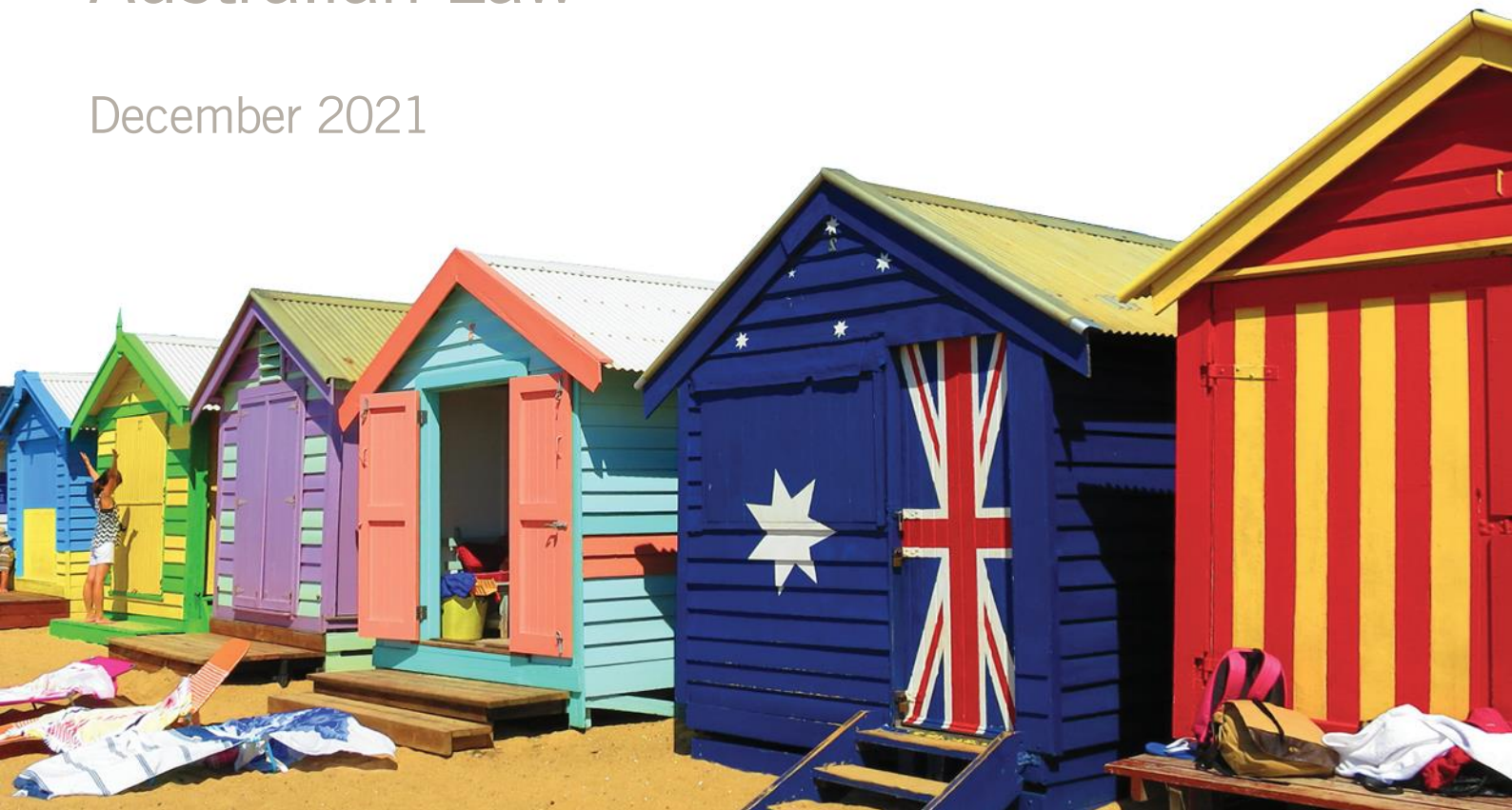


# Year to Come, Year in Review Australian Law

December 2021



# Year to Come

## Australian Law in 2022

Australia is expected to prioritise law reform in a range of areas that are both locally and globally significant: cybersecurity; privacy and data; and environmental, social and governance, with a particular focus on climate change. Corporate, financial, data and consumer reforms will also feature.



