Bird & Bird

Riding the wave

Peak issues in Australian law

May 2024

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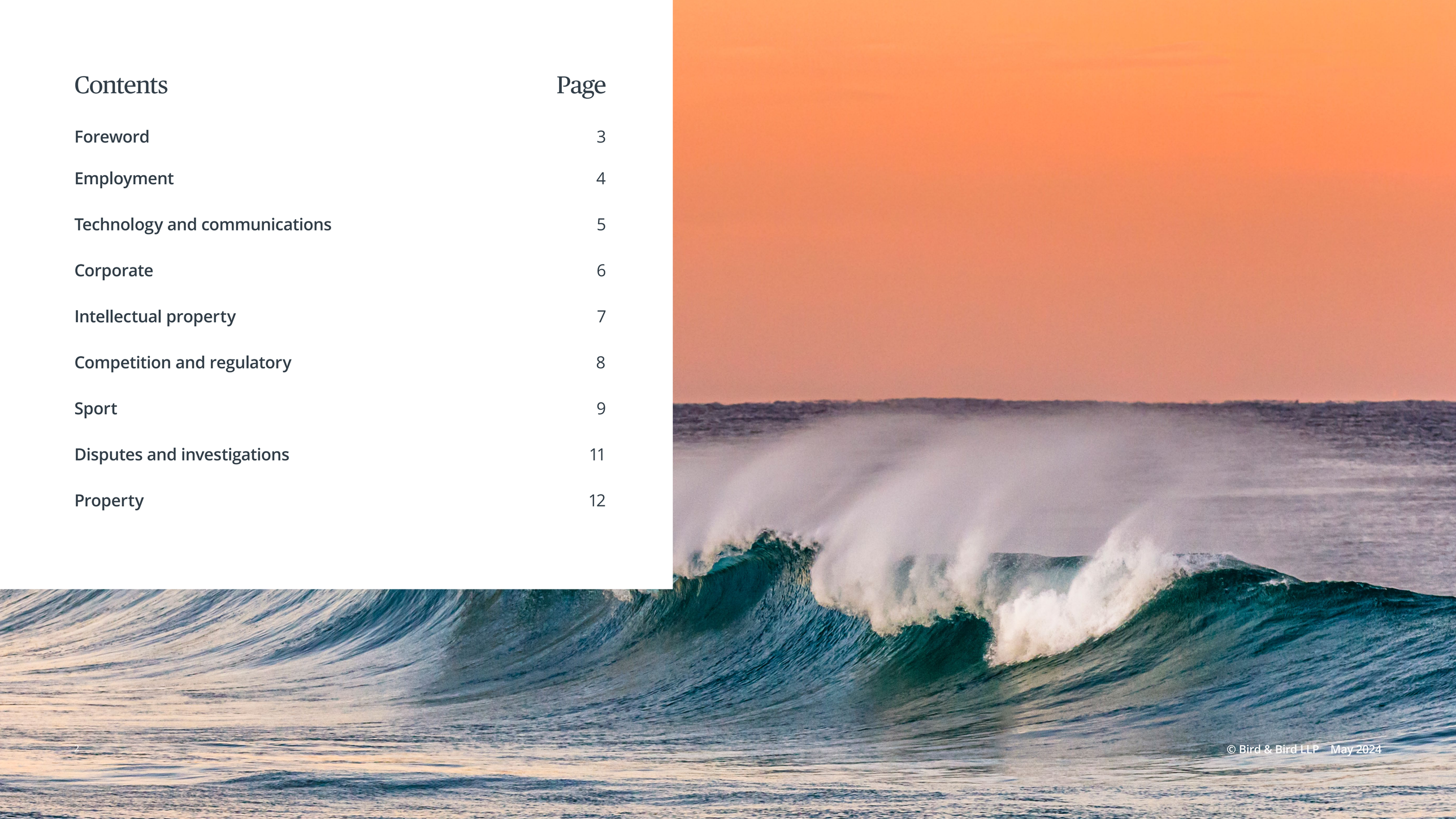

Foreword

As we approach our 10th anniversary in the Australian market, there is much to celebrate.

Over the past decade, we have had the privilege of supporting a wide array of Australian, international and multinational clients – particularly on legal and regulatory matters where there is a technology impact or where the knowledge economy is in play.

