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Fact Sheet 1 - Corporate Governance Principles

Good corporate governance is a key element in improving economic efficiency and growth, as well as enhancing investor confidence. It involves the relationships between a company's management, its board, its shareholders and other stakeholders. Good corporate governance should provide proper incentives for the board and management to pursue objectives that are in the interests of the company and its shareholders and should facilitate effective monitoring. The presence of an effective corporate governance system, both within an individual company and across an economy as a whole, helps to provide a degree of confidence that is necessary for the proper functioning of a market economy.

The Australian Securities Exchange (ASX) Corporate Governance Council has developed Corporate Governance Principles for Australian listed entities.¹ Companies listed on the ASX must comply with these Corporate Governance Principles on an 'if not, why not' basis. Although non ASX listed companies are not required to comply with the ASX's Corporate Governance Principles, they provide a useful framework for identifying those behaviours that are considered to be good corporate governance practices.

By Australian standards, a good corporate governance system would generally be expected to encompass the following characteristics:

- A formalisation of the functions reserved to the board and those delegated to management.
- A majority of the board would be independent directors. The chairperson would also be an independent director. The Chairperson and the Chief Executive Officer would not be the same person.
- An established code of conduct for company officers.
- An established trading policy for company officers.
- An established audit committee.
- Established policies for the oversight and management of material business risks.
- An established remuneration policy for executives and non executive directors.

Further details regarding corporate governance principles may be obtained from ASX's website (https://web.archive.org.au/awa/20211213003954mp_/http://www.asx.com.au).

From an international perspective, the Organisation for Economic Co-operation and Development (OECD) Principles of Corporate Governance are often used as a benchmark for standard setting and identifying corporate governance best practices. Although primarily focussed on assisting governments in their efforts to evaluate and improve their legal, institutional and regulatory frameworks for corporate governance, the OECD Principles are also intended to provide guidance and suggestions for other parties that have a role in the process of developing good corporate governance (including stock exchanges, corporations and investors). The OECD has also developed Guidelines on Corporate Governance of State Owned Enterprises to provide concrete advice to countries on how to manage more effectively their responsibilities as company owners, thus helping to make state owned enterprises more competitive, efficient and transparent.²

1 See www.asx.com.au/documents/asx-compliance/cgc-principles-and-recommendations-3rd-edn.pdf (https://web.archive.org.au/awa/20211213003954mp_/http://www.asx.com.au/documents/asx-compliance/cgc-principles-and-recommendations-3rd-edn.pdf).

2 The OECD's Principles of Corporate Governance and Guidelines on Corporate Governance of State-Owned Enterprises are available at www.oecd.org (https://web.archive.org.au/awa/20211213003954mp_/http://www.oecd.org).

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Fact Sheet 2 - Compliance with Corporate

Law Administered by the Australian Securities and Investments Commission (ASIC)

The Australian Securities and Investments Commission (ASIC) is Australia's corporate, markets and financial services regulator. It is the independent Commonwealth Government body responsible for (among other things) registering and ensuring companies, schemes and various individuals and entities meet their obligations under the *Corporations Act 2001* (https://web.archive.org.au/awa/20211213003954mp_/https://www.legislation.gov.au/latest/C2004A00818) (the Act).

Foreign companies intending to carry on a business in Australia are generally required to register with ASIC as a foreign company. These companies are discussed further below.

Alternatively, a foreign entity may choose to incorporate an Australian company (for example, a subsidiary), to conduct business in Australia.

Australian companies

Australian companies are generally governed by a constitution; in the absence of a constitution, a company will be governed by a set of common rules provided in the Act.

In order to be registered as an Australian company by ASIC, the company must have at least one member. The majority of Australian companies are 'proprietary companies'. Proprietary companies must have at least one director who ordinarily resides in Australia, and a registered office in Australia. Companies with more than 50 non-employee members and/or who wish to offer shares to the public must be 'public companies'. Public companies must have at least three directors, with two directors that reside in Australia. Large proprietary companies (for example, those meeting a threshold level of revenue, assets and employees) and public companies are required to lodge an audited financial report and directors' report with ASIC each financial year.

