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Year in review, Year to come Australian Law

December 2018



Year in review

Australian Law in 2018

Key areas of focus included law reform in relation to data protection and foreign investment regulation and taxation as well as new laws aimed at protecting critical infrastructure assets and making companies operating in Australia more accountable in some of their business practices and operations.



Schemes of arrangement:

The Federal Court took a pragmatic approach to the question of whether, in a takeover bid effected by a scheme of arrangement, the bidder can make a last-minute increase in the scheme consideration without having to adjourn the scheme meeting and provide supplementary disclosure to target shareholders.

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Authorised deposit-taking institutions (ADI):

The Australian Prudential Regulation Authority (APRA) introduced the restricted ADI licensing scheme, providing a new pathway for small financial entities to enter the banking industry. The scheme provides for two-year licences for a limited range of banking activities with reduced prudential and reporting standards.

Changes to the Banking Act:

Amendments to the *Banking Act 1959* (Cth) mean that ADIs may use "bank", "banker" and "banking" without APRA's prior approval. "Credit union", "credit society", "credit co-operative" and "building society" continue to be restricted terms.

Financial benchmarks:

In 2018, laws were enacted to strengthen the Australian Securities and Investments Commission's (ASIC) regulation of financial benchmarks. The scheme introduces a "benchmark administrator" licensing regime with civil and criminal penalties for financial institutions, including foreign entities, that manipulate financial benchmarks. ASIC also published rules and guidance for the new regulatory regime.

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Goods and Services Tax (GST) withholding on new residential premises sales:

From 1 July, purchasers of new residential properties or new potential residential land are required to pay the GST directly to the Australian Tax Office (ATO) on settlement.

Overhauling foreign financial service licensing:

ASIC released a consultation paper on a proposed new licensing regime for foreign financial services providers that will be broadly in line with the regime for Australian financial services providers, but with relief from some *Corporations Act* provisions and the imposition of certain additional tailored licence conditions.

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Digital currency:

As of 11 April, all Digital Currency Exchange providers operating in Australia are required to register with the Australian Transaction Reports and Analysis Centre and comply with "know your customer" and anti-money laundering and counterterrorism financing requirements. The new laws cover for the first time regulation of service providers of cryptocurrencies, including bitcoin.

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Asia Region Funds Passport:

With the enactment of the *Corporations Amendment (Asia Region Funds Passport) Act 2018* (Cth), Australian fund managers can now offer interests in qualifying funds to investors across multiple participating economies in Asia, with limited additional regulatory requirements. ASIC subsequently released updated guidance for the funds management industry to help improve industry access to funds from participating economies throughout the Asia region.

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Corporate collective investment vehicles (CCIV):

The Federal Government released for consultation the third tranche of proposed legislation, and accompanying explanatory materials, to address some of the remaining gaps in the proposed CCIV framework.

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2018 highlights

Australian fund managers can now offer interests in qualifying funds to investors across multiple participating economies in Asia, with limited additional regulatory requirements.

2018 highlights

Under the new Notifiable Data Breaches Scheme, the Office of the Australian Information Commissioner and affected individuals must be notified if certain data breaches occur.

Mandatory data breach notification:

From 22 February, all agencies and organisations with existing personal information security obligations under the *Privacy Act 1988* (Cth) must, under the new Notifiable Data Breaches Scheme, notify the Office of the Australian Information Commissioner and affected individuals if certain data breaches occur.

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ATO guidance on the diverted profits tax (DPT):

The ATO released its much-anticipated guidance on the operation of the DPT, which came into effect on 1 July 2017 and imposes a 40% tax. The DPT aims to ensure that the tax paid by "significant global entities" properly reflects the economic substance of their Australian activities, and aims to prevent the diversion of profits offshore through arrangements involving related parties.

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Foreign land and agribusiness acquisitions:

The Foreign Investment Review Board released revised guidance on the application of the "open and transparent sale process" requirements for foreign persons acquiring agricultural land, narrowing the categories of land to which the policy applies and clarifying what constitutes an acceptable form of sale process and the foreign persons subject to the policy.