### Combatting cybercrime:

During 2022, the Federal Government will focus on laws to strengthen Australia's capability to combat cybercrime, as outlined in its Ransomware Action Plan, including mandatory reporting of ransomware incidents affecting businesses with a minimum A\$10m a year turnover, and new penalties for non-compliance. It is also likely to overhaul the *Autonomous Sanctions Act 2011* (Cth), prohibiting organisations from transacting with designated persons involved in malicious cyber activity. These reforms will align Australia with the EU, UK and US. [Read more...](#)

### Security of critical infrastructure reforms:

Security of critical infrastructure laws are likely to be passed in two amended bills following recommendations of the Parliamentary Joint Committee on Intelligence and Security. The first bill, which includes government assistance measures and cybersecurity notification requirements, will likely be passed and implemented before the end of 2021. All remaining elements will be deferred to the second bill and will involve industry consultation in relation to risk management programmes and declarations of systems of national significance. [Read more...](#)

### Online safety reforms:

Under the *Online Safety Act 2021* (Cth), which takes effect from January 2022, online service providers will be under more stringent obligations to take down image-based abuse, cyber abuse, cyber bullying and seriously harmful online content, while the eSafety Commissioner will have new powers to ensure enforcement and create industry standards.

### Continued Consumer Data Right (CDR) rollout:

The Government will continue expanding the scope of the CDR regime on a sector-by-sector basis to enable further consumer data sharing. Following the CDR rollout to the banking sector in 2020, rules have been proposed for the energy sector, and industry consultation on CDR implementation has commenced with the telecommunications sector.

### Evaluation of changes to foreign investment laws:

In 2022, the Government will consider the findings of its legislatively-required evaluation of the 1 January 2021 changes to the foreign investment laws (see Year in Review section). The report, to be completed by 10 December 2021, will cover the impact of the reforms and their implementation on foreign investment in Australia and on the broader Australian economy, and whether the right balance is struck between welcoming foreign investment and protecting Australia's national interests.

[Learn more...](#)

### Changes to Australia's designs system:

Amendments to Australia's designs regime, relating to the standard against which design registrability and infringement will be assessed, commenced in September 2021. Further changes take effect on 10 March 2022, including a 12-month grace period for some publications or uses of a design, a "prior use" defence and greater rights for exclusive licensees.

[Read more...](#)

### Privacy reform:

Broad privacy law reform is expected in 2022. The Government previously flagged a review, including stricter requirements for when and how consent is obtained, an updated definition of "personal information" and enhanced enforcement powers for the Office of the Australian Information Commissioner (OAIC). Any changes in this area will be heavily scrutinised in light of COVID-19, with personal privacy being at the forefront of Australians' minds.

[Read more...](#)

### Unfair trading prohibition:

The Australian Competition and Consumer Commission (ACCC) is likely to continue advocating for a general prohibition on unfair trading practices to address unfair conduct that harms consumers and is not currently caught by consumer protection laws.

## 2022 highlights

Although the Reserve Bank of Australia has stated a negative cash rate is highly unlikely in Australia, APRA expects banks to develop tactical solutions to implement zero and negative interest rates by 31 July 2022 and to be able to implement them within three months, if needed.

## 2022 highlights

From March 2022, businesses with an Australian presence will be able to register a ".au direct" domain name (such as "cakes.au"), allowing for shorter, more memorable domain names.

## 2022 highlights

Increased volume and complexity of regulatory reform and overlapping regimes should see greater collaboration among the key Australian regulators (the OAIC, the ACCC and FIRB) in 2022.

**How corporates are responding to climate change:**

The “Say On Climate” is a new global initiative seeking to alter how listed entities engage with climate-related matters and their related disclosures. In Australia, despite the absence of a legal framework for advisory resolutions, this initiative is being supported by the boards of prominent listed Australian resources companies, which have voluntarily committed to submitting advisory resolutions for shareholder approval of their climate action plans at their 2022 annual general meetings. [Read more...](#)

**Financial Accountability Regime (FAR):**

The consultation period for the much-anticipated FAR closed in August, with the FAR legislation expected to be passed in the Spring of 2022 Parliament session. The FAR regime will have significant implications for all entities regulated by the Australian Prudential Regulation Authority (APRA), particularly non-authorised deposit-taking institutions that are not currently caught by the Banking Executive Accountability Regime. [Read more here and here...](#)

**Below baseline credit scheme:**

The Government allocated A\$280 million in its 2021 budget to implement a “below baseline” crediting scheme over the next decade. It will sit within the Safeguard Mechanism compliance framework and reward large emitters with tradeable “Safeguard Mechanism Credits” if they reduce their greenhouse gas emissions below agreed limits.

