCA alternate dispute resolution scheme provides a non-judicial dispute resolution service for aggrieved clients who are unable to resolve complaints with member financial services organisations

Banking in 2023 and Beyond

The Australian economy has experienced significant disruption in recent years. Having withstood the seismic effect of the COVID-19 pandemic and continued external shocks from global conflict, the Australian economy today finds itself in a precarious position.

Australian banks are facing falling mortgage demand and rising interest rates, coupled with the ever looming risk of an economic downturn that would invariably affect borrowers’ ability to repay loans, consequently posing a risk for banks’ profitability.

As the RBA commits to tightening its monetary policy to tackle persistent inflation, the four major banks in Australia have gained ten successive interest rate since 2022. While the higher interest rate environment will support margin recovery, banks will face continued economic, social and political challenges in the face of a worsening ‘cost of living’ crisis.

Yet against this backdrop, the Australian banking and financial systems have operated consistently to maintain the stability of the Australian economy. Despite domestic and international pressures, the banks have entered 2023 in a stronger position in terms of capital, liquidity and quality of credit due to the regulatory reform and prudential conservatism that was applied through the global pandemic and beyond. Australian banks continue to boast a broad suite of levers to pull and

position for in this turbulent period.

IT & e-Commerce

Tim Clark & Craig Subocz

(Last Reviewed 13 April 2023)

Australia's digital economy is diverse and rapidly expanding. This is especially accelerated by the COVID-19 pandemic and increased levels of internet connectivity in Australia in recent years. More than 88% of Australian households have internet access from their homes and in 2022, there were over 22 million internet users in Australia. The implementation of the National Broadband Network (NBN) and the construction of the 5G network has increased and improved connectivity. With the spread of connectivity, there is an increasing focus to ensure IT users and consumers are protected.

In Australia, the *Electronic Transactions Act 1999* (Cth) and the supporting State and Territory legislation recognise that electronic transactions are not invalid merely because they rely upon electronic communications or electronic signatures. This recognition is in line with the burgeoning practice of e-commerce in Australia where online sales are expected to reach $91.5 billion in 2025, according to GlobalData. There are, however, a number of legal and business process issues that remain to be resolved (including in relation to appropriate means of authentication of electronic transactions) that have held back the widespread adoption of electronic transactions in large commercial dealings. Issues such as the protection of intellectual property online, competition and consumer law issues, censorship regulations, privacy and spam regulations and contract law also require careful consideration.

Businesses operating in Australia often benefit from having an online presence. The .au Domain Administration Ltd (often called auDA) is an independent non-profit Australian company entrusted as the policy authority and industry self-regulatory body for the .au domain space and is recognised by the Internet Corporation for Assigned Names and Numbers (ICANN). It has adopted a dispute resolution procedure based on ICANN's Uniform Domain Name Dispute Resolution Policy (often called UDRP) (but with some important modifications) to deal with disputes relating to .au domain names. The rise of city-specific domain names such as .melbourne and .sydney, which have also been approved by ICANN, has presented new opportunities for businesses to utilise a new range of domain names in Australia.

Other issues facing businesses with an online presence relate to security and privacy. Increasingly, customers' personal information stored by businesses becomes a prized target for hackers and failure to adequately protect customer data from unauthorised access could result in breaches of the *Privacy Act 1988* (Cth). Mandatory data breach reporting laws came into force on 22 February 2018 requiring mandatory notification to the Privacy Commissioner and affected individuals in the event of a data breach.

Furthermore, many consumer protection laws in Australia are similarly applicable to online transactions. Businesses should be aware of the broad scope of the Australian Consumer Law, particularly as it relates to representations made by businesses about their goods and services sold online. There are potential legal obligations for businesses to monitor their online presence (including social media sites) to ensure any posted content, whether by the business itself or third parties, are compliant with Australian consumer protections laws. Importantly, Australian courts have held that the Australian Consumer Law applies to transactions in Australia regardless of whether the business selling the product has any physical presence in Australia.

The sending of unsolicited commercial electronic messages (spam) is prohibited by the *Spam Act 2003* (Cth). A commercial electronic message must not be unsolicited, must contain information which accurately identifies the sender and must contain a functional unsubscribe facility. Significant financial penalties may apply for contraventions. Messages sent by way of voice call (for example, for the purposes of telephone marketing) are regulated under the *Do Not Call Register Act 2006* (Cth). More information on this area can be found in the Privacy section on page 46.

Another major change which has recently occurred is the introduction of GST (a local goods and services tax) applying to online purchases from overseas vendors (such as Amazon). Previously, only overseas purchases greater than $1,000 attracted GST, however since 1 July 2018, all purchases have been subject to GST, with overseas vendors required to collect and remit GST (for purchases equal to or less than $1,000).

There is no doubt that the IT and e-commerce space will continue to undergo changes. Legal issues around enforcement by copyright owners of their copyright against online infringement continue to be the subject of government review and industry lobbying. An example is the amendment to the *Copyright Act 1968* (Cth) to provide copyright owners an ability to seek an injunction to require internet service providers to disable access to copyright-infringing websites overseas.