We're constantly working with our global colleagues across our extensive global network of 32 offices, and are looking forward to continuing to strategically grow, expand and evolve: supporting you, our clients, well into the future.

Looking ahead, 2024 will be a busy year marked by many significant legal developments. In considering new and upcoming changes to the Australian legal landscape, you might feel that there is an ocean of legal information for you and your business to navigate.

To help you stay ahead, this document includes a summary of topically organised issues, as identified by our lawyers, which represent key areas to watch throughout 2024.

Of course, if you need help diving deeper into any of the legal, regulatory and policy themes or issues that this document explores (or indeed in other legal areas), may I encourage you to contact us. We look forward to working with you.

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Employment

Issue 1: AI-powered applications

AI will be an increasingly key factor in how employers make decisions about their staff in 2024. From hiring to performance evaluation, companies will increasingly find new and innovative ways to use AI-based applications to manage their recruitment and performance management practices.

By embedding AI in the recruitment and performance evaluation process, employers will need to find new and innovative ways to avoid unintended biases from infecting the way in which HR-focused AI operates. This is particularly so where AI is driven by machine learning algorithms than can unintentionally introduce or amplify existing biases in the way employee data is analysed and used.

Issue 2: New protections for 'employee-like' workers

The current federal government has demonstrated a strong interest, including as part of a suite of new reforms that have recently been made to Australia's workplace relations framework, to introduce new protections for 'employee-like' workers who work in gig economy businesses.

Businesses engaging 'employee-like' workers will soon need to prepare to engage with new minimum standards that may, in turn, affect the viability of current terms that workers are engaged under.

Issue 3: Positive duty to prevent sexual harassment, discrimination and other unlawful conduct

In addition to longstanding work health and safety obligations, employers now have a positive duty to prevent sexual harassment, sex-based discrimination and victimisation in the workplace.

Employers can expect increasing regulatory focus in this space over the course of 2024 and in particular, a concerted effort by the Australian Human Rights Commission to shift employers' people management practices from being reactive to proactive in managing the risk of sexual harassment and other unlawful employee conduct occurring in the workplace.

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Technology and communications

Issue 1: Privacy Act review

In February 2023, Australia's Attorney-General unveiled the Privacy Act Review Report, which resulted from an examination of the country's outdated privacy laws. The report included 116 proposals aimed at modernising privacy regulations, expanding the scope of data covered by the *Privacy Act*, and enhancing individuals' control over their personal information to align with global privacy standards. In September 2023, the Australian Government responded to the report, agreeing to 38 proposals, expressing in-principle agreement to 68 proposals. We anticipate further actions from the Australian Government in 2024, including the publication of exposure draft legislation, as part of the ongoing reform process.

Issue 2: AI regulation

As Australia considers regulating AI, current laws like the *Privacy Act* 1988 (Cth), *Copyright Act* 1968 (Cth), and *Competition and Consumer Act* 2010 (Cth) govern AI, though they may need updates to account for continuing developments to the capability of generative AI.

The federal government plans to implement changes recommended in the Privacy Act Review Report regarding automated decision-making. These include specifying personal information used in automated decisions, incorporating indicators into the *Privacy Act*, and giving individuals the right to request information about such decisions, with entities required to disclose this in privacy policies. Legislation is expected to enact these changes soon.

Issue 3: Unfair contracts

Recent changes to the Unfair Contract Terms (UCT) regime in the Australian Consumer Law now apply nationwide and will significantly impact how tech businesses draft contracts. These changes prohibit businesses from proposing, using, or relying on UCTs in standard contracts with consumers or small businesses.

Penalties for non-compliance include fines up to $50 million, three times the benefit gained, or 30% of adjusted turnover during the breach period if the benefit cannot be determined. A term is considered unfair if it creates a significant imbalance between parties and causes detriment without serving legitimate interests. Examples include unilateral indemnities, automatic term renewals, unilateral termination rights, or charging for services not provided without appropriate counterbalancing rights. Many tech vendors will need to adjust their terms in response to these changes.

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Corporate

Issue 1: Mandatory annual climate reporting

Earlier this year, the Federal Government released the exposure draft of legislation which proposes to impose mandatory climate-related financial disclosure requirements on companies, registered schemes and superannuation entities meeting certain consolidated revenue, consolidated gross asset, employee count and energy reporting thresholds.