[Read more...](#)

**Developing Australia's hydrogen industry:**

The review of the national gas regulatory framework to accommodate hydrogen blends and other renewable gases will continue through 2022, with any legislative changes expected to take effect from 2023. [Read more...](#)

**Continued regulatory reform in the energy sector:**

In 2022, continued energy-related regulatory reform is expected as Australia transitions away from a centralised, coal-based energy system to a more decentralised system, focused on renewable energy. [Read more...](#)

**Offshore wind farm regulation:**

Australia is establishing a legislative framework for granting rights to the seabed of its national waters for the development of offshore electricity infrastructure, such as offshore wind farms and transmission infrastructure. Proposed legislation was introduced in 2021. Details will be developed in regulations that are planned to be published in 2022. [Read more...](#)

**Climate change litigation continuing to increase:**

Litigation is increasingly being used to seek to compel government and business to act on climate change and climate-related risks, with this trend expected to continue. Claimants are testing numerous litigation pathways, including claims based on human rights, tort law, consumer laws and corporate disclosure laws.

[Read more...](#)

**Investor state arbitration and the environment:**

The overlap between international investment and environmental protection is expanding, with environmental protection provisions featuring in International Investment Agreements, international Free Trade Agreements and a mounting body of environment-related investor-state disputes. [Read more...](#)

**APRA phasing out reliance on Committed Liquid Facility (CLF):**

APRA expects all locally incorporated banks subject to the Liquidity Coverage Ratio to reduce their reliance on the CLF to zero by the end of 2022, subject to financial market conditions. Beyond 2022, APRA anticipates there will be sufficient high-quality liquid assets available to negate reliance on the CLF. [Read more...](#)

**APRA update on key policy settings for capital framework reforms:**

APRA has provided an update to authorised deposit-taking institutions on capital framework reforms, which will come into effect from 1 January 2023. The reforms are intended to strengthen the financial resilience of the industry. APRA intends to maintain the current approach to capital buffers but modify capital requirements for higher-risk residential mortgage lending, and revise settings to improve the framework's flexibility.

**Reserve Bank of Australia to test central digital currencies for international settlements:**

The RBA, with the Bank for International Settlements Innovation Hub and the central banks of Malaysia, Singapore and South Africa, will jointly test the use of central bank digital currencies for international settlements. The project aims to develop prototype shared platforms for cross-border transactions, using multiple digital currencies. [Read more...](#)

**Merger reform:**

The ACCC wants to overhaul Australia's merger regime, including by adopting a mandatory and suspensory regime in which the need to file is automatically triggered above certain value thresholds. The ACCC has also proposed to change the legal test, lowering the standard of proof from the “substantial lessening of competition” test, and adding specific rules for merger parties with existing market power, as well as for large digital platforms. Extensive industry consultation and debate on the proposed reforms is expected in the year ahead.

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

**Proposed “pre-determined” regulation of digital platforms:**

The ACCC has proposed the possibility of adopting an ex-ante approach to the regulation of digital platforms, such as introducing sector-specific rules to govern the conduct of key players, reflecting some measures currently being considered in the EU, UK and US. The ACCC will release a Concepts Paper in the second half of 2022 on these issues.

**Amendments to test for corporate tax residency:**

In the last budget, the Government announced proposed technical amendments to clarify the corporate residency test so that a company incorporated offshore will be treated as an Australian tax resident if it has both a “significant economic connection to Australia” and its central management and control is in Australia. The new law will have effect from the first income year after the date of Royal Assent of the new legislation but, as currently proposed, taxpayers will have the option of applying the new law from 15 March 2017.

**Taxpayer Alert concerning foreign income of Australian residents:**

The Australian Tax Office (ATO) has signalled that, in the coming year, it intends to target high net worth individuals with substantial foreign assets and dealings, where it finds arrangements involving income or capital gains being disguised as loans or gifts from a foreign resident to an Australian resident. Together with the ATO's Tax Avoidance Taskforce targeting higher risk trust arrangements in privately owned and wealthy groups, and in light of the recent litigation concerning the Greensill family (see Year in Review section), the ATO is likely to dedicate more resources to investigating high net worth individuals with substantial foreign assets/dealings, and foreign residents with substantial Australian assets/dealings.

# Year in Review

## Australian Law in 2021

While COVID-19 continued to impact the legal landscape, postponed 2021 initiatives were progressed, including corporate and financial law reform. Significant judicial rulings on the application of tax and data laws also featured.