Andrew Rankin

(Last reviewed date at 17 April)

Privacy Act Overview

The principal legislation in Australia protecting privacy is the *Privacy Act 1988* (Cth) (the Act). The Act regulates the collection, storage, quality, use and disclosure of personal information. The Act broadly defines "personal information" so that it includes any information or opinion about an identified individual or an individual who is reasonably identifiable:

- whether the information or opinion is true or not, and
- whether the information or opinion is recorded in a material form or not.

There are 13 'Australian Privacy Principles' (APPs) which govern how Australian businesses or businesses with an Australian link and government agencies must handle, use and manage personal information. Additional privacy and health information legislation exists in each State and Territory, the obligations of which may apply depending on the nature of the personal information being collected and used and/or where such obligations are imposed contractually in arrangements with State and Territory government departments or agencies.

In very broad terms the Act restricts organisations from collecting personal information from individuals unless the collection is reasonably necessary for the organisation's business activities. Organisations also have an obligation to take such steps, as reasonable, to notify individuals of collection of their personal information in advance or at the time of collection (or as soon as possible after such collection). An organisation is generally only permitted to use the personal information for the purpose it was collected unless the individual has otherwise consented or an exception applies. An organisation is also obliged to have systems in place in order to enable an individual to access and correct the personal information that has been collected about them. The responsibilities under the Act generally only apply to organisations with an annual turnover of more than $3 million, however, this threshold does not apply to government agencies or organisations that collect certain types of personal information. Organisations are also obliged to take reasonable steps to ensure that the personal information they collect, use or disclose is complete, accurate and up to date, and to protect the information from misuse or loss from unauthorised access, modification or disclosure.

Additional restrictions apply in respect of collection of 'sensitive information' (which includes information about an individual's ethnicity, political opinions, religious beliefs, sexual preferences and health information). In particular, organisations require the consent of the individual in order to be able to collect such information and are restricted in how they are able to use and disclosure that sensitive information (in particular, the use or disclosure must be directly related to the primary purpose of collection unless an exception applies).

There are exemptions for employers in relation to employee records, who are separately required under the Fair Work Act to keep certain records of current and former employees for a period of 7 years.

The Act appoints a Privacy Commissioner who is responsible for dealing with and investigating breaches of the Act. The Privacy Commissioner has power to investigate and to make binding determinations in respect of privacy grievances. Recent amendments to the Act have expanded the extraterritorial application of the Act such that an overseas organisation is deemed to have an Australian link and be caught by the Act where they carry on business in Australia, regardless of where the organisation has collected or holds personal information..

Review of the Privacy Act

A current review of the Privacy Act has been undertaken by the Attorney-General's office and a report released on 16 February 2023. The report contains 116 proposals including a broader definition of personal information, an amended definition of consent, a requirement to act fairly and reasonably when collecting, using and disclosing personal information, a statutory cause of action for invasion of privacy and introduction of processors and controllers, among other proposals.

Cross-border Disclosure of Personal Information

Organisations may only disclose personal information about an individual to an overseas recipient where it has taken steps, reasonable in the circumstances, to ensure the overseas recipient does not breach the APPs or it has satisfied one of the following exceptions:

- the organisation reasonably believes that the overseas recipient is bound by a law or binding scheme which protects privacy in a manner which is substantially equivalent to the protection under the APPs and the individual can access mechanisms to enforce those protections;
- the individual has been specifically informed about the disclosure and after being informed, consents to the disclosure;
- the disclosure is required or authorised by an Australian law or court/tribunal order (a disclosure required or authorised by overseas jurisdiction is not exempted), or
- other permitted general situations apply (including circumstances such as involving threats to life, health or safety of an individual, public health, unlawful activities or missing persons).

An organisation is required to ensure that it has taken reasonable steps to ensure the individual, from which it has collected personal information, is notified at, or as soon as practicable after, the time of collection, whether the organisation is likely to disclose the personal information to overseas recipients.

Mandatory Data Breach Notification Scheme

Australia introduced a mandatory data breach notification scheme (NDB Scheme) which commenced on 22 February 2018.

The NDB Scheme introduces mandatory obligations on organisations to notify:

- the Privacy Commissioner, and
- individuals, whose personal information it holds and whose information is involved, in respect of an "eligible data breach".

The notification must include a description of the eligible data breach, the kind or kinds of information concerned and recommendations about the steps that individuals should take in response to the data breach.

The NDB Scheme requires organisations to notify affected individuals and the Privacy Commissioner only of "eligible data breaches". An "eligible data breach" occurs where a reasonable person would conclude that access or disclosure of personal information would be likely to result in serious harm to any of the individuals to whom the information relates in cases where:

- there is unauthorised access to or unauthorised disclosure of personal information held by an organisation, or
- the information is lost in circumstances where unauthorised access to or unauthorised disclosure of the information is likely to occur.

