Carter Newell LAWYERS

Doing Business in Australia Guide

5th edition

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Doing Business in Australia Guide

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GLOSSARY

ACCC means the Australian Competition and Consumer Commission.

ACL means an Australian Credit Licence.

ACN means Australian Company Number.

ADI means Authorised Deposit-taking Institution.

AFSL means an Australian financial services licence.

AML means anti-money laundering.

AML/CTF Act means the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth).

APRA means the Australian Prudential Regulation Authority.

APPs means the Australian Privacy Principles.

Arm's Length Debt Amount is a concept applying under the thin capitalisation rules (refer to page 57) by limiting the allowable level of debt deductions for the taxpayer's borrowings, based on the level of debt. (A review of the Safe Harbour Test and Arm's Length Debt Amount was reported upon by the Board of Taxation in December 2014 and predicates legislative change occurring).

ASIC means the Australian Securities and Investments Commission.

ASX means the Australian Securities Exchange.

ASX Guidelines means the '*Principles of Good Corporate Governance and Best Practice Recommendations*' adopted by the ASX and applicable to ASX listed companies.

ATO means the Australian Taxation Office.

AUSTRAC means the Australian Transaction Reports and Analysis Centre.

Austrade means Australian Trade Commission.

CBIA means the *Cross-Border Insolvency Act 2008* (Cth).

CCA means the *Competition and Consumer Act 2010* (Cth).

CGT means capital gains tax.

CGT Events means events or triggers under CGT legislation which can create capital gains on which tax is payable.

Code means the *Commonwealth Criminal Code Act 1995* (Cth).

CoMI means Centre of Main Interests.

Copyright Act means the *Copyright Act 1968* (Cth).

Corporations Act means the *Corporations Act 2001* (Cth).

CPI means the Corruption Perceptions Index.

DHA means the Department of Home Affairs.

DoCA means Deed of Company Arrangement.

EPBC Act means the *Environmental Protection and Biodiversity Conservation Act 1999* (Cth).

Fair Work Act means the *Fair Work Act 2009* (Cth).

FATA means the *Foreign Acquisitions and Takeovers Act 1975* (Cth).

FATR means the *Foreign Acquisitions and Takeovers Regulation 2015* (Cth).

FBT means fringe benefits tax.

FIRB means the Foreign Investment Review Board.

GST means goods and services tax.

IFA means Individual Flexibility Agreement.

ILP means incorporated limited partnerships.

Input tax credit means input tax credit.

JV means joint ventures.

Migration Act means the *Migration Act 1958* (Cth).

NCC means the National Credit Code.

NED means Nominal Expiry Date.

NES means the National Employment Standards.

NZ means New Zealand.

OECD means the Organisation for Economic Co-operation and Development.

PCBU means a person conducting a business or undertaking.

PPSA means the *Personal Property Securities Act 2009* (Cth).

Privacy Act means the *Privacy Act 1988* (Cth).

R&D means research and development.

RBA means the Reserve Bank of Australia.

Replaceable Rules means a truncated body of rules that are set out in the *Corporations Act 2001* (Cth).

Safe Harbour Test means a strict and formulae calculation based on a debt equity ratio as an alternative test for the thin capitalisation rule known as '*Arm's Length Debt Amount*' (see page 57).

Tax Acts means the *Income Tax Assessment Act 1936* (Cth) and the *Income Tax Assessment Act 1997* (Cth).

Trade Marks Act means the *Trade Marks Act 1995* (Cth).

UNICITRAL means United Nations Commission on International Trade Model Law.

USA means the United States of America.

WIPO Convention means the World Intellectual Property Organisation Convention.

WHSA means the *Work Health and Safety Act 2011* (Qld).

INTRODUCTION AND OVERVIEW

This guide endeavours to address a selection of important and unique aspects of doing business in Australia which have broad application across a wide range of industries.

This guide is designed to be of assistance to overseas investors and businesses in answering some of the initial questions that arise when determining:

- what may be an appropriate business structure to use in Australia, and understanding the application of Australian law to business;
- what corporate governance measures apply to companies listed on the Australian Securities Exchange (**ASX**);
- how the Australian banking system and regulation of funding operates;
- how foreign investment is regulated in Australia;
- how commercial conduct is regulated in Australia in relation to competition, trade practices and consumer protection;
- what taxation requirements to take into consideration;
- what industrial relations regime applies for companies wishing to conduct business and employ staff in Australia;
- how the system of land title works in Australia;
- what protections are afforded to intellectual property in Australia; and
- what systems Australia has in place in relation to foreign anti-bribery and corruption laws.