Under the proposed regime, reporting entities will be required to prepare and lodge an annual sustainability report setting out compliance with sustainability standards (which are in the process of being finalised). It is anticipated that the sustainability standards will require disclosure with respect of greenhouse gas emissions, climate transition planning, governance and strategy (amongst others).

The proposed regime will be implemented on a phased basis, commencing 1 July 2024.

Issue 2: Foreign investment in Australia's critical mineral sector

Foreign investment in Australia's critical mineral sector in 2024 will continue to be shaped by increased scrutiny and oversight, with the federal government having last year updated its list of critical minerals and publishing its critical mineral strategy for 2023-2030. The critical mineral list and strategy form part of a framework intended to grow Australia's critical mineral sector within the lens of national security, supply chain resilience and sovereign capability.

The effects of this increased scrutiny were evidenced in 2023, with the Australian Treasurer having stopped two deals involving proposed Chinese investment in Australia's critical mineral sector from proceeding. It is expected that the Australian Treasurer will continue to exercise its power in 2024 to block proposed transactions that do not align with Australia's critical mineral strategy.

Issue 3: Directors' duties and cybersecurity

In the wake of several large cyberattacks on Australian companies, the Australian corporate regulator has flagged its intention to undertake enforcement action against directors who fail to take reasonable steps in establishing and adhering to cyber security protocol appropriate to the size and scope of their company's business for breach of their directors' duties. In discharging their statutory duties to act with care and diligence, directors are now expected to take an active stance in safe-guarding their companies from cyberattacks – a duty that further extends to risks posed to the company through reliance on digital supply chains.

Accordingly, directors should consider cybersecurity as within the ambit of their responsibility and formulate action plans to properly discharge their responsibilities and take reasonable steps to mitigate the risks posed by cyberattacks on their company.

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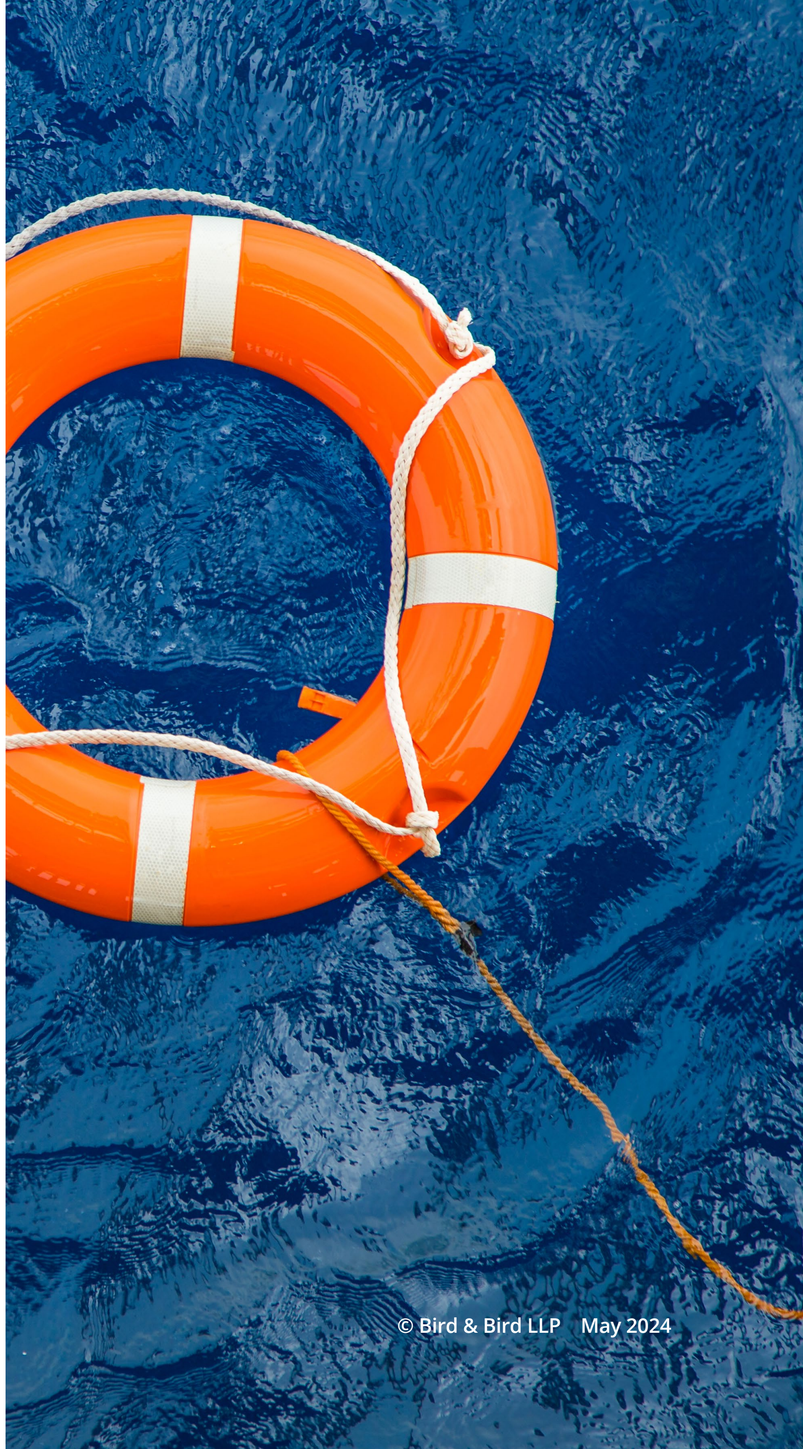

