

# Taste of Australia

March 2024





Hamilton Locke's '**Taste of Australia**' provides foreign investors and their advisers with a snapshot of the issues that have been front of mind for dealmakers in Australia during the last quarter. The information is deliberately introductory – no more than a taste. However, our experts would be delighted to expand on any aspect that may be of interest to you or any of your clients.

### **In this edition we discuss:**

- [State of the nation – Lessons from the Port of Hastings rejection](#)
- [Capital markets update – signs of life](#)
- [Where does the Takeovers Panel sit on standing?](#)
- [Foreign investment update](#)
- [Merger control update – ACCC is pushing for reform](#)
- [Real Estate – a mixed bag](#)
- [Projects and Construction](#)
- [Mandatory disclosure of climate related financial risks is on the way](#)
- [Foreign bribery laws passed](#)
- [Workplace and Employment reform](#)
- [Resources update – nickel in the news](#)
- [Agribusiness](#)



## State of the nation – Lessons from the Port of Hastings rejection

Foreign investors could be forgiven for overlooking the fact that Australia is, in fact, a federation of States. Inbound investments are subject to national rather than local laws, and many State laws are harmonised in such a way that Australia generally presents to the investment community as a homogenous whole.

A reminder of the true structure of Australian democracy was provided by the Federal Government's recent rejection of the State of Victoria's application to build the Victorian Renewable Energy Terminal at the Port of Hastings in Western Port Bay, Victoria.

The State of Victoria has led the way in seeking to develop a viable offshore wind farm industry in Australia. The State's ambitious targets for offshore wind energy – 2 GW by 2032, 4 GW by 2035, and 9 GW by 2040 – hinge on the development of suitable infrastructure for wind turbine assembly. In September 2023, the [Victorian government selected the Port of Hastings](#) as the most suitable installation port for Victorian offshore wind farms.

However, in a blow to the nascent industry, the Federal Government recently rejected the development of the project because of its 'clearly unacceptable' impacts on the ecological character of 'Ramsar wetlands' located adjacent to the Port of Hastings site. In her decision, the Federal Minister for the Environment and Water cited concerns that the project would breach both international environmental law under the Ramsar Convention on Wetlands and the Federal *Environment Protection and Biodiversity Conservation Act 1999* (Cth).

Further salt was rubbed into the wound earlier this month when the Federal Minister for Climate and Energy decided to declare a much smaller area available for a new offshore wind zone in the Southern Ocean off Victoria than what had originally been proposed. That decision was made after public consultation identified significant ecological concerns with the original proposal.

From a distance, it seems incomprehensible that the two levels of government who represent the same political party could be disconnected on a matter of such public significance. While the Federal Government's position may have been entirely predictable, the fact that the Victorian government made a public bet on the original proposal suggests that there was a fundamental lack of communication between State and Federal lawmakers.

It is a reminder that a nuanced understanding of both local and national laws and of individual policymakers and their agendas is essential to successfully managing regulatory risk in Australia.

In terms of energy transition, the Port of Hastings experience speaks to a broader tension – balancing environmental preservation with the urgent need for renewable energy infrastructure. Addressing those challenges will require a more coordinated approach to be taken by all levels of government.