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International business obligations (IBO):

In a rare appellate court decision in this area of law, the Full Federal Court clarified that the Anti-Dumping Commission must conform strictly with the legislated methods for calculating normal value in relation to dumping duties.

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The Modern Slavery Bill was introduced into Federal Parliament. If passed, affected Australian entities, or entities carrying on business in Australia, will be required to submit a statement on modern slavery risks in their operations and supply chains.

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Foreign Influence Transparency Scheme Act:

In September, a new regulatory scheme was established requiring persons who undertake activities on behalf of a foreign government or political organisation to register with the Attorney General's Department if those activities are intended to influence Australian governmental or political decision-making.

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Intellectual property (IP) laws:

New legislation implementing recommendations from the Productivity Commission's inquiry into Australia's IP arrangements commenced in August. Key changes include: clarifying the scope of the parallel importation laws; repealing some of the requirements applying to filing of pharmaceutical patents; and, introducing additional damages for unjustified threats of infringement proceedings.

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Cartel conduct:

In May, the Full Federal Court allowed an appeal by the Australian Competition and Consumer Commission (ACCC) and imposed a \$46 million penalty for cartel conduct on a Japanese corporation, the highest penalty ever imposed under the *Competition and Consumer Act 2010* (Cth) (CCA).

In July, in a first, the ACCC brought proceedings against an entity for "gun jumping" in relation to a merger, highlighting that until completion of corporate transactions, the prohibition on cartels in the CCA continues to apply.

Security of payment laws:

The Federal Government released a report of the outcome of the Murray Review into Australian security of payment regimes, with extensive recommendations aimed at achieving legislative best practice (including that security of payment is best dealt with at a national level) and balancing the often competing interests of stakeholders.

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Consumer Law:

New legislation to increase the maximum financial penalties for breaches of the Consumer Law was enacted in August. In October, further legislation was passed that included extending the unconscionable conduct protections to publicly listed companies, and enabling the ACCC and ASIC to investigate possible unfair contract terms.

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Franchising:

In March, the Parliamentary Joint Committee on Corporations and Financial Services announced an inquiry into the Franchising Code of Conduct. The reporting date was extended to 6 December 2018. Meanwhile, the ACCC recommitted to focusing on Franchising Code issues and business-to-business unfair contract terms.

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Statutory priority:

In February, the Victorian Court of Appeal confirmed that the statutory order of priority applies to trust creditors, so that trust assets should be applied first in paying employees and other statutory preferred creditors. In March, the Full Federal Court came to the same conclusion but for varied reasons, meaning confusion remains.

[Read more here](#) and [here](#)

Ipsso facto laws:

Australia's new ipso facto regime applies to contracts entered into on or after 1 July 2018. It imposes a stay on the exercise of certain contractual rights in some insolvency regimes (administration and some receiverships and schemes of arrangement, but not liquidation). There are many exemptions from the regime.

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Class actions:

The Federal Court stayed two competing class actions against a company and allowed a third class action to proceed, suggesting an increasingly "hands on" approach by the Court to case management. The Australian Law Reform Commission supported this approach.

Subsequently, the Full Federal Court ordered the transfer of four related class actions to the New South Wales Supreme Court, where a fifth class action is pending.

[Read more here](#), [here](#), [here](#) and [here](#).

The Victorian Law Reform Commission completed a class action regime review, calling for national litigation funding regulation, lifting the ban on contingency fees subject to appropriate regulatory measures and a greater supervisory role for the Victorian Supreme Court.

Infrastructure:

The Federal Parliament legislated to protect Australia's infrastructure in the electricity, water, ports and gas sectors from security risks.

From 11 July, Australian infrastructure owners and operators must provide information about "critical infrastructure" for inclusion on the Register of Critical Infrastructure Assets.

[Read more here](#) and [here](#).

Read more [here](#) and [here](#).

Year to come

Australian Law in 2019

There are a number of areas on which law reform is anticipated in 2019, including in relation to the banking and financial sectors and data protection. However, the requirement to hold a federal election by 18 May 2019 may see some proposed reforms delayed or abandoned, depending on the outcome.