### Foreign Investment Review Board (FIRB) changes:

On 1 January, significant changes to the FIRB regime commenced, including mandatory FIRB approval for investments in national security businesses and land; the Treasurer's new "call-in" and "last resort" powers, significantly increasing penalties for non-compliance; and a new FIRB filing fee regime. In July, the Government released updated FIRB guidance notes. [Read more here and here...](#)

### Restricting effectiveness of director resignations:

In February, new laws commenced preventing director resignations from becoming effective unless they are notified to the Australian Securities and Investments Commission (ASIC) within 28 days or where a company would be left with no directors. [Read more...](#)

### Final report on review of Australia's patent system:

In February, the Government released its final report on the review of accessibility of patents for small and medium-sized enterprises, following the phasing out of the innovation patent system. [Read more...](#)

### Corporations and financial services (CFS) regulation:

In June, the Australian Law Reform Commission released a summary of initial stakeholder views on its review of the CFS legislative framework. The need for simplified and principles-based legislation, consistent use of definitions and the relevance of a disclosure regime were key themes. An interim report was scheduled for release in November 2021. [Read more...](#)

### London Interbank Offered Rate (LIBOR):

In June, Australian regulators issued a joint release reiterating the importance of ensuring a timely transition away from LIBOR and ceasing use of LIBOR in new contracts before the end of 2021. The ATO has asked for input on the tax implications arising from IBOR reform, including the cessation of LIBOR, so it can provide guidance to assist in compliance with tax obligations. [Read more here and here...](#)

### New director identification (Director ID) number:

There are new laws requiring directors of Australian entities to have a director ID number. Directors can apply from November 2021. Refer to the Australian Business Registry Services website for more details.

### Franchising Code amendments locked in:

On 1 July, Australian Franchising Code amendments took effect (with new disclosure document requirements taking effect from 1 November). The amendments increase the burden on franchisors, particularly in relation to pre-contractual disclosure. Further amendments, including increased penalties for breaches of the Code and a new Franchise Disclosure Registry, are expected soon. [Read more...](#)

### Superannuation reforms:

In July, "Your Future, Your Super" legislation came into effect, implementing three key reforms: a new annual performance test for superannuation products; a revised "best financial interests" duty; and a single default account "stapled" fund. [Read more here and here...](#)

### Significant reforms to continuous disclosure laws:

From August, new laws mean that listed entities will only be exposed to civil penalties for breaches of continuous disclosure obligations if they act with "knowledge, recklessness or negligence". This new test also extends to misleading or deceptive conduct claims brought under the Corporations Act or the ASIC Act. While listed entities welcomed the reforms, the impact on reducing shareholder class action risk is still to be assessed. [Read more...](#)

### Businesses responsible for social media comments:

In September, the High Court confirmed that the administrators of public social media pages are "publishers" of comments posted by third parties and members of the public on their page, for the purposes of defamation law. [Read more...](#)

## 2021 highlights

Australia, China, Japan, Korea and New Zealand signed the Regional Comprehensive Economic Partnership, currently the largest Free Trade Agreement in the world, incorporating matters not previously covered in existing FTAs between ASEAN and non-ASEAN countries.

## 2021 highlights

The ACCC's case against Google, under consumer law provisions, was a world first in probing Google's approach to the collection of users' location data. The ACCC also released the final report on the digital advertising services inquiry which focused on Google's dominance in the ad tech supply chain.

## 2021 highlights

The Federal Court decision in *Thaler v Commissioner of Patents* is the world's first judicial ruling in favour of an artificial intelligence system being named as the inventor of a patent.

### Cartel conduct still a key enforcement priority for the ACCC:

The ACCC finalised two cases in 2021. In one, the Federal Court ordered three international shipping participants to pay a cumulative penalty of A\$83.5 million, one of the largest criminal cartel fines awarded in Australia. In another landmark trial, a company, its managing director and a former employee were all acquitted of criminal cartel offences. It was the first Australian case to involve criminal cartel charges against individuals and the first Australian criminal competition law matter to be heard before a jury.

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

### Class actions update:

There have been fewer class actions this year, with most arising from the pandemic, including in relation to COVID-19 outbreaks in hotel quarantine and aged care facilities, and business interruption insurance claims. The High Court has clarified that there is no "one size fits all" approach to dealing with competing class actions. Also, to moderate shareholder class action risk, "knowledge, recklessness or negligence" must now be proved to establish a continuous disclosure breach or misleading or deceptive conduct by a listed entity.