## Capital markets update – signs of life

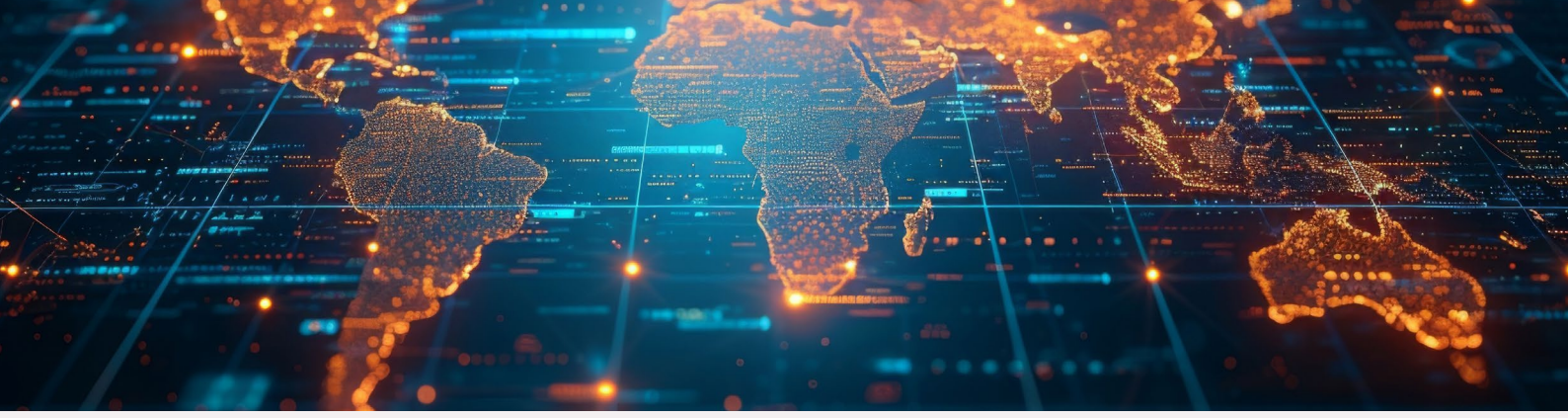
Australian capital markets experienced challenging times in 2023. The ASX saw less than 50 IPOs last year, which is significantly down from the typical range of 100-120. However, early indications suggest that the slump is unlikely to recur in 2024. The stabilisation of inflation and interest rates towards the end of 2023 has provided renewed optimism for capital markets as we step into 2024.

Already, the ASX is fielding a number of new listing applications. We expect to see activity from the small caps, both in IPOs and M&A, particularly in the mining and resources sector. Commodities such as gold and copper are expected to be prominent in 2024. We are also seeing continued interest in lithium companies, notwithstanding pricing challenges. Notably, there has been a substantial level of activity from Canadian listed small cap companies (primarily listed on TSX-V or CSE) looking to undertake dual listings on the ASX. This trend is particularly notable among exploration companies (such as lithium explorers), who are attracted by the higher valuations available on the ASX compared to their domestic market.

Regarding larger IPOs, many issuers shelved their IPO plans in 2023 and will be looking to enter the market in 2024 as the IPO landscape re-opens on the ASX.

The advancement of technology will also continue to shape the equity capital markets. Trends such as fintech, decarbonisation and artificial intelligence are expected to have a significant impact on how companies raise capital and how investors participate.





## Where does the Takeovers Panel sit on standing?

The Australian Takeovers Panel (**Panel**) recently announced that it has changed its pro-forma application form to expressly require applicants to show why they have standing to bring an application. The Panel also intends to amend its Procedural Guidelines to explicitly reference standing as part of the Panel's up-front consideration as to whether it will conduct proceedings in relation to a takeover complaint.

Section 657C(2)(d) of the *Corporations Act 2001* (Cth) (**Corporations Act**) provides that an application to the Panel may be made by any person "whose interests are affected" by the circumstances being complained about. What is not yet clear, is where the Panel will set the bar in terms of the nature of the interest that the applicant is required to demonstrate, and the extent of the effect that the relevant circumstances must have on that interest, in order to establish standing.

Some market participants have argued that the Panel should take the chance to filter out applicants who only have a small economic interest in the target. They suggest that such applicants must be acting vexatiously, or because they see a business opportunity in disrupting the takeover.

With respect, that is a very 'top of the town' view. The language of section 657C(2)(d) is deliberately broad. It allows standing to any person "whose interests are affected" by the circumstances. It does not require that the interest be material or that the effect be substantial. We would argue that a retiree with a modest investment in a company has a genuine interest in making sure that the competition for control of that company occurs in an efficient, competitive and informed market.

It should be remembered that the purpose of takeovers law is to defend the proper functioning of the market. It is not to protect the interests of the bidder, the target or of any particular cohort of investors.

The Panel already has the power under section 658A(1) of the *Corporations Act* to dismiss an application if the Panel is satisfied that the application is frivolous or vexatious. So far as we are aware, the Panel has never used that power. If there really are troublemakers out there utilising Panel processes to create mischief for deal makers, we suggest that it would be more appropriate for the Panel to dismiss those proceedings based on the powers already afforded to it. To do so based purely on the fact that the applicant only has a small financial interest at stake raises important access to justice issues.