Federal election:

The requirement to hold a federal election by 18 May 2019 may see some proposed areas of law reform delayed or abandoned, depending on which party wins and the composition of the Senate (upper house).

Banking Royal Commission:

In 2018, the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry conducted hearings into consumer lending, financial advice, loans to small and medium sized enterprises, financial service entities in regional and remote communities, superannuation, insurance and general policy questions. The interim report was tabled in September 2018, with the final report expected by 1 February 2019.

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Authorised deposit-taking institutions (ADI):

In August 2018, the Australian Prudential Regulation Authority (APRA) sought feedback on proposals to promote increased transparency of ADI capital ratios and their comparability with other domestic and international markets. APRA will consult on draft revised prudential standards in 2019. Also, APRA has altered reporting standards for counterparty credit risk and adopted a simplified approach for measuring counterparty credit risk exposures for ADIs with immaterial levels of counterparty credit risk. The new prudential and reporting standards commence on 1 July 2019.

Ownership limit for banks:

In October 2018, the Federal Parliament introduced a Bill that, if enacted, will increase the current maximum shareholding limit for ADIs and other financial sector entities from 15% to 20%. It also introduces a streamlined approval process for new financial sector companies.

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Corporate and financial sector misconduct:

In September 2018, the Federal Government released draft legislation that, if enacted, will implement many of the recommendations of the ASIC Enforcement Review Taskforce to strengthen the penalty regime for corporate and financial sector misconduct, following the Taskforce's finding that the current penalty regime is "inadequate" for addressing the "severity of misconduct" or acting as a "credible deterrent".

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Decryption law:

In August 2018, the Federal Government released draft legislation requiring tech companies with end-to-end encrypted messaging services to cooperate with law enforcement agencies. Industry and rights groups, who opposed the proposed law, are waiting for the Government's response.

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Digital platforms:

A final report into the Digital Platforms Inquiry, charged with looking at the effect that digital search engines, social media platforms and other digital content aggregation platforms have on competition in media and advertising services markets, is due by 3 June 2019.

Consumer data right (CDR) rules:

The first phase of the CDR, allowing consumers to access particular data, including transaction, usage, and product data, in a useful digital format, commences on 1 July 2019. The rules will begin in the banking, energy and telecommunications sectors, and will be rolled out to other sectors over time. The Office of the Australian Information Commissioner and the Australian Competition and Consumer Commission will have separate but complementary enforcement roles.

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2019 highlights

The ATO will continue to focus on tax avoidance by multinational enterprises operating in Australia during 2019.

2019 highlights

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2019 highlights

With the current rate of solar PV and wind deployment, Australia is forecast to exceed the 2020 renewable energy target of 33,000 GWh, achieve 26% emissions reduction by 2020/21 and meet its Paris greenhouse emissions target in 2024/25.

Stapled structures:

On 20 September 2018, the Federal Government introduced a Bill to give effect to various integrity measures aimed at foreign investors. The changes, which are subject to transitional rules, include the imposition of a 30% managed investment trust withholding tax rate on: distributions of some income from cross-staple arrangements (subject to various exceptions); distributions attributable to trading income derived through other trusts; and, income and capital gains from agricultural land and residential premises. The sovereign immunity and superannuation fund withholding tax exemptions are restricted to payments by entities in which the non-resident has a less than 10% interest.

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Hybrid mismatch rules:

As part of the base erosion and profit shifting project, the Organisation for Economic Cooperation and Development developed hybrid mismatch rules aimed at preventing multinational companies from gaining an unfair competitive advantage by avoiding income tax or obtaining double tax benefits through hybrid mismatch arrangements. These arrangements exploit differences in the tax treatment of an entity or instrument under the laws of two or more tax jurisdictions. Subject to some exceptions, the rules apply to affected payments after 1 January 2019, and to income years commencing on or after 1 January 2019.