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

### Updated taxation exchange of information arrangements:

The list of jurisdictions with information-sharing agreements with Australia has been updated, adding the Dominican Republic, Ecuador, El Salvador, Hong Kong, Jamaica, Kuwait, Morocco, North Macedonia and Serbia, and removing Kenya, from the existing 122 jurisdictions on the list. This became effective on 1 July 2021. Residents of listed jurisdictions may access the reduced "Managed Investment Trust" withholding tax rate of 15% on certain distributions of income (usually passive income streams from real estate and non-controlling equity investments), instead of the corporate tax rate of 30%. [Read more...](#)

### Developments on electronic signing and contracts, remote witnessing and online registration:

In response to the impact of COVID-19, the Government made temporary amendments to the Corporations Act to facilitate virtual meetings and electronic signing of documents by Australian companies. Legislation has been introduced to make permanent and widen the reforms. Separately, the Government has consulted on modernising document execution. Some Australian states have also passed legislation to allow electronic deeds, electronic signing and remote witnessing. [Read more here and here...](#)

### Landmark climate change decision and review of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBCA):

In *Sharma v Minister for the Environment*, the Federal Court ruled that the Federal Environment Minister has a duty of care to protect Australian children from climate change harms when exercising powers under the EPBCA. The Minister has appealed. Also, an independent review of the EPBCA identified required key reforms, including new, legally enforceable National Environmental Standards; independent oversight and enforcement; and indigenous engagement. [Read more here and here...](#)

### Contracting out of statutory rights:

In *Price v Spoor*, the High Court confirmed that parties may contract out of statutory limitation periods (subject to any express or implied prohibition). [Read more...](#)

### APRA updates licensing approach for new bank entrants:

In August, APRA released its revised approach to licensing and supervising new banking entrants, including establishing stronger requirements for being granted a banking licence and closer supervision of new entrants.

### Transfer pricing appeal concluded:

In May, the High Court refused the Commissioner of Taxation leave to appeal against the Full Federal Court's decision in a significant transfer pricing dispute. The case dealt with a change in contractual and pricing arrangements between Glencore, an owner and operator of an Australian mine, and its Swiss parent in relation to the sale of copper concentrate. This decision has significant implications for the interpretation of Australia's domestic transfer pricing provisions. It is likely to be of interest outside Australia.

### Projects and infrastructure:

There has been record spending on infrastructure by governments across Australia as a source of stimulus. However, lack of opportunities, cost and complexity of bidding and policy, and regulatory instability have started to have an impact. Australia also risks being left behind by other regions on ESG investment.

[Read more...](#)

### Review of "safe harbour" insolvency provisions:

In September, the Government released a consultation paper seeking feedback by 1 October on the effectiveness of the insolvent trading safe harbour laws, which aim to give financially distressed companies some ability to restructure their affairs. [Read more...](#)

### New breach reporting obligations in the wake of Australia's Banking Royal Commission:

In October, the new breach reporting regime commenced. Among the significant changes, there is an obligation to automatically report to ASIC certain breaches (or likely breaches), including classes of breaches that are deemed to be significant. [Read more...](#)

### Foreign resident beneficiaries taxable on capital gains:

In June, the Full Federal Court confirmed a controversial view held by the Commissioner of Taxation on the taxation of capital gains from non-taxable Australian property (broadly speaking, any property other than direct or indirect interests in Australian land) made by Australian resident discretionary trusts that are distributed to foreign resident beneficiaries. The Greensill case ruling means that such capital gains are taxable in Australia, despite the fact that, if the non-taxable Australian property had instead been owned directly by the foreign resident, any capital gain would be exempt from tax.

[Read more...](#)

### Broad scope for Australian agencies to intercept and modify data:

Australian law enforcement bodies have been granted broad new online surveillance and communications data powers. The *Surveillance Legislation Amendment (Identify and Disrupt) Act 2021* (Cth) allows the Australian Federal Police and Australian Criminal Intelligence Commission to issue warrants to covertly collect, modify, add, copy or delete data, and take control of accounts to combat online crime. Under the *Telecommunications Legislation Amendment (International Production Orders) Act 2021* (Cth), Australia can negotiate agreements with foreign governments for reciprocal cross-border access to communications data. The *Foreign Intelligence Legislation Amendment Act 2021* (Cth) introduced a warrant authorising the interception of communication for the purpose of obtaining foreign intelligence.

### Guidance on crypto asset-related investment products:

In October, ASIC reissued guidance for product issuers and market operators on meeting their regulatory obligations in relation to crypto asset exchange-traded products and other investment products. Key matters covered include admission and monitoring standards; custody of crypto assets; pricing methodologies; disclosure; and risk management. [Read more...](#)

## What now?

### Your contacts

We hope you have found this guide useful.  
Please contact your usual Allens contact if you would like to discuss any of these matters further.



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