Intellectual property

Issue 1: AI-powered applications

AI is creeping into every facet of business and our daily lives – AI can assist in simple everyday processes, contract drafting and sophisticated innovation processes.

Complicated questions around intellectual property rights arise from any use of AI, such as:

- Is the business using third party information to train AI? If so, does the business have the rights to use that material, and does this pose a copyright infringement risk?
- What about the output of the AI – can/does a business own that output?

At this stage, statutory intellectual property rights (at least in Australia) have not caught up to include AI as being (i) capable of being an inventor for the purposes of the Australian patent regime, or (ii) an author of any work for the purposes of the *Copyright Act*.

The state of our regime poses interesting, and difficult considerations for business in considering any use of AI, particularly in any innovative space.

Issue 2: An increase in data breaches and theft of confidential information

Over the past several years there has been a demonstrable increase in data breaches, and also theft of confidential information cases by ex-employees.

In a world where there is an increasing risk of a confidential data and information being stolen from a business, and made publicly available, should business consider other avenues to protect innovation that it would have traditionally treated as confidential information?

For example, should the business consider relying on statutory monopolies, such as granted patents, in respect of any innovation (where this option is available)?

While this particular statutory monopoly is finite (20 years, assuming renewal fees are paid), the benefit is that if information regarding the invention the subject of that patent is stolen (for example, by an ex-employee), and disseminated, or otherwise used, the business has a statutory right which they can enforce to prevent the use of the invention for the period of the monopoly.

A business can of course bring an action for breach of confidence, but these are inherently difficult cases to prove.

Issue 3: Brand protection in a global marketplace

It is becoming increasingly common for Australian brands that want to launch overseas after a successful Australian launch, to find that the mark that they want to use is owned by someone else in that country, and cannot be used. This is because registered trade mark protection is jurisdiction based.

It is imperative that businesses consider the ultimate end goal at the outset of the development of their offering, be that a product or service.

If global domination is on the agenda, or even a launch in one other foreign country outside Australia, the business should consider during the development phase whether the chosen mark is available for use in all markets of interest. If they are, they should secure trade mark and domain name rights early in those jurisdictions. This will save disappointment down the track, and the need to have different brands operating in different markets (or the cost of a rebrand to avoid that scenario).

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Competition and regulatory

Issue 1: Cost of living

Cost of living concerns are at the forefront of many Australians' minds this year. It is also a high priority for both the Government and Australia's competition regulator, the Australian Competition and Consumer Commission ("**ACCC**").

One of the ACCC's current enforcement priorities is competition and consumer issues arising from the pricing and selling of essential services, including energy and telecommunications.

The ACCC has also been directed by Treasury to conduct an inquiry into the supermarket sector. While the precise details of the ACCC inquiry have not been published (at the time of writing), the intention is that it will consider the pricing practices of supermarkets and other suppliers within the supply chain, as well as the structure of relevant markets for the supply of groceries by suppliers, wholesalers, and retailers. A draft report is due to the Government by 31 August 2024.

Government is also undertaking a review of the current Food and Grocery Code of Conduct which is a voluntary code that sought to address the imbalance of bargaining power between supermarkets and their suppliers.