Failure to comply with the obligations under the mandatory data breach notification regime will be deemed an interference with the privacy of an individual and a breach of the Act, engaging the Privacy Commissioner's enforcement powers and relevant penalties under the Act. Recent amendments to the Act empowers the Privacy Commissioner to obtain information and documents relating to an eligible data breach from individuals and organisations and to issue infringement notices for non-compliance.

Enforcement and penalties under the Privacy Act

The main function and role of the Privacy Commissioner is to ensure the proper handling of personal information in accordance with the Act. This role includes day to day administration of privacy enquiries and complaints and investigation of potential contraventions of the Act. The Privacy Commissioner may also take civil enforcement action against a party in contravention of the Act.

The Privacy Commissioner has wide powers of investigation to obtain information, documents and other evidence where it believes an act or conduct may constitute a contravention of the Act and in particular the APPs. Investigations by the Privacy Commissioner may arise as a result of a complaint by an individual or at the Privacy Commissioner's own initiative. The Privacy Commissioner's powers also include the ability to interview witnesses.

For serious and repeated interferences with privacy the maximum civil penalties for:

- individuals is $2.5 million; and
- corporations, the greater of:
    - $50 million;
    - three times the value of the benefit obtained directly or indirectly from the conduct constituting the contravention; and
    - if the value of the benefit cannot be determined, 30% of turnover over the period of contravention.

Spam Act

The Spam Act regulates the sending of unsolicited commercial electronic messages in Australia.

An organisation must not send, or cause to be sent, a commercial electronic message, that has an Australian link (e.g. the message originates in Australia, the organisation that sent the message is physically in Australia or the organisation that sent the message has its central management in Australia, or the computer, server or device used to access the message is located in Australia) and is not a designated commercial electronic message, unless the electronic account holder has consented to the sending of the message.

A commercial electronic message is an electronic message including emails, instant messaging, SMS and MMS messages that is of a commercial nature.

A designated commercial electronic message is a message which includes:

- no more than a factual message
- messages authorised by a government body, registered political party or a registered charity, and
- messages authorised by an educational institution whether the relevant electronic account holder is or was an enrolled student.

Consent to the sending of a commercial message can be either express or inferred. Organisations sending commercial messages must also comply with additional conditions under the Spam Act including providing specific information in relation to the authorised sender of the commercial message and an appropriate unsubscribe facility. The *Spam Regulations 2021* require organisations sending commercial electronic messages to make it straightforward for recipients to unsubscribe and not require them to provide personal information, use a premium service, pay a fee or log into/create an account.

Do Not Call Register

The Do Not Call Register Act regulates the making of telemarketing class to an Australian number.

A person must not make, or cause to be made, a telemarketing call to an Australian number where the number is registered on the Do Not Call Register and the call is not a designated telemarketing call unless the relevant account-holder or a nominee of the relevant account-holder has consented to the making of the call.

The kinds of calls which are not telemarketing calls include:

- product recall calls
- fault rectification calls
- appointment rescheduling and reminder calls
- calls relating to payments, and
- solicited calls.
- Designated telemarketing calls include:
    - a call authorised by either a government body or registered charity
    - a call authorised by a registered political party, member of parliament or candidate in election for parliament, or
    - a call authorised by an educational institution.

Anti Money Laundering & Counter-Terrorism Financing

Andrea Beatty

Australia operates as a deregulated financial market system with a unrestricted floating exchange rate. The few restrictions which do exist in this system are applied to address the risk of money laundering and the financing of terrorism.

Money laundering is concealing or disguising the identity of illegally obtained proceeds so that they appear to have originated from legitimate sources. The prevention of money laundering has become an international effort and now includes terrorist funding among its targets. Terrorism financing is the financing of terrorist acts, terrorists and terrorist organisations.

This article explores how Australia has formed a concrete policy to restrict money laundering and counter terrorist

funding. The *Anti-Money Laundering and Counter-Terrorism Financing* Act 2006 (Cth) (**AML/CTF Act**) is the primary legislation governing Australia's Anti-Money Laundering and Counter-Terrorism Financing (**AML/CTF**) regime.

The Australian Transaction Reports and Analysis Centre (**AUSTRAC**) is Australia's chief financial intelligence agency and administers the AML/CTF Act through the use of its regulatory powers.

Legislation

Australia's AML legislative framework is comprehensive and is regulated by three distinct arms:

Criminal Code

AML/CTF Act

Financial Transactions Act

Money laundering is an offence defined in Part 10.2 of the *Criminal Code Act 1995* (Cth) (**Criminal Code**). In accordance with sections 400.2B to 400.8 of the Criminal Code it is an offence to deal with money or property that is the proceeds of crime, or intended to become an instrument of crime. In addition, it is an offence under 400.9 of the Criminal Code to deal with money or property that is reasonably believed to be the proceeds of crime. Similar offences exist under equivalent state and territory criminal legislation.