## Foreign investment update

Foreign investment in Australia remains strong. According to the latest quarterly report released by the Foreign Investment Review Board (**FIRB**), commercial investment proposals totalling AUD\$49.5 billion were approved in the quarter ending 30 September 2023, sourced from 283 deals. This is significantly higher than the total value of approved transactions for the previous quarter (AUD\$34.9 billion from a total of 297 deals). US investors continue to lead the charge down under, accounting for almost two-thirds of the total approved deal value (AUD\$31.3 billion) from 119 transactions.

In an attempt to "improve housing affordability and supply" across Australia, the Federal Government has recently announced a significant reduction in the FIRB application fees for foreign investors seeking to invest in build-to-rent (**BTR**) projects.

BTR projects have gained prominence globally as an alternative housing model. Although the sector is still relatively young in Australia, it is becoming increasingly appealing to developers and institutional investors due to the potential for long-term, stable revenue and government tax breaks. Accordingly, the sector is tipped to experience transformative growth here in the short to medium term.

Prior to the recent changes, the initial investment in residential or vacant land by foreign investors for the purposes of undertaking a BTR project required FIRB approval, regardless of the value of the land. In the case of BTR projects to be built on existing residential land, extremely high application fees applied. Historically, this has deterred foreign investors from investing in the sector.

The government has sought to address this issue by ensuring that the application fees for all BTR projects will now be calculated based on commercial land rates, regardless of the type of land that is initially acquired for the development. The practical impact of this change is that the acquisition of any type of land for a BTR project with a purchase price of up to \$50 million will now attract a flat FIRB filing fee of just \$14,100 (this figure is indexed annually on 1 July).



## Merger control update – ACCC is pushing for reform

We have previously highlighted the Australian Competition and Consumer Commission (ACCC) campaign to reform Australia's merger control laws. Broadly, the ACCC's proposal is to replace the existing voluntary system with a mandatory notification regime in keeping with the conventional approach of other jurisdictions. In recent developments, the ACCC has published a series of responses to the Australian Government's November 2023 consultation paper. In its responses, the ACCC argues forcefully against other less interventionist options and makes the case for what it now calls an "urgent" need for reform.

In summary, the ACCC's preferred option would involve:

- mandatory ACCC notification of transactions over a specified value or turnover thresholds (in past submissions, the ACCC has suggested surprisingly low thresholds of only A\$35 million (~US\$23 million) in global deal value or acquirer/target turnover of only A\$400 million (US\$~260 million));
- a limited right of review by the Australian Competition Tribunal (**Tribunal**);
- an obligation not to complete notifiable transactions until ACCC approval (or a "fast-track waiver" for uncontentious transactions) has been received; and
- a "call-in" power to address transactions that do not meet the mandatory notification thresholds, but which nevertheless may raise substantive competition concerns.

The Australian Government has publicly expressed the view that the current regime is "*too permissive*". The ACCC also has a strong track record in ultimately obtaining the reforms that it wants. While the detail remains to be seen, we are therefore expecting legislative changes broadly in line with the ACCC's proposed approach.

In related news, the ACCC has recently opened a public merger review into the proposed acquisition of property technology group Dynamic Methods by the operator of Australia's leading real estate listings platform, REA Group. The ACCC was not notified of the proposed acquisition and commenced a public review once it became aware. In its media release, the ACCC described the transaction as "*yet another example of a potentially concerning merger not being notified to the ACCC under the current informal voluntary system*".

Finally, in a major decision, the Tribunal has just overturned the ACCC's August 2023 decision not to authorise the acquisition of Suncorp Bank by ANZ. The Tribunal was satisfied that the deal would not substantially lessen competition in the relevant markets for home loans, SME banking services and agribusiness banking products, and should therefore be allowed to proceed. Somewhat counterintuitively, the ACCC did not take the outcome as in any way undermining its position that it should be the first-instance decision maker for all transactions. Instead, the ACCC noted that the decision "*demonstrates the checks and balances*" that would be inherent in its proposed reforms.

## Real Estate – a mixed bag

2023 was an intriguing year for the Australian property market, with significant shifts that reshaped our expectations and strategies.