Issue 2: Telcos under scrutiny - combatting scam and addressing cyber threats

2023 was a year in which the impact of network outages and the potential risk of cyber threats hit the headlines, and 2024 will be the year in which Government seeks to tackle these risks.

While the telecommunications industry has previously stood outside many of the obligations under the *Security of Critical Infrastructure Act* 2018 (Cth) ("**SOCI**"), in 2024 it seems likely that telecommunications providers will be brought within its scope as part of the Government's Cyber Security Strategy. In particular, it seems likely that some version of the current Part 14 security obligations in the *Telecommunications Act* 1997 (Cth) will be migrated into SOCI, as will incident and asset reporting obligations.

Telecommunications providers are also likely to be the "canary in the coalmine" for proposed new mandatory industry codes tasked at combatting scam traffic on their networks. As part of this initiative, the Communications Alliance will likely be asked to review the existing Scam Code and consider what changes are required to improve it. Although, how much any future obligations will differ from the existing Scam Code remains to be seen.

Issue 3: Merger reform

Following extensive Government consultation, landmark reforms to Australia's merger laws are on the way. The proposed changes follow substantial advocacy from both the current and former ACCC Chairs. The recent decision by the Competition Tribunal in ANZ/Suncorp Bank merger, where the Tribunal authorised ANZ's proposed acquisition of Suncorp and overturned the ACCC's previous decision, had ensured that the adequacy of the current merger regime remained a hot topic.

On 10 April 2024, the Treasurer announced the key changes. The proposed reforms are set to apply from 1 January 2026 and shall include:

- Merger clearance will be mandatory and suspensory for mergers above a certain threshold (which will be determined through consultation).
- The notification threshold will account for serial acquisitions.
- The factors to consider when determining whether a transaction will substantially lessen competition will include whether the merger creates, strengthens or entrenches a position of substantial market power in any market.
- Merger notification will incur a fee and timelines will be tight.

Further consultation on the details is expected to take place this year.

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Sport

Issue 1: Proposed changes to the regulation of gambling advertising

In 2023, amid growing public concerns regarding the scope and extent of online gambling and its impacts on those experiencing gambling harm in Australia, the Australian Government announced a parliamentary inquiry to be conducted by the Social Policy and Legal Affairs Committee (Committee). In that inquiry, the Committee made a number of recommendations including the introduction of a comprehensive ban on all forms of advertising for online gambling to be implemented in four phases between 2023 and 2026:

Phase one

A ban of all online gambling inducements, such as the offer of credits, rewards or vouchers, a ban on all advertising of online gambling on social media and online platforms and a ban on advertising online gambling on commercial radio between 8.30am – 9.00am and 3.30 – 4.00pm (i.e. during school drop off and pick up times);

Phase two

a ban on all online gambling advertising and commentary on odds, during and an hour either side of a sports broadcast. The ban would also extend to all advertising inside stadiums, including logos on players' uniforms;

Phase three

a ban on all broadcast online gambling advertising between the hours of 6am and 10pm; and

Phase four

all advertising and sponsorship of online gambling to be banned by the end of year three (i.e. 2026).

The recommendations have been strongly resisted by a number of key stakeholders in the sports industry in Australia and lobbying continues. It remains to be seen whether a complete ban on online gambling in Australia will be implemented.

The Australian Government is currently considering its response to the inquiry, which is expected in the coming months.

Issue 2: Eligibility and integrity matters

With Australia hosting the Brisbane Olympics in 2032, the CEO of the Australian Sports Commission has announced the governing body's strategic vision to: (i) lead and enable the 'world's best sport system'; (ii) involve more Australians with sport at all levels; and (iii) drive innovation in sport.