This guide provides information in a summary and overview format, current as at 30 July 2018. It does not purport to be a comprehensive statement of the law in any of the topics covered, but rather it is hoped the guide will assist overseas investors and businesses in *asking the right questions* should they need to further examine aspects of doing business in Australia.

Australia

The Commonwealth of Australia is a federation of six states – Queensland, New South Wales, Victoria, South Australia, Western Australia and Tasmania, and two territories – the Northern Territory and the Australian Capital Territory, each with their own parliament and government. Within the states and the Northern Territory are local authorities or councils, so in all but the Australian Capital Territory, there are effectively three levels of government in operation. In this guide, for each topic covered, we have identified where a national regime of regulation is in place, and where separate state and territory laws apply. Potential investors should, however, generally bear in mind that the laws and regulations applying in one state or territory may not be the same as in another part of the country.

In many instances, there are online resources available from the websites of regulating authorities, which can provide a good starting point for initial inquiries. Website references have been provided on a number of the topics covered.

For any specific queries that arise, Carter Newell Lawyers recommends you contact our firm for advice before acting upon any information contained in this guide. Carter Newell Lawyers offers expertise across a broad range of areas relevant to clients looking to establish business and invest in, or further advance ties with, Australia.

If you require any more detailed information or advice on the areas covered in this guide, or in relation to doing business in Australia generally, please contact:

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BUSINESS STRUCTURES

When considering whether to conduct business operations in Australia, a foreign entity should, as a primary consideration, determine the business structure through which it wishes to operate. This choice will depend on a number of factors, including whether the foreign entity wishes to establish a separate operating entity in Australia, the anticipated size of its Australian operations, taxation implications, risk profile and whether it wishes to raise public funding.

Business in Australia is usually carried on through one of the following structures:

- company (private or public);
- registered Australian branch of a foreign corporation;
- partnership;
- joint venture; or
- trading trust.

Of these structures, only companies and incorporated limited partnerships (**ILP**) have a separate legal identity. Partnerships, unincorporated joint ventures and trusts do not have an identity independent of their participants and, in legal terms, these structures are relationships rather than separate entities. In some circumstances these may be treated as separate entities for taxation purposes.

This chapter reviews these operating structures in Australia and the advantages and disadvantages of using them. Particular attention is paid to Australian companies, which are the most commonly used business structure. A foreign company may wholly own an Australian company. Australian companies have the ability to limit the liability of its shareholders and have exposure to a more attractive tax rate than that for individuals.

A foreign company can operate in Australia either by establishing an Australian subsidiary company, or by establishing a branch. Most foreign companies prefer to establish a separate company in Australia, as this allows the foreign company to isolate its Australian operations in a separate entity.

Australian companies

The *Corporations Act 2001* (Cth) (**Corporations Act**) is the primary source of company regulation in Australia and is administered by the Australian Securities and Investments Commission (**ASIC**), an Australian Government body. Companies are incorporated in Australia by being registered with ASIC. The scheme of regulation for companies in Australia is a national one, so it is the same in all states and territories. ASIC has an extensive website through which legislation and regulatory information can be accessed at: www.asic.gov.au.

Upon incorporation, ASIC allocates each company a nine digit Australian Company Number (**ACN**) as a unique identifier and the company becomes a separate legal entity in its own right, with powers to hold property, to sue and be sued, and to enter into contracts.

ASIC will not accept registration if the name of the company is identical to that of another registered company, or if the name is considered to be offensive or contravenes the prohibition in the Corporations Act on certain wording being used in company names. If the company has no name, it will be known solely by its ACN. Companies must state their ACN on all public documents and negotiable instruments.