The office sector continues to experience cautious investment sentiment, with a noticeable decrease in transaction volumes in 2023 as compared to 2022. The sector remains in a period of adjustment, with working from home becoming part of the new normal for many office tenants. There has been a decline in vacancy rates in CBDs, particularly in relation to premium office space. This is mainly attributable to the reduction in supply, as net demand for office space continues to reduce.

Affordability issues, lower borrowing power, high interest rates and low housing supply continue to impact the residential market. The Federal Government is aiming to tackle these issues, and increase housing development and supply, with the introduction of a 'Help-to-Buy Scheme' in the first half of 2024. Despite the introduction of this scheme, strong population growth is expected to have an impact on the housing market, with supply unable to keep up with the pace of demand.

The hotel market is experiencing a revival, with international and domestic travel rebounding to pre-pandemic levels. In 2023, transaction activity in the sector was strong, with hotel investment volumes totalling \$2.43 billion. Transaction volumes in the hotel sector are expected to remain strong throughout 2024.

The industrial sector continues to be a strong preference for investors. The sector demonstrated robust performance in 2023 with a total deal volume of \$5.92 billion (being 34% of the market share). Tight incentives, low vacancy rates and current rental growth make industrial assets very attractive for investors. The current pre-commitment of 50% of industrial supply for 2024 suggests that rental growth rates in this sector will continue to exceed historical averages for some time.

For the retail sector, demand is predicted to outpace market supply, which will lead to high occupancy rates and positive rental growth. There is a strong focus for the retail sector on providing a more experience-based retail experience, which will be a key driver for increased sales.



## Projects and Construction

It will be interesting to watch the impact that the Unfair Contracts Terms regime will have on the relationships between suppliers, subcontractors, contractors and principals in the construction sector.

Under that regime, which came into force in early November 2023, a term in a standard form contract will be deemed unfair and voided if it causes a significant imbalance to the parties' rights and obligations, is not reasonably necessary to protect legitimate business interests of the party advantaged and would cause detriment to a party if the term was relied on.

The regime applies to standard form contracts entered into with a 'small business' – being businesses that have either fewer than 100 employees or a turnover of less than \$10 million. That will capture many participants in the sector below head contractor level.

Given the widespread use of standard form contracts in the construction industry, parties should review key clauses, including those relating to time bars, liquidated damages, assignment without consent and termination for convenience. The penalties that can now be awarded for an unfair contract term include fines equal to the greater of \$50 million, three times the benefit obtained by the party in breach, or 30% of that party's adjusted turnover during the breach period.

In Victoria, the Legislative Assembly Environment and Planning Committee has made 28 recommendations regarding the amendment of the *Building and Construction Industry Security of Payment Act 2002* (Act) (**SOPA**) after a parliamentary inquiry into the non-payment of subcontractors. These proposed changes, although significant in terms of the Victoria SOPA, would mean that the Victorian legislation would be largely aligned with other Australian jurisdictions.

The proposed amendments would be welcomed by the Victorian construction sector where SOPA claims have, to date, been largely ineffective given the carve outs in the present legislation. The Victorian Government has until May 2024 to respond to recommendations.

## Mandatory disclosure of climate related financial risks is on the way

Australia has kept pace with the global trend towards mandated reporting of Environmental, Social and Governance (**ESG**) performance with the release of the draft exposure of the *Treasury Laws Amendments Bill 2024: Climate-related financial disclosure (Bill)*.

The Bill seeks to introduce mandatory climate-related financial disclosures through amendments to the Corporations Act and related legislation. The proposed regime will require large reporting entities to provide more transparent and comparable information on their climate-related risks and opportunities by way of specific disclosure in the company's financial reports. This will bring Australia in line with other jurisdictions including the United Kingdom, New Zealand, Japan and the European Union.

The following entities will be required to make climate-related financial disclosures:

- large entities that are required to lodge annual reports under Chapter 2M of the Corporations Act;
- asset owners managing funds in excess of \$5 billion; and
- entities of any size that are subject to both the annual reporting requirements under the Corporations Act and the *National Greenhouse and Energy Reporting Act 2007* (Cth).