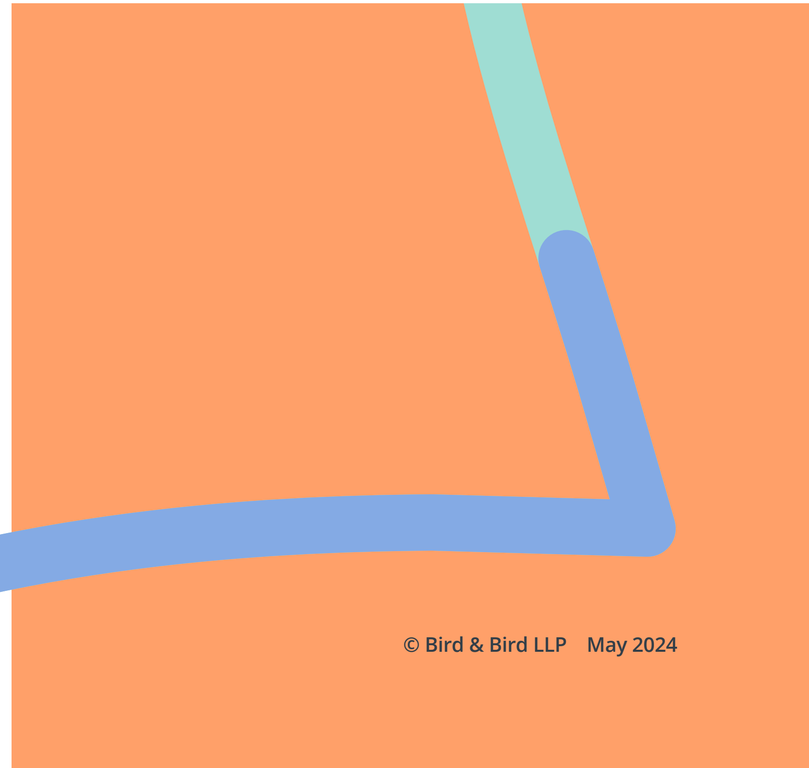
There are three particular issues that currently have the attention of Australian sport stakeholders in achieving this strategic vision:

1. How best to regulate the inclusion of transgender and gender diverse athletes in Australian sport. Sports organisations must carefully balance the rights and interests of all athletes concerned, and the outcome of ongoing and high profile cases at the Court of Arbitration for Sport are likely to provide good indications of what can be expected of a sports organisation conducting such an exercise.

2. How best to regulate the anti-doping system, particularly where recent high profile anti-doping cases in Australia have renewed interest in the global anti-doping system. The noise around the so-called 'Enhanced Games' – an alternative competition where athletes are only minimally restricted in their use of performance enhancing substances – is furthering the debate, and anti-doping organisations will need to be proactive on both fronts.

3. How to ensure that our sports are, and continue to be, safe to participate in. Following many inquiries that resulted in shocking revelations, safeguarding has become a key focus for sports organisations. The sharing of knowledge in this space is vital, as this is a relatively new focus for many sports and the consequences of getting it wrong are serious.

The major sporting events to be held in Australia over the coming decade will require all sporting organisations to ensure that the regulations applicable to their competitions in Australia comply with Australian law. There are also increasing opportunities for greater international collaboration.



Issue 3: Proposed changes to broadcasting regulation to support free-to-air television providers

In November 2023, the Australian Government introduced the *Communications Legislation Amendment (Prominence and Anti-siphoning) Bill 2023* (Cth). If passed, it will introduce a number of important changes to various laws that are designed to provide greater accessibility to free-to-air (FTA) content to Australian audiences (including sporting content) in an attempt to modernise Australia's broadcast regulatory framework.

There are two key elements of the Bill to be aware of. Briefly summarised, these are:

1. The establishment of a 'prominence framework' which will impose obligations on manufacturers of regulated connected television devices (e.g. smart TVs) to ensure that those devices carry certain national television broadcasting services and broadcasting video on demand services provided by FTA providers, and comply with certain minimum requirements. Regulations setting out more details are not yet released, but this will be an area to watch; and

2. New reforms to Australia's anti-siphoning regime. Until now, Australia's 30- year old anti-siphoning regime has applied only to subscription television broadcasting licensees (as defined under the *Broadcasting Services Act* 1992 (Cth)). The changes are proposed to capture online media and streaming services so that they are subject to the same anti-siphoning related restrictions as traditional subscription television providers.

The Bill has now been referred to the Senate Environment and Communications Legislation Committee for its review, and the Committee's report is due to be delivered to the federal Parliament by 9 April 2024.

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Disputes and investigations

Issue 1: Implications of high-profile data breaches – a new world of litigation risk

Following a series of high-profile data breaches affecting companies in Australia, there has been increased scrutiny and pressure placed on the Australian Government to strengthen and enforce Australia's privacy laws.