The AML/CTF Act is the principal legislation with respect to the prevention and detection of money laundering and terrorism financing. The AML/CTF Act operates in conjunction with the *Anti-Money Laundering and Counter-Terrorism Financing Rules Instrument 2007* (No. 1) (Cth) (**AML/CTF Rules**) and associated regulations. The Anti-Money Laundering and Counter-Terrorism Financing Rules (AML/CTF Rules) aim to prevent money laundering and the financing of terrorism by imposing a number of obligations on the financial sector, gambling sector, remittance (money transfer) services, bullion dealers and other professionals or businesses (known as 'reporting entities') that provide particular services (known as 'designated services'). These obligations include collecting and verifying certain 'know your customer' (KYC) information about a customer's identity when providing those services..

Finally, the *Financial Transaction Reports Act 1988* (Cth) (**the FTR Act**) operates alongside the AML/CTF Act. The FTR Act focuses on industry groups that, by the nature of their business, deal in large amounts of cash (a characteristic that can make an industry particularly attractive to money launderers and those who wish to avoid Australia's taxation laws). Included in this category are banks, building societies, credit unions, insurance companies, securities dealers, futures brokers and bureaux de change. This category also includes casinos, totaliser agency boards and bookmakers.

Under the provisions of the FTR Act, these entities are classed as cash dealers, and as such, are required to report:

- significant cash transactions – transactions of $10,000 or more;
- suspicious transactions – transactions with customers where there are reasonable grounds to suspect that the information about the transaction may assist investigation of breaches of Commonwealth and State and Territory laws; and
- international funds transfer instructions – those instructions an organisation makes and receives to transfer value into and out of Australia on behalf of its customers.

Obligations under the AML/CTF Act

The AML/CTF Act mandates obligations for businesses to deter money laundering and prevent terrorism financing. The AML/CTF Act extends to any business that provides a 'designated service' set out in the Act.[1] Under the AML/CTF Act, a designated service provider is referred to as a 'reporting entity'.

The AML/CTF Act imposes the following obligations on reporting entities:

1. **Enrolment**

If an entity provides a designated service outlined in the AML/CTF Act, it must enrol with AUSTRAC, provide its enrolment details, and comply with the obligations set out in the AML/CTF Act.

2. **Establishing a reporting entity AML/CTF program**

An entity must establish and maintain an AML/CTF prescribed program that enables them to identify, mitigate and manage any money laundering and terrorism financing risks facing the business.

3. **Customer identification and due diligence**

An entity must have rigorous customer identification procedures. Firstly, the reporting entity must perform what is known as "know your customer (**KYC**)" procedures. Further, customer due diligence processes are necessary for identifying and verifying the customer's identity, and ongoing monitoring of transactions.

4. **Reporting**

An entity is obligated to notify authorities of any suspicious matters, threshold transactions and international funds transfer instructions. Reporting entities are also required to submit an annual report outlining its activities and compliance with the AML/CTF Act.

5. **Record Keeping**

All reporting entities are required to keep records that comply with their AML/CTF obligations. These include records of transactions, customer identification and electronic funds transfer instructions. The entity is obligated to create full and accurate records as well as store and manage them.

The AML/CTF legal framework adopts a risk and principles based approach to regulation placing the onus on reporting entities to identify, mitigate and manage their money laundering or terrorism financing risk.[2] Responsible entities must assess risks of potential money laundering or terrorism financing when providing a designated service to a customer.

The Role of AUSTRAC

AUSTRAC is responsible for administering the obligations outlined in the AML/ CTF Act. AUSTRAC's role is to detect, deter and disrupt criminal abuse of the financial system to protect the community from serious and organised crime. AUSTRAC is empowered by the AML/CTF Act to ensure regulated entities are knowledgeable, vigilant, and capable of preventing, detecting, and responding to threats of criminal abuse and exploitation.

AUSTRAC regulates more than 15,000 companies.[3] Regulated entities must comply with AML/CTF obligations and ensure they have systems and controls in place to manage risks. AUSTRAC's role is to monitor these processes and provide guidance and education to assist businesses in guarding against criminal activity. While AUSTRAC aims to facilitate proper AML/CTF practices, it may take enforcement action against reporting entities with unsatisfactory AML/CTF systems. This enforcement is reserved for serious and systemic breaches of the AML/CTF Act.

This regulatory process enables AUSTRAC to collect and analyses financial reports and information from reporting entities to generate financial intelligence. This contributes to national security and law enforcement investigations. Consequently, AUSTRAC is empowered to share intelligence with other financial intelligence units and regulators internationally.

Recent Reforms

On 17 June 2021, amendments to the AML/CTF Act came into effect. The reforms reflect the recommendations made following a review of the AML/CTF Act by the Attorney General's Department .

1. **Safe harbour:**

Section 37A of the AML/CTF Act allows a reporting entity to rely on customer identification procedures undertaken by a third party provided a written agreement or arrangement is entered into and the reporting entity has reasonable grounds to believe that the customer due diligence requirements of the AML/CTF Rules are being met by the relevant parties. Where a reporting entity purports to rely on the identification procedures of a third party, section 38A of the AML/CTF Act requires regular assessments of the arrangement to be carried out. Additionally, section 38 of the AML/CTF Act permits a reporting entity to rely on the customer identification procedures undertaken by another foreign entity.