These reforms are consistent with the recent trend in Australia towards mandating reporting on ESG issues. Since 2018, entities with a consolidated revenue of over \$100 million have been required to report on modern slavery. Additionally, with the passing of the *Workplace Gender Equality Amendment (Closing the Gender Pay Gap) Act 2023* (Cth), companies with over 100 employees are required to report gender equality data to the Workplace Gender Equality Agency.

There is significant demand from institutional investors for more stringent reporting on ESG issues such as safety, supply chain management, data protection and human rights. Ensuring compliance with mandatory reporting requirements is now a minimum expectation. Having processes in place for regular independent audits on a broad range of ESG issues is critical to developing a comprehensive ESG strategy.







## Foreign bribery laws passed

Long awaited legislation intended to make it easier to investigate and prosecute foreign bribery finally passed both houses of parliament on 29 February. The legislation will have significant impacts on how companies will need to deal with any illegitimate benefits given or offered for the purpose of securing business or personal advantages. This will especially be the case for the new “failure to prevent” bribery offence, which will see companies liable for the actions of their associates (including officers, employees, agents or other service providers) unless they can provide evidence of “adequate procedures” being in place aimed at preventing the offending conduct. Other amendments broaden the scope of commercial and personal conduct that will be considered to amount to foreign bribery.

The “failure to prevent” offence is an offence of absolute liability, meaning that a company will be liable without the need for the prosecution to establish a mental (or fault) element. A company will have the legal burden of demonstrating it has “adequate procedures” in place. The legislation requires that guidance on “adequate procedures” be published. We expect the guidance will be principles based and informed by several overarching principles (including proportionality, top-level commitment, due diligence and communication (including training)).

The penalties for failure to prevent foreign bribery are severe – being the greatest of:

- \$31.3m (currently);
- three times the value of the benefit obtained; and
- if the value cannot be determined, 10% of annual turnover in the relevant period.

We expect the number of prosecutions for foreign bribery offences will significantly increase once the legislation commences.

Foreign investors with a presence in Australia will need to make sure that their group ABC policies include their Australian operations and that those policies address the “adequate procedures” requirements.

## Workplace and Employment reform

There have been significant changes in the Australian industrial landscape over the past 12 – 18 months, with wide ranging reforms being introduced across Australia’s workplace laws that seek to promote job security, gender equality and work-life balance in changing and challenging times.

Prohibitions are now in place preventing the use of fixed-term contract arrangements and pay secrecy clauses in Australian employment agreements. In addition, Australian employees have been provided with additional flexible working rights and domestic violence leave entitlements. Landmark changes have also come into operation in Australia’s health and safety laws with the introduction of a ‘positive duty’ on Australian employers to prevent and respond to sexual harassment in connection with work – shifting the onus to employers who will face significant civil penalties for non-compliance.

The pace of change in workplaces in Australia is not set to slow down in 2024 with the passing of the *Fair Work Legislation Amendment (Closing Loopholes) Act 2023* (Cth) through Federal Parliament on 12 February 2024. This new tranche of omnibus legislation will become law in the coming months and will, amongst others, provide workers with a new ‘right to disconnect’ that enables them to refuse to monitor, read or respond to contact in relation to their work outside of working hours. A new definition of casual employment will also be introduced, and new statutory tests will be created to determine the ordinary meanings of ‘employee’ and ‘employer’. Increased regulation and further protections will come into operation for ‘employee-like workers’ (i.e. gig economy workers), including increased powers for Australia’s workplace regulator (the Fair Work Commission) to make minimum orders and provide regulatory guidance.

Greater transparency of gender pay-gap data will also be seen in 2024 as part of other key workplace relations reforms. Large Australian employers now have increased reporting requirements, including providing more detailed workplace data, as well as obligations to report on measures taken to prevent and respond to sexual harassment in the workplace. In February 2024, Australia’s Workplace Gender Equality Agency started publishing the gender pay gaps of private sector Australian employers with a workforce of 100 or more employees. Commonwealth public sector organisation gender pay-gaps will follow shortly, due for publication later this year or early 2025.

## Resources update – nickel in the news

Commodity prices have been a major topic of conversation over the last 6 months, with nickel and lithium prices, in particular, collapsing in recent times.