All companies must also comply with various notification requirements under the Act, including certain changes to a corporation's and directors' details.

Registered foreign companies

A foreign company intending to carry on a business in Australia is generally registered with ASIC. For the purposes of this requirement, 'foreign company' includes incorporated bodies (other than a corporation sole or exempt public authority) and certain unincorporated bodies that are formed in an external territory of Australia or outside of Australia.

Registered foreign companies are required to lodge financial statements with ASIC at least once every calendar year and at intervals of not more than 15 months. These financial statements comprise:

- a copy of the company's balance sheet, profit and loss statement, and cash flow statement (all made up to the end of the last financial year of the company); and
- any other documents the company is required to prepare by the law that applies in the company's place of origin, together with a statement in writing in the prescribed form, verifying that the copies are true copies of the documents required.

A registered foreign company must appoint a local agent, who is 'answerable for the doing of all acts, matters and things that the foreign company is required by or under the *Corporations Act 2001* (https://web.archive.org.au/awa/20211213003954mp_/https://www.legislation.gov.au/latest/C2004A00818) to do'. The local agent may also be personally liable to a penalty imposed on the foreign company for a contravention of the Corporations Act.

Registered foreign companies must also notify ASIC of certain changes, including amendments to: its constitution or any other lodged documents; its directors (including changes to the powers of Australian resident directors); and/or its local agent.

Please refer to ASIC's website (https://web.archive.org.au/awa/20211213003954mp_/http://www.asic.gov.au/) for further details regarding the regulatory obligations of Australian and registered foreign companies.

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Fact Sheet 3 - Directors' Obligations

Australia's corporate regulatory regime, the *Corporations Act 2001* (https://web.archive.org/awa/20211213003954mp_/https://www.legislation.gov.au/latest/C2004A00818) (the Act) and general Australian law impose duties upon directors of Australian companies. These include to:

- exercise due care and diligence in the exercise of their powers and the discharge of their duties;
- act in good faith in the best interests of the company and for a proper purpose;
- avoid improper use of their position to gain advantage for themselves or cause detriment to the company; and
- avoid improper use of information obtained in their role as a director to gain advantage for themselves or cause detriment to the company.

The law regarding these general duties is subject to detailed interpretation by Australian courts. For example, these duties impose obligations on directors to ensure that they appropriately manage any conflicts that arise during the discharge of their duties. They also import obligations regarding their knowledge and understanding of the financial position of the company. There are also restrictions on the ability of directors to delegate the discharge of their duties to third parties.

In addition to their general duties, the Act also imposes certain specific obligations on directors. These include:

- the duty to prevent insolvent trading by the company. This requires directors to ensure that the company does not incur a debt at a time when the company is insolvent, or becomes insolvent by incurring that debt (or other debts including that debt); and
- obligations with respect to the preparation of the company's financial statements, including the making of a declaration as to whether the financial statements comply with accounting standards and give a true and fair view of the financial position and performance of the company.

Breaches of certain directors' duties and other obligations carry serious penalties including fines, imprisonment, and being prohibited from acting as a director or managing a company. Any person proposing to be a director should ensure that they are fully aware of all of their obligations under Australian law.

Please refer to company officeholder duties on the ASIC website (https://web.archive.org/awa/20211213003954mp_/http://www.asic.gov.au/for-business/running-a-company/company-officeholder-duties/) for further details.

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Fact Sheet 4 - Market Activities

Dealings, including takeovers, in securities involving Australian companies and other dealings on Australian financial markets must be conducted in accordance with the *Corporations Act 2001* (https://web.archive.org.au/awa/20211213003954mp_/https://www.legislation.gov.au/latest/C2004A00818) (*Corporations Act*).