2. **Corresponding banking relationship**

Section 95 of the AML/CTF Act imposes increasingly rigorous obligations on reporting entities in relation to correspondent

banking relationships. This recognises the increased money laundering risks posed by these relationships. Further, section 96 requires financial institutions to conduct due diligence assessments not only upon entry, but also throughout the term of the correspondent banking relationship.

3. **Tipping-off offences**

Section 123 of the AML/CTF Act now allows the disclosure of suspicious matter reports to both external auditors and members of a designated business group or corporate group outside of Australia. It functions as an exception to the general prohibition against disclosing the making of suspicious matter reports.

4. **Cross-border movements of money**

Section 53 of the AML/CTF Act now mandates that travellers report all cross-border movements of monetary instruments over $10,000 in the form of physical currency or bearer negotiable instruments.

What's next for AML/CTF reform in Australia?

In March 2022, the Senate Legal and Constitutional Affairs References Committee (**Committee**) released its highly anticipated report: 'The adequacy and efficacy of Australia's anti-money laundering and counter-terrorism financing (AML/CTF) regime' (**AML/CTF Report**).

The Committee's AML/CTF Report honed in on the previously recommended 'Tranche 2' reforms to the AML/CTF Act. These reforms were first proposed in 2016 with the intention of regulating Designated Non-Financial Businesses and Professions under the AML/CTF Act, including but not limited to lawyers, accountants, and real estate agents. The Report emphasises that the failure to act on these much-needed reforms exposes both Australians and the national economy to potential harm, while simultaneously risking Australia's reputation and credibility. It is imperative for the government to prioritise these reforms to strengthen the country's financial security and safeguard its global standing.

Based on the above findings, the Committee has put forth a series of recommendations. These recommendations are as follows:

1. the Committee recommends that the Government expedite its consultation process regarding the implementation of the 'Tranche 2' reforms.;
2. the Committee advises that AUSTRAC and the Department of Home Affairs receive adequate resources to implement and manage the 'Tranche 2' reforms;
3. the Committee calls for the Government's consultation process to be broad in scope, considering the regulatory burden on small businesses and any potential efficiencies gained from the use of technology;
4. the Committee recommends that the Government seek advice on whether section 242 of the AML/CTF Act should be amended to ensure the proper operation of legal professional privilege. This recommendation reflects the complexity of balancing the need for transparency and accountability against the fundamental principles of legal practice; and
5. the Committee advises that the Government pursue a beneficial ownership register, which would provide valuable information on who ultimately owns and controls companies and trusts. Such a register would be a significant step forward in addressing the challenges posed by anonymous corporate structures and beneficial ownership secrecy.

The Committee's AML/CTF Report has increased the pressure on the Commonwealth Government to expedite their efforts in pursuing the 'Tranche 2' reforms. Although the implementation of these reforms is contingent upon consultations, their far-reaching impact cannot be overstated. If introduced, the 'Tranche 2' reforms will significantly impact the way Designated Non-Financial Businesses and Professions entities operate.

[1] *The Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) s 6.

[2] AUSTRAC, AUSTRAC's Approach to Regulation, Report (19 July 2019) 2.

[3] AUSTRAC, AUSTRAC Overview (Web page, 7 July 2021 <https://www.austrac.gov.au/about-us/austrac-overview>

Bribery & Corruption

Andrea Beatty

Bribery of foreign and Commonwealth public officials is regulated under the *Criminal Code Act 1995* (Cth). A foreign public official is defined broadly and includes employees and officials of foreign public enterprises and public international organisations. The offences carry financial penalties and, additionally, the risk of imprisonment for individuals.

Offences for bribery of persons in public office also exist among Australia's States and Territories. These offences are varyingly established in the common law or statute.

The offences are intended to apply to a wide range of persons and body corporates. This was highlighted by the prosecutions of and the imposition of record fines in recent times on two companies tied to Australia's central bank, the Reserve Bank of Australia.

The following types of benefits could be captured by s 70.2 if not legitimately due and given with the intention of influencing a foreign public official to obtain or retain business or a business advantage:

- Making political or charitable donations.
- Gifts or corporate hospitality.
- Promotional expenses, travelling expenses or accommodation.
- Employing foreign public officials or their relatives.
- Provision of services such as use of a car.

Australian businesses should also be conscious of any exposure to foreign bribery and corruption regulations, including the US *Foreign Corrupt Practices Act 1997* and the UK *Bribery Act 2010*. The statutory regimes in the United States and United Kingdom have established a broad jurisdiction and potentially increase a business's exposure to liability from the actions of third parties.