The market has been somewhat taken by surprise by Indonesian nickel miners' ability to quickly and cost-effectively build new mines and processing facilities. This includes the development of HPAL (High-Pressure Acid Leaching) technology, which has made the processing of laterite deposits into battery grade material feasible. The resulting market surplus has led to a decline in nickel prices, severely impacting the profitability (and viability) of the higher cost Australian nickel producers.

Given the importance of nickel to the battery mineral sector and the Australian mining industry, and the environmental and social issues linked to Indonesian nickel players, there were calls for the Australian Government to step-in and support the long-term viability of the domestic industry. Just last month, the Australian Government responded by adding nickel to the Critical Minerals list, thereby granting companies access to a new pool of Government funding. Additionally, the Western Australian Government has proposed a 50% rebate (repayable) on the Government nickel royalty, in a bid to provide some short-term relief to the ailing sector. There have also been meetings between the Australian Government and the mining sector where further reforms were discussed, including tax relief linked to investment in downstream processing and the use of common user infrastructure for strategic minerals like nickel.

Despite these government initiatives, Australian nickel companies are likely to face ongoing challenges in at least the short to medium term, given the surplus supply and sustained increase in Indonesian production. This challenge is exacerbated by the fact that the Indonesian nickel industry appears to be using its market dominance to address some of the ESG issues that have faced its operations, including by seeking to transition its coal-fired power stations to renewable energy sources.

Finally, whilst there have been calls from Western producers for a "green premium" to be paid in respect of mineral production by companies with strong ESG credentials, given the nature of the nickel market, the ultimate offtakers and LME's flagged issues with how to define "green" nickel, any such approach to pricing appears to be some way off.

## Agribusiness

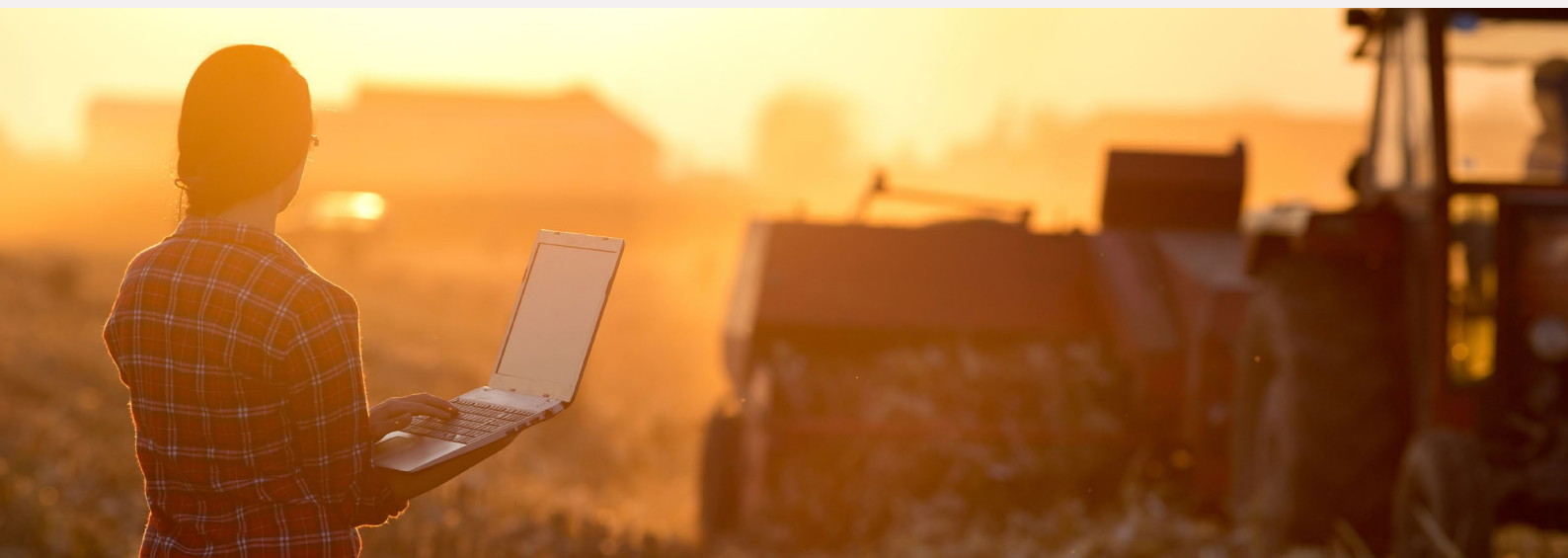
What a difference a spot of rain can make! The expectations of a dry summer and the start of an El Nino weather cycle were firmly planted in the minds of the rural sector, which definitely had an impact on pushing livestock commodity prices lower last year. However, the unexpectedly wet summer lifted spirits, dam levels and sentiment right across the industry. By way of example, since its low of 349 c/kg in mid-October, the main cattle index (EYCI) climbed over 90% to just shy of 680 c/kg in the early weeks of 2024 – an unprecedented gain for such a short period.