- The Australian Securities and Investments Commission (ASIC) performs supervision of real-time trading on all of Australia's domestic licensed markets. ASIC is responsible for both the supervision and enforcement of the laws against misconduct on Australia's financial markets. ASIC provides full details and guidance regarding these matters — please refer to ASIC's website (https://web.archive.org.au/awa/20211213003954mp_/http://www.asic.gov.au/).
- The Takeovers Panel is a peer review body that regulates corporate control transactions in widely held Australian entities, and is the primary forum for resolving disputes about a takeover bid. The Panel publishes helpful information, including guidance notes and the reasons for its decisions, at its Takeovers Panel website (https://web.archive.org.au/awa/20211213003954mp_/http://www.takeovers.gov.au/).
- The Australian Securities Exchange (ASX) website (https://web.archive.org.au/awa/20211213003954mp_/http://www.asx.com.au/) also has information regarding ASX-listed entities, including relevant forms and notices.

Insider trading

It is illegal under the Corporations Act to use inside information to acquire or dispose of financial products, or to procure another person to acquire or dispose of financial products.

ASIC is responsible for detecting insider trading. However allegations of insider trading may also be referred to ASIC by a market operator, usually the ASX, as well as by other sources including complaints made by the public and self-reporting by stockbroking firms. ASIC is also responsible for investigating and prosecuting allegations of insider trading.

Serious civil and criminal penalties apply under the Corporations Act to both individuals and corporations for conduct amounting to insider trading.

Market manipulation

Any deliberate attempt to force a security's price to an artificial level is illegal under the Corporations Act, irrespective of the method(s) employed. ASIC continuously monitors market activity, in real time, for suspicious trading patterns that could indicate market misconduct. Where such patterns are observed, or if matters are referred to them, ASIC has broad powers to investigate and, where appropriate, prosecute misconduct. If the activity is determined to constitute market abuse, ASIC will pursue appropriate sanctions under the Corporations Act.

Serious civil and criminal penalties apply under the Corporations Act to both individuals and corporations for conduct amounting to market manipulation.

Disclosure of shareholdings

Under both the Corporations Act and the ASX Listing Rules, an entity (whether foreign or local) that controls five per cent or more of the securities (including the holdings of its associates) in an ASX-listed entity is required to lodge a substantial shareholder (or security holder) notice with the listed entity and the ASX. It must also then lodge further notices whenever its shareholding increases or decreases by one per cent or more.

For both the takeovers and substantial shareholding provisions an associate of a company is any other body corporate that controls or is controlled by the original company, is controlled by the same holding company as the original company, or any person that the original company is acting in concert with in regards to the affairs of the entity in which the shares are held.

Takeovers and acquisitions

The Corporations Act imposes restrictions on the acquisition of voting power in companies or managed investment schemes. An entity must make a takeover bid for a company where it increases its (including the holdings of its associates) voting shareholding in a listed company or an unlisted company with more than 50 members:

- to more than 20 per cent; or
- further increases its holding from a starting point that is above 20 per cent.

There are a number of exceptions to this rule, including where an entity increases its shareholding in a company by no more than three per cent every six months or where the acquisition is approved by the target's shareholders.

Capital raisings

Disclosure to investors is generally required when capital is raised, whether by way of a new issue of securities or a sale of existing securities, unless an exception applies. Disclosure may take the form of a disclosure document such as a prospectus or, in the case of a managed investment scheme, a product disclosure statement.

A disclosure document must contain all the information that investors and their professional advisers would reasonably require to make an informed assessment of the rights and liabilities attached to the securities, as well as the assets and liabilities, financial position and performance, profits and losses and prospects of the entity.

An offer document must not contain any information that is likely to mislead or deceive investors or omit any material information.

Serious civil and criminal penalties apply for failing to adhere to the disclosure requirements under the Corporations Act.

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Fact Sheet 5 - Competition and Consumer Protection Laws

The *Competition and Consumer Act 2010* (https://web.archive.org/awa/20211213003954mp_/https://www.legislation.gov.au/latest/C2004A00109)(CC Act) deals with most aspects of commercial dealings, including those with (and between) suppliers, wholesalers, retailers, competitors and consumers. The CC Act is enforced by the Australian Competition and Consumer Commission (ACCC).