Failed amendments to the Federal Bribery and Corruption Laws

Amendments to the bribery and corruption laws under the *Criminal Code Act 1995* (Cth) were introduced in December 2019 pursuant to the Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2019 (**Bill**). The proposed changes include amendments to the offence of bribery of a foreign public official in order to broaden the scope of the offence and the introduction of a new offence for failing to prevent foreign bribery by an associate. Additionally, the Bill seeks to implement a "Deferred Prosecution Agreements" scheme (similar to the scheme already in place in the United Kingdom, Canada and the United States) which will allow the Commonwealth Director of Public Prosecutions to enter into deferred prosecution agreements with serious corporate criminal offenders, imposing certain conditions on the offender. As a result of COVID-19, the reforms were delayed. Nevertheless, the Bill lapsed in Parliament on 25 July 2022.

Crime and Corruption Commissions

Corruption Commissions of varying names and mandates exist in Australia's States and Territories. Their role includes investigating corrupt conduct of politicians or public organisations (including government departments and statutory bodies).

Against the contextual backdrop of growing concerns over corrupt practices, the Commonwealth Parliament passed two significant pieces of legislation on 30th November 2022, namely the *National Anti-Corruption Commission Act 2022* (Cth) (**NACC Act**) and the *National Anti-Corruption Commission (Consequential and Transitional Provisions) Act 2022* (Cth) (**Consequential Act**).

The NACC Act established a new independent anti-corruption body, the National Anti-Corruption Commission (**NACC**). The principle purpose of the NACC is to:

- investigate and report on serious or systematic corruption conduct in the Commonwealth public sector;
- undertake educational and preventative initiatives;
- refer cases of criminal misconduct for prosecution; and
- enhance corruption prevention across the Commonwealth government by conducting public inquiries and providing advice on risks, vulnerabilities and strategies to mitigate them.

Furthermore, the NACC Act would be reinforced by the Consequential Act, which would modify multiple statutes to give effect to the NACC.

Energy & Resources

Josh Steele, Kathryn Walker & Martin Lovell

(Last Reviewed 12 April 2023)

Petroleum

Onshore

Onshore petroleum exploration and production is regulated by each State and Territory. The regulatory principles are similar, but each State and Territory has separate petroleum and environmental legislation that differ in detail.

Offshore

Although Australia is a major exporter of natural gas (which it converts into LNG for that purpose) it produces less oil than it consumes. For its energy security, Australia, therefore, requires more oil from indigenous sources, for which most of the prospective areas are offshore.

Australia has one of the world's largest exploitable areas of seabed, 8.2 million square kilometres, larger than its land area of 7.7 million square kilometres.

Coastal Waters

Coastal waters are regulated by State legislation alone. Outside the 3 nautical mile limit, the Commonwealth exercises exclusive jurisdiction.

Offshore Bidding System

Each year, the Australian Government releases additional offshore acreage, through a work program bidding system. Under this system:

- an applicant is required to propose a six-year exploration program
- the first three years are referred to as the "primary term", and a successful applicant must complete all of the minimum work requirements in order to avoid cancellation of the permit, and
- the second three years is the "secondary term", whereby the applicant may undertake the relevant work program on a yearly basis, providing the permit holder with a degree of flexibility.

In most circumstances, permits are renewable for two further terms of five years. However, the permit holder must nominate 50% of the blocks within the permit area as being relinquished at each renewal.

Discoveries

On the discovery of petroleum, the permit holder has two years to apply for a production licence.

If the discovery is not currently considered to be commercially viable, but is expected to become commercially viable within 15 years, the permit holder may apply for a 5 year retention lease, allowing it to retain the exclusive right to explore for petroleum in the area.

Environmental issues

The government has power to direct the clean-up of oil spills or to direct a licensee to eliminate, mitigate, manage or remediate a serious situation.

The consequence of breaching any governmental direction is a penalty of up to 100 penalty units.

Resource Rent

The Petroleum Resource Rent Tax applies to all Australian offshore oil and gas projects, which is a profit based tax levied at 40% of taxable profits from a project.

Offshore petroleum royalties currently apply to the North West Shelf production area and State and Territory waters.

Royalties

Onshore, royalties are levied on petroleum production and are collected by the States and Territories. The rate varies from state to state and may depend on the type of hydrocarbon produced (gas vs petroleum) what that hydrocarbon is used for (i.e. domestic use or offshore supply) and the average sales price received over the relevant period.

Mining and minerals

The permitting regime for the exploration and mining of minerals is regulated at a State and Territory level.

Exploration licence/permit

The regulatory principles for the exploration of minerals in Australia is similar but differs in details for each State and Territory.

Generally, an exploration licence/permit will entitle the holder to undertake activities that are in the nature of 'exploration' only and do not involve any substantive disturbance to the land, and will be granted for an initial term of up to five years depending on the State or Territory.

Exploration licences/permits are often granted subject to minimum expenditure or work program obligations, the failure to comply with which may result in the forfeiture of the license/permit.

In some States and Territories, holders of an exploration licence/permit may be required to relinquish a percentage of the area of the permit at the end of each year (e.g. 40 – 50%).

Mining leases

Generally, in order to extract and/or process ore/ minerals, the holder of an exploration license/permit is required to first obtain a mining lease.