In response to this surge in cybercrime, Australian regulators (including the OAIC and APRA), have been actively pursuing regulatory action against entities the subject of cybercrime. Class action proceedings (both shareholder and consumer-led) have also commenced in this space. This will test novel issues including negligence in the data privacy context, avenues for redress for consumers impacted by cybercrime and the interpretation and application of Australia's data privacy laws.

Additionally, proposed reforms to the *Privacy Act* 1988 (Cth) could further impact businesses through the proposed introduction of a statutory tort for serious invasions of privacy, and a direct right of action for interference with privacy. These changes may simultaneously enhance privacy protections, and increase the risk to businesses by creating direct causes of action for consumers impacted by cybercrime.

Issue 2: Increased responsibilities for boards and body corporates

In what appears to be an attempt to harmonise with other developed nations, Australia has added more responsibility for boards and body corporates.

AUSTRAC, Australia's anti-money laundering and counter-terrorism financing regulator, released its 2024 regulatory priorities: 'enduring priorities' and 'increased regulatory focus'. The enduring priorities include mitigating and managing money laundering and terrorism-financing risk, and ensuring that reporting entities have effective AML/CTF programs setting out how they will comply with the ***AML/CTF Act*** and AML/CTF Rules. The increased regulatory focus is on sectors including digital currency exchanges, payment platforms, bullion, and non-bank lenders and financiers.

Australia has also strengthened its laws for prosecuting foreign bribery by body corporates, after two prior failed attempts. The expanded regime means that Australian companies need to consider what changes may be required to their internal risk and compliance programmes, to ensure that they have 'adequate procedures' in place to prevent the commission of bribery of foreign public officials by 'associates' of the company.

In the past year, the Australian Parliament has continued to exercise its robust powers to inquire about matters important to the Australian public, including the Optus outage. There is also an inquiry into the management and assurance of integrity by consulting services, and more recently, an inquiry into the pricing practices of supermarkets. These inquiries have seen Parliament flex its ability to obtain information from private companies as well as from the public sector, including by way of seeking documents and calling witnesses (in particular, company executives) to give evidence in public hearings. The results of the inquiries are varied and have included referrals to the National Anti-Corruption Commission as well as senior leaders from companies appearing before the inquiries ultimately stepping down.

Issue 3: Greenwashing

With increasing consumer interest in environmentally sustainable services and products, we expect Australia's regulators to continue with enforcement activity against business and financial service providers who engage in misleading or deceptive conduct in relation to 'green' claims.

ASIC and the ACCC have cracked down on greenwashing and misleading ESG claims over the past 12 months, commencing action against entities alleged to have misrepresented the extent to which their company, product, service or investment strategy is environmentally friendly, sustainable or ethical.

ASIC announced its 2024 enforcement priorities in November 2023 to industry and stakeholders, and indicated its enforcement focus covers this space. The ACCC released a guide for businesses in 2023 titled 'Making environmental claims: A guide for business', which aims to provide guidance on businesses' obligations under the ACL when making environmental and sustainability claims.

Companies the subject of adverse regulatory outcomes also risk becoming the subject of future shareholder class actions.

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Property

Issue 1: Foreign investment regulations:

In Australia, there is a comprehensive framework of regulations in relation to foreign investment in Australian real estate, overseen primarily by the Foreign Investment Review Board (**FIRB**).

FIRB mandates that foreign investors seek approval before acquiring certain types of property. The regulations categorise properties into different classes based on factors such as property type, value and the nationality of the foreign investor. Commercial properties, residential real estate, agricultural land, and certain types of developments are subject to scrutiny by FIRB and specific guidelines dictate the permitted investment activities.

FIRB closely examines investments made by Foreign Government Investors (**FGIs**) in particular. FGIs are required to seek approval from FIRB before acquiring Australian assets, including property interests, and FGIs investments undergo thorough review.

In our observation, numerous companies, including typically entities with affiliations to large pension or endowment funds, may unwittingly find themselves classified as FGIs subject to FIRB. FGIs undergo a thorough review process by FIRB, which examines various aspects of the proposed investment, including its nature, purpose and potential impact. Legal practitioners or entities involved in cross-border transactions need to be aware of the impact of FIRB and its compliance requirements at the outset of a transaction that involves Australian real estate or assets.