Competition

The competition provisions of the CC Act deal with anti-competitive conduct. Broadly speaking, the Act prohibits the following market conduct:

- contracts, arrangements and understandings that would substantially lessen competition or contain exclusionary provisions or a cartel provision; mergers and acquisitions that would substantially lessen competition;
- misuse of market power;
- exclusive dealing, including third line forcing (for example, when a supplier places a condition on the supply of its goods or services that the customer must acquire goods or services of a particular type from a third person nominated by the supplier); and
- resale price maintenance.

Companies should be mindful of the cartel provisions of the CC Act. Cartel provisions in contracts, arrangements or understandings between parties that are, or would otherwise be, in competition with each other may involve:

- price fixing;
- restricting outputs in the production and supply chain;
- allocating customers, suppliers or territories; and/or
- bid-rigging.

Consumer protection

The CC Act also contains the Australian Consumer Law. It contains a range of consumer protection provisions which, among other things:

- prohibit misleading and deceptive conduct;
- invalidates unfair terms in standard form consumer contracts;
- provide statutory consumer guarantees for goods and services;
- set out Australia's product safety regime; and
- regulates unsolicited selling practices.

Consumer protections applying to financial products and services are generally mirrored in the *Australian Securities and Investments Commission Act 2001* (https://web.archive.org/awa/20211213003954mp_/https://www.legislation.gov.au/latest/C2004A00819).

The CC Act also provides for industry codes of practice and the regulation of industries such as telecommunications, gas, electricity and airports.

Significant penalties apply to breaches of the competition and consumer laws in the CC Act.

Please refer to the ACCC's website (https://web.archive.org/awa/20211213003954mp_/http://www.accc.gov.au/) for further details.

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Fact Sheet 6 - OECD Guidelines for Multinational Enterprises

The Organisation for Economic Co-operation and Development Guidelines for Multinational Enterprises (https://web.archive.org/awa/20211213003954mp_/https://www.oecd.org/corporate/mne/) (OECD Guidelines) encourage multinational enterprises operating in Australia and overseas to conduct themselves responsibly and in accordance with the voluntary principles and standards set out in the *OECD Guidelines*. The Australian Government encourages Australian enterprises to observe the Guidelines wherever they operate, while taking into account the particular circumstances of each host country.

The OECD Guidelines provide recommendations on a broad range of issues including:

- human rights;
- employment and industrial relations;
- environment;
- combating bribery, bribe solicitation and extortion;
- consumer interests;
- science and technology;
- competition; and
- taxation.

The Australian National Contact Point (AusNCP) promotes the use of the OECD Guidelines and contributes to the resolution of issues relating to their implementation, including facilitating access to conciliation services. A Senior Official in the Australian Department of the Treasury is responsible for the AusNCP function, which is supported by a Secretariat in the Treasury and a Governance and Advisory Board (https://web.archive.org/awa/20211213003954mp_/https://ausncp.gov.au/about/governance-and-advisory-board), comprising representatives from several government and non-government organisations. Complaints made against multinational enterprises, alleging non-observance of the OECD Guidelines, are managed by an individual independent decision-maker.

For more information, please visit the AUSNCP website (https://web.archive.org/awa/20211213003954mp_/http://ausncp.gov.au/).

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Fact Sheet 7 - Interacting with the Australian Tax System

Generally under Australian law, residents are taxed on their worldwide income and on capital gains from the disposal of most assets. Foreign residents are taxed on their Australian sourced income and on capital gains from the disposal of taxable Australian property.

The income tax law is contained in various acts of the Australian Parliament and in a number of double taxation agreements which Australia has with other countries.

The tax law is administered by the Australian Taxation Office, which has also issued extensive administrative guidance on obligations imposed by Australia's taxation law. Further information on taxpayers' obligations under Australia's taxation laws (https://web.archive.org.au/awa/20211213003954mp_/https://www.ato.gov.au/About-ATO/Commitments-and-reporting/Taxpayers-Charter/Taxpayers-Charter-what-you-need-to-know/) is available on the ATO website.