A mining lease/license:

- will have a term of up to 21 years and may be renewed for successive periods in accordance with the relevant State/Territory legislation
- entitles the holder to mine for and dispose of any minerals on the land in respect of which the lease was granted and to conduct mining works relating to the minerals noted on the lease or licence.

Retention leases

In most States and Territories, the holder of an exploration authority may also apply for a retention/development license. This may occur where the applicant has identified a mineral resource but it is currently impractical to mine the resource.

Royalties, rent and expenditure

Royalties are enforced by the relevant State or Territory and each the amount payable for royalties within each state and territory vary depending on a variety of statutory considerations (generally this will be 10% or less).

Renewable Energy

Australia is committed to matching the greenhouse gas emission reduction targets of other developed economies. It offers a number of incentives for investors.

Renewable Energy Target (RET) Scheme

Australia has adopted a Renewable Energy Target of 20% by 2020. This is implemented via Renewable Energy Certificates (RECs). In 2021, 24% of electricity generation was from renewable energy sources. The growth of solar and wind generation greatly contributed to meeting this generation target. At this time, there have been no adjustments to the national Renewable Energy Target set for future years.

Most renewable energy systems are eligible to create RECs corresponding to the amount of MWh produced, regardless of whether they are grid-connected or off-grid.

Power stations accredited in the Large-scale Renewable Energy Target are able to create large-scale generation certificates (LGCs) for electricity generated from that power station's renewable energy sources. Small-scale technology certificates (STCs) are provided to the purchasers of small-scale renewable energy systems 'up front' for the systems' expected power generation from the installation year until 2030, when the scheme ends. RECs can be bought and sold on the primary and secondary markets and are created, registered and transferred by way of the REC Registry.

The RET scheme obliges electricity retailers to source a proportion of their electricity from renewable energy sources. It does this by requiring electricity retailers to surrender a number of LGCs annually and STCs quarterly to the Clean Energy Regulator based on the amount of electricity acquired for that year.

Australian Renewable Energy Agency (ARENA)

ARENA was established in 2012 as an independent agency. Its purpose is to accelerate Australia's shift to affordable and reliable renewable energy.

ARENA announced three priorities for new investment in its 2021 Investment Plan:

- support the transition to an electricity system powered by renewables
- accelerating clean hydrogen
- supporting industry to reduce emissions.

Clean Energy Finance Corporation (CEFC)

CEFC is the Australian government-owned finance corporation that supports investment in renewable energy, energy efficiency and low emissions technologies. Since its inception in 2012, CEFC has committed over $10 billion in finance for investments in clean energy projects reflecting $33 billion in investments aimed at cutting carbon emissions.

CEFC does not provide grants like ARENA instead, it invests through a variety of financing mechanisms. CEFC also collaborates with banks and other financing institutions to provide co-financing.

Environment, Native Title and Land Access

In addition to obtaining permits to explore for and extract minerals, oil and gas, there are a number of ancillary environmental, land access and native title issues that need to be considered and catered for.

Environmental issues

In addition to the relevant exploration licence/ mineral lease, persons wanting to explore, mine and/or obtain a production lease, will be required to observe various environmental obligations arising in accordance with the relevant State, Territory and Commonwealth legislation, including obtaining an environmental authority.

Generally, this will require that the holder rehabilitate and restore the land to the same condition it was in prior to the relevant activity occurring and to provide some form of financial security to secure their rehabilitation and other environmental related obligations.

The form of security varies between Commonwealth, State and Territory obligations, but may be in the form of a surety bond covering some or all of the anticipated rehabilitation costs and/ or require the relevant holder to contribute to a centralised fund that is used to contribute to anticipated rehabilitation costs based upon a levy calculation.

Environmental licences/authorities will be required for operations and those licences/authorities will contain conditions such as reporting requirements, discharge limits, storage limits and monitoring requirements.

Native title

Native title has been recognised to exist at common law, however, this recognition is subject to partial extinguishment in the case of pastoral leases, mining leases and the creation of certain reserves.

Prior to the grant or renewal of a mining tenement, an applicant or tenement holder must undertake a Federal statutory process which generally involves agreeing to certain conditions and compensation with the Native Title holder parties which will apply to certain mining activities that it, and any subsequent transferees, carry out in the relevant area.

The agreement is recorded in an Indigenous Land Use Agreement (ILUA) which is registered with the Native Title Tribunal. ILUAs can cover the agreement of Native Title holders to current and future activities in the land, access, cultural heritage, employment opportunities for Native Title groups and compensation. Good faith consultation and negotiation with Native Title holders must be entered into to allow for a mutually beneficial outcome for all parties.

Cultural heritage

Exploration licences and mining leases are granted subject to a condition requiring observance with the cultural heritage legislation of the relevant State or Territory. The consent of the relevant Minister is required where any use of land is likely to result in the excavation, alteration or damage to an Aboriginal cultural heritage site or any objects on or under that site.