Issue 2: Register of foreign ownership of Australian assets:

From 1 July 2023, a new Register of Foreign Ownership of Australian Assets (**Register**) came into effect imposing additional reporting obligations on foreign persons, which includes investors or entities, who acquire or dispose of certain interest in Australian assets, including Australian land, water, businesses and entities.

It is important for foreign persons to note that the obligation under the New Register is a distinct and separate obligation from FIRB. Some transactions that do not require FIRB approval will need to be notified to the ATO and added to the Register after they have completed.

The purpose of the Register, which is administered by the Australian Taxation Office (**ATO**) and not available to the public, is to provide the government with visibility of Australian assets owned by foreign persons to assist with future policy developments in Australia.

While the Register consolidates and streamlines several existing Australian registers it also captures a broader range of interests acquired by foreign investors than previous registers, particularly in relation to commercial land.

What are notifiable actions?

Actions in relation to Australian land by foreign persons that would trigger the requirement to provide the ATO with a register notice include (but are not limited to):

- Acquisitions of an interest in Australian land which includes agricultural land, commercial land, residential land or a mining or production tenement;
- Acquisitions of an equitable interest or legal interest in Australian agricultural land;
- Acquisitions in a security in an entity which grants the holder an entitlement to occupy a flat or home unit on Australian land;
- Acquisitions of an interest in a share in an Australian land corporation or agricultural land corporation;
- Acquisitions of an interest in a unit in an Australian land trust or agricultural land trust;
- Acquisitions of an interest in a share of a corporation which is the trustee of an Australian land trust or agricultural land trust;
- A change in the nature of an interest in acquired Australian land change from what has been previously recorded in the Register (for example, the classification of the land changes from residential to commercial land);
- Acquisitions of a registrable water interest (e.g., an irrigation right or a right to hold or take water) by a foreign person held during the Australian financial year;
- A change in the characteristics of water interest held by a foreign person (e.g., changes to volume of water or the share of a water resource) during the financial year.

When must the ATO be notified?

Notification is generally required to be submitted within 30 days after either the:

- date the acquisition of an interest in Australian land occurred;
- date the foreign person is aware or should have reasonably known about the change in the nature of interest in acquired Australian land; or
- last day of the financial year, being the period from 1 July to 30 June, in relation to an acquisition of a registrable water interest.

How can the ATO be notified?

A notice is given by submitting a registrar notice electronically via the Online Services foreign Investors (on the ATO website). Foreign investors and their representatives will need a myGovID to access the service.

Records

Foreign persons must make records relating to register notices and keep those records for 5 years.

Key takeaways

Foreign persons should review their internal policies to ensure compliance with these provisions as failure to report their interest to the ATO or to keep records may attract a civil penalty of 250 penalty units (currently AUD$68,750).

It is important for foreign persons to note that reporting obligations can exist regardless of whether FIRB approval is required in relation to a transaction. Foreign investors must ensure that all acquisitions are assessed for compliance with their monitoring obligations.

Foreign investors should review their internal processes to effectively monitor all changes in interest and acquisitions after 1 July 2023 and ensure that the ATO are notified in a timely manner to avoid penalties.

1. What constitutes an interest in land is drafted very broadly and includes an interest as a tenant in a lease in relation to commercial or residential land with a term that is likely to exceed 5 years (including any extension or renewal of the term).

Issue 3: Other hot topics

Climate change resilience and adaptation:

With the increasing recognition of climate change impacts on the built environment, there is a heightened focus on regulations and legal frameworks related to sustainability, energy efficiency, and resilience in real estate development and transactions. This includes stricter construction codes, requirements for climate risk assessments, and incentives for green building practices.

Additionally, regulatory changes regarding construction codes and insurance requirements may affect property development and investment decisions. Investors will need to consider the implementation of resilient building practices, investment in climate-adaptive infrastructure, and policy measures to incentivize sustainable development and mitigate climate-related risks.

Technology disruption and digital transformation:

Rapid technological transformation, driven by innovations such as artificial intelligence, blockchain, and virtual reality will continue to reshape various aspects of the real estate lifecycle, including property listing, transaction processes, and property management.

The adoption of technology in the real estate sector is likely to continue, with a greater emphasis on digital platforms, data analytics, and PropTech solutions. Real estate law may need to evolve to address legal considerations related to e-conveyancing, smart contracts, blockchain-based transactions and data privacy and security in property transactions.

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