The Australian Government expects foreign enterprises operating in Australia to meet all obligations imposed under the tax laws and to cooperate with the Australian Taxation Office in a timely and complete manner. In addition to various provisions of the law which calculate tax liabilities and impose reporting requirements the following areas will be particularly relevant to firms involved in cross border arrangements.

Transfer Pricing

Australia's transfer pricing rules seek to ensure that an appropriate return for the contribution made by Australian operations is taxable in Australia. This is achieved through the application of the internationally recognised arm's length principle, which has been endorsed by the Organisation for Economic Co-operation and Development (OECD).

Under the arm's length principle, businesses are required to enter into international dealings under terms and conditions similar to what independent parties acting truly independently would reasonably be expected to have done in comparable circumstances.

The Australian Taxation Office has tax rulings and other publications that assist a business in understanding and complying with its obligations under the transfer pricing rules. These publications can be found on the ATO website (https://web.archive.org.au/awa/20211213003954mp_/https://www.ato.gov.au/). Guidance on transfer pricing and the arm's length principle can also be found on the OECD website (https://web.archive.org.au/awa/20211213003954mp_/http://www.oecd.org/).

Thin capitalisation

The thin capitalisation rules limit the amount of debt deductions available to Australian operations of both foreign entities investing into Australia and Australian entities investing overseas. A debt deduction is an expense an entity incurs in connection with a debt interest, such as an interest payment or a loan fee that the entity would otherwise be entitled to claim a deduction for.

The rules apply when the entity's debt-to-equity ratio exceeds certain limits. Three alternative limits may be available to an entity in any given situation, a safe harbour test, world-wide gearing test and an arm's length debt test. Broadly under the safe harbour test, where the debt exceeds 60 per cent of the net value of the Australian assets (this threshold is higher for certain financial entities), a portion of the debt deductions may be disallowed. The thin capitalisation rules affect both Australian and foreign entities that have multinational investments, subject to certain exemptions.

If an entity is affected by the thin capitalisation rules, the Thin Capitalisation part of the International Dealing Schedule (IDS) must be completed regardless of whether any debt deductions are disallowed by the rules. The IDS is lodged at the same time as the tax return.

Further information on the thin capitalisation rules is available on the ATO website (https://web.archive.org.au/awa/20211213003954mp_/https://www.ato.gov.au/Business/Thin-capitalisation/).

Private Equity

Australia's tax law includes anti-avoidance rules. These rules could apply to private equity investment arrangements designed to avoid Australian tax becoming payable on investment gains. Of particular concern to the Australian Taxation Office are arrangements featuring holding companies that have no obvious commercial purpose and which appear to exist only in order to attract the operation of international tax treaties.

The Australian Taxation Office has published a number of tax determinations relevant to foreign private equity funds disposing of Australian investments. These can be found on the ATO website (https://web.archive.org.au/awa/20211213003954mp_/https://www.ato.gov.au/Business/Debt-and-equity-tests/).

Capital Gains Tax

Australia's capital gains tax (CGT) regime imposes an income tax liability on a foreign resident in relation to any gains on the disposal of taxable Australian property.

Australia's domestic regime is consistent with international practice, reflected in the OECD Model Tax Convention.

Broadly, taxable Australian property includes direct or indirect interests in Australian real property and the business assets (other than Australian real property) of an Australian permanent establishment.

Previously, foreign residents with a capital gain (for example, from the sale of an investment property) were eligible for a CGT discount of 50 per cent. From 8 May 2012, the 50 per cent CGT discount for capital gains made by non-residents was removed. However, for assets purchased before this date a partial discount may apply. Further information can be accessed on the ATO website (https://web.archive.org.au/awa/20211213003954mp_/https://www.ato.gov.au/Calculators-and-tools/Capital-gains-tax-discount-for-individuals-calculator/?=redirected). Foreign residents (individuals or entities) affected by these CGT rules are

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