A cultural heritage management system should be developed to help you know and understand cultural heritage considerations, have inclusive engagement, communication and monitoring and evaluation of impacts on cultural heritage.

Land access

Land access is governed by legislation specific to each State and Territory. In some jurisdictions such as Western Australia, certain obligations and restrictions apply in relation to land access on non-freehold land, which may require the

consent of the lessee of the relevant lease. In other states like New South Wales, the Department of Planning and Environment publishes land access arrangement templates to assist in negotiations between parties, and in Queensland there is a Land Access Code which specifies mandatory matters to be covered in land access agreements. In the absence of agreement between the parties, compensation payable is determined by the relevant court within the jurisdiction.

Therapeutic Goods

Lis Boyce

(Last Reviewed 17 April 2023)

In Australia, therapeutic goods for human use are regulated under the *Therapeutic Goods Act 1989* (Act), which is administered by the Therapeutic Goods Administration (TGA). 'Therapeutic goods' are defined as goods to be used in connection with:

- preventing, diagnosing, curing or alleviating a disease, ailment, defect or injury;
- influencing, inhibiting or modifying a physiological process;
- testing susceptibility to a disease or ailment;
- influencing, controlling or preventing conception;
- testing for pregnancy; and
- replacement or modification of parts of the anatomy;

and in practice include prescription medicines, over-the-counter medicines, complementary medicines, medical devices (including in vitro diagnostic devices), vaccines, blood and blood products, sunscreens and cosmetics that make therapeutic claims.

Any product for which therapeutic claims are made must be listed, registered or included in the Australian Register of Therapeutic Goods (ARTG) before it can be legally manufactured, exported, imported and supplied in Australia. However, there are exceptions which provide for limited and restricted use of unapproved products including:

- for the purpose of conducting clinical trials; and
- where prescribed by a medical practitioner authorised by the TGA to do so, where already-listed products do not provide adequate treatment (for example, medicinal cannabis products may be supplied under this exception).

In order for therapeutic goods to be listed, registered or included in the ARTG, the goods must satisfy standards of quality, safety and efficacy. Different requirements and standards apply for different types of therapeutic goods according to the associated level of risk.

Software as a medical device

Under the Therapeutic Goods Act, software is categorised as a "medical device" if it is intended to be used for certain purposes including:

- diagnosis, monitoring, prediction, prognosis, treatment or alleviation of disease, injury of disability; or
- as an accessory to a medical device.

Where software drives or influences a physical medical device, it has the same risk classification as the associated device.

There are a number of exceptions and exclusions (such as for certain forms of clinical decision support software).

Clinical trials

In Australia, clinical trials of unapproved pharmaceuticals, biologicals or medical devices must either:

- be notified to the TGA under the Clinical Trial Notification pathway; or
- be pre-approved by the TGA under the Clinical Trial Approval pathway (generally for high risk or novel treatments where there is no or limited knowledge of safety).

The Human Research Ethics Committee (HREC) approving the protocol for the trial also determines which pathway will be used.

Clinical trials in Australia must have a local sponsor, and be conducted in accordance with the relevant guidelines for Good

Clinical Practice adopted by the TGA.

Each of Medicines Australia and the Medical Technology Association of Australia have published template agreements for the conduct of clinical trials. International parties seeking to undertake research in Australia should familiarise themselves with these agreements.

Advertising

The Therapeutic Goods (Therapeutic Goods Advertising Code) Instrument 2021 (**Therapeutic Goods Advertising Code**) limits and regulates advertisements of therapeutic goods to promote safe and proper use of the goods, to not mislead or deceive the consumer, and to prohibit advertisements that cause undue distress. Advertising to the general public is permitted for the majority of over-the-counter medicines whilst the advertising of prescription-only medicines to the general public is prohibited. Paid testimonials or testimonials based on incentives cannot be included.

In 2023, the TGA published guidance for life sciences companies listed on the ASX, to ensure that market announcements on their products under development are balanced and avoid emotive language.

In addition, the *Competition and Consumer Act 2010* governs advertising of therapeutic goods, and industry associations also have their own Codes of Practice.

Interactions with healthcare professionals

Under the laws regulating healthcare professionals, it is regarded as unprofessional conduct if the healthcare professional accepts from a supplier of a health product (or from a 3rd party on the supplier's behalf) a benefit as inducement, consideration or reward for recommending that another person use the health product.

The industry associations for suppliers of pharmaceutical products, and for suppliers of medical devices, also provide guidance in their Codes of Conduct on appropriate interactions between the suppliers and healthcare professionals, including in the areas of sponsoring research and sponsoring attendance at conferences.

Australia is a land of great natural beauty and boundless opportunity. Despite often turbulent global financial conditions, Australia's economy continues to be one of the world's most stable. Sound governance creates certainty for foreign investment and Australia's skilled workforce, ties to Asia and success in key industries makes Australia a great place for doing business.

If you would like further information about any of the issues covered in this guide, please contact the relevant author of each chapter or another member of Piper Alderman's national team.