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IBO:

New and impending laws, such as the *Foreign Influence Transparency Scheme Act 2018* (Cth) and the *Modern Slavery Bill 2018* (Cth), 2019 will be implemented in 2019, and there is interest in how courts will interpret the requirements, if tested. Also, the ASX Corporate Governance Council is expected to release the fourth edition of the Corporate Governance Principles and Recommendations. The draft released in May 2018 retained the same eight core principles contained in the third edition, although the Council has proposed significant changes to principle 3 (*a listed entity should act ethically and responsibly*) to address issues of corporate values and culture, social licence to operate with stronger reference to stakeholders beyond shareholders, and specific recommendations on whistleblowing and anti-bribery and corruption.

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Infrastructure:

Further development of major construction projects will occur in the Australian infrastructure market in 2019, including North East Link, Melbourne Airport Rail Link, Sydney Metro West and the Victorian Outer Suburban Arterial Roads project.

Class actions:

With inquiries by the Victorian Law Reform Commission and the Australian Law Reform Commission into Australia's class action regime in 2018, there is likely to be pressure for reform in 2019, particularly in relation to litigation funding and the management of class actions. However, progress may be delayed by the impending federal election.

Security of payment laws:

The New South Wales Government has proposed changes to the *Building and Construction Industry Security of Payment Act 1999* (NSW) that are consistent with the recommendations in the Murray Review, though not primarily created specifically to give effect to that review. The Bill seeks to facilitate greater confidence within the industry about the Act's ability to facilitate cash flow along the construction chain.

Improved conveyancing technology:

Technology is increasingly being used in conveyancing practice, enabling integration between searches and enquiries functions, conveyancing matter management and electronic conveyancing. Reliance on, and ongoing development of, technology-based practices is expected to increase in 2019. Further, in 2019, it is anticipated that Sympli, a new Electronic Lodgement Network Operator (ELNO), will commence operating. Currently, the sole Australian ELNO is Property Exchange Australia (PEXA). The aim is for all ELNOs to share information to facilitate electronic settlements even though parties may be using different platforms.

Multinational anti-avoidance compliance activity:

It is likely the ATO will continue to focus on tax avoidance by multinational enterprises operating in Australia during 2019. In particular, the ATO can be expected to continue applying the enhanced transfer pricing rules, the multinational anti-avoidance law (directed at significant global entities where a foreign entity makes sales directly to Australian customers without attribution of that income to an Australian permanent establishment), and the diverted profits tax.

IP:

IP Australia released exposure draft legislation to implement the second part of the Federal Government's response to the Productivity Commission's final report on its inquiry into Australia's IP arrangements. Changes include amending inventive step requirements and provisions for compulsory licensing for patents, as well as abolishing the innovation patent system. A Bill is expected in late 2018 or early 2019. The *Copyright Amendment (Online Infringement) Bill 2018* (Cth) passed the lower House in October 2018 and was referred to a Senate Committee for review, with the Senate's report due in late November 2018. The Bill aims to allow copyright owners to enforce their rights in the online sphere, expanding the threshold test to catch more online locations that are deliberately infringing copyright.

[Read more](#) [here](#) and [here](#)

Foreign exchange inquiry:

Following a World Bank report that found Australia was the third most expensive G20 country for consumers and small businesses to transmit money, the ACCC will examine the supply of foreign currency conversion services. The final report into the inquiry is due May 2019.

Energy:

The Australian Capital Territory, the first Australian jurisdiction to join the UN-backed Powering Past Coal Alliance, has announced a renewable energy target (RET) of 100% and net zero emissions by 2045. Also, the NSW Government has launched the NSW Emerging Energy Program, aiming to scale back coal and transition to renewable energy by 2040. By maintaining the current rate of solar PV and wind deployment, Australia is forecast to comfortably exceed the 2020 RET of 33,000 GWh, achieve 26% emissions reduction by 2020/21 and meet its Paris greenhouse emissions target in 2024/25. The ACCC will continue its measures to improve transparency across the gas market supply chain, including its trial measures of publishing the LNG netback price on its website. The ACCC will also continue to push for implementation of its electricity recommendations arising from the Retail Electricity Pricing Inquiry Final Report.

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Your contacts

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Please contact your usual Linklaters contact, if you would like to discuss any of these matters further.



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