All eyes are on the looming Beef24, the triennial beef industry extravaganza in Rockhampton, which will bring together over 100,000 beef enthusiasts, producers and stakeholders from around the country and across the globe for an unparalleled week of all things beef.

Changes to the Horticulture Award in 2022 are continuing to reverberate. The changes had the effect of essentially abolishing piece rates (piece rates are paid according to the amount a worker harvests. In short, the more fruit or vegetables they pick, the higher their wages) by requiring compliance with a minimum hourly wage. Anecdotally, and unsurprisingly, this change to a long-standing horticultural industry practice is having a severe impact on productivity and affecting future potential investment.

Global demand for Australian agricultural products remained robust, offering a silver lining amid domestic challenges. International trade agreements and the opening of new markets continue to contribute to the sector's resilience. The export of high-quality beef, lamb and dairy products continues to thrive, underscoring the competitiveness and desirability of Australian agricultural commodities on the global stage.

The Australian agricultural sector remains agile, leveraging innovation and sustainable practices to navigate challenges and capitalise on emerging opportunities, thereby positioning itself for continued growth and resilience in the months to come.





# Key Contacts



## Justin Fox - Corporate

justin.fox@hamiltonlocke.com.au  
T +61 417 220 275

[View Profile](#)



## Shaun Hardcastle - Corporate

shaun.hardcastle@hamiltonlocke.com.au  
T +61 428 488 760

[View Profile](#)



## Clementyne Rawlyk – Foreign Investment

clementyne.rawlyk@hamiltonlocke.com.au  
+61 412 034 116

[View Profile](#)



## Alistair Newton - Competition

alistair.newton@hamiltonlocke.com.au  
T +61 2 8072 8271

[View Profile](#)



## Sarah Roettgers – Real Estate

sarah.roettgers@hamiltonlocke.com.au  
+61 438 727 382

[View Profile](#)



## Elena Stojcevski – Projects and Construction

elena.stojcevski@hamiltonlocke.com.au  
+61 434 501 344

[View Profile](#)



## Michael Tooma – ESG

micheal.tooma@hamiltonlocke.com.au  
+61 457 087 952

[View Profile](#)



## Tim Grave – Dispute Resolution

tim.grave@hamiltonlocke.com.au  
+61 409 664 118

[View Profile](#)



## Emily Cossgrove – Employment

emily.cossgrove@hamiltonlocke.com.au  
+61 438 727 382

[View Profile](#)



## Michael Boyce – Energy and Resources

michael.boyce@hamiltonlocke.com.au  
+61 400 142 494

[View Profile](#)



## Trent Thorne – Food and Agribusiness

trent.thorne@hamiltonlocke.com.au  
+61 427 729 055

[View Profile](#)

### SYDNEY

Australia Square  
Level 42, 264 George Street  
Sydney NSW 2000

### MELBOURNE

Level 33  
360 Collins Street  
Melbourne VIC 3000

### PERTH

Level 48  
152-158 St Georges Terrace  
Perth WA 6000

### BRISBANE

Level 19  
123 Eagle Street  
Brisbane QLD 4000

### NEWCASTLE

Level 3  
21 Bolton Street  
Newcastle NSW 2300

### AUCKLAND

Vero Centre  
Level 35, 48 Shortland Street  
Auckland 1010 New Zealand

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