Types of Australian companies

Australian companies may be incorporated as either public or proprietary entities. Proprietary companies are commonly known as '*private*' companies due to their prevalence in the small business sector and their use in personal estate planning. A private company must have a minimum of one director, who must ordinarily reside in Australia, and no more than 50 non-employee shareholders. Although it is not compulsory for a private company to appoint a company secretary, if they do choose to appoint a company secretary, then he or she must ordinarily reside in Australia. Proprietary companies are predominantly registered as '*limited by shares*', although there is the ability to register the company as '*unlimited*', with liability of the shareholders being unlimited. Proprietary companies with limited liability must have a name which ends with '*Pty Ltd*' (e.g. the abbreviation for '*proprietary limited*').

In contrast, a public company is often used when the company wishes to list on the ASX or when the legislation requires it to be a public company, for example, a company that is to act as the responsible entity (that is, the operator) of a managed investment scheme.

Due to their public nature, public companies are more highly regulated than their private counterparts, in terms of their internal structure, their disclosure requirements and their reporting requirements to ASIC. Key features of public companies include:

- the company must have at least three directors, at least two of whom ordinarily reside in Australia;
- the company must have at least one company secretary who must ordinarily reside in Australia;
- the company may be limited by shares, limited by guarantee, unlimited with share capital or, in the case of a mining company, a no liability company;
- their public capital raising and fundraising activities are less restricted than those of private companies; and
- if the company is ASX listed, it will be subject to the corporate governance principles discussed later in this guide, and it will be subject to the ASX listing rules.

Generally speaking, the ability of public companies to raise capital from the public is off-set by extra reporting and other regulatory requirements not faced by proprietary companies. For these reasons, the cost of administering a public company can be significant.

Liabilities of the company, shareholders and directors

The liability of a company is limited to its assets (unless the shareholders have accepted unlimited liability). A creditor of an insolvent company can apply to court to have the company wound up. The liability of shareholders to contribute to any deficiency in the company's assets in meeting the amount owing to creditors depends on the type of company registered and whether the issued shares are fully paid, as distinct from partly paid. If the company is limited by shares, each shareholder is liable only to the extent of the unpaid subscription price of their shares. If a shareholder has paid for their shares in full, they face no further liability. If the company is limited by guarantee, the liability of the members is limited to the amount of the guarantee given (which can often be as little as A$10 per member).

Liability of directors

In Australia, as in other common law jurisdictions, there is a high degree of respect for the '*corporate veil*' in recognising a company as a separate legal entity, distinct from its directors and shareholders. In the ordinary course, there is no ability for a creditor to pursue a director personally for the debts of the company unless the director has provided a personal guarantee, or has incurred the debt in the director's own name.

As a public protection mechanism, the Corporations Act does place certain duties upon directors as managers of companies – these include duties of honesty, diligence, disclosure in certain circumstances, duties to act in good faith and in the best interests of the company and duties not to permit the company to trade whilst insolvent. The duty in relation to not trading whilst insolvent is effectively a duty not to permit the company to incur debts when the directors know, or ought to know, that the company is unable to pay its debts as and when they fall due, or if the company fails the '*balance sheet*' insolvency test regarding its assets and liabilities.

These protections are aimed at preventing directors from hiding behind the company as a separate legal entity to incur debts the company cannot pay, and then leaving unsecured creditors with a worthless company to pursue.

The power to pursue a director for insolvent trading lies principally with the liquidator of a company and ASIC. Contravening directors can be liable for fines and, in certain circumstances, the relevant debts incurred whilst the company was insolvent. A director may even be imprisoned for up to five years if the director's failure to prevent the company incurring the debt was dishonest. Directors therefore need to be constantly aware of the company's financial position.

For companies listed on the ASX, there are important duties of disclosure for the benefit of investors, and directors may be liable for failure by the company to comply with those ongoing disclosure requirements.

Establishing an Australian branch

A foreign company can carry on business in Australia as an Australian branch or alternatively through an Australian subsidiary company. Foreign companies wishing to operate in Australia need not necessarily set up a separate Australian company that requires resident directors (as mentioned earlier). They can carry on business in Australia as a branch of the foreign company, however if the company participates in capital raising activities by either offering shares or debentures in Australia, then it must be registered with ASIC and must comply with a number of other requirements.

Where it is required to register with ASIC, the foreign company must maintain a registered office within Australia and it must appoint a local agent who is responsible for ensuring that the foreign company complies with Australian legal requirements. The local agent must be an Australian company or a person resident in Australia, and may be held personally liable for any penalties imposed for contravention of the Corporations Act.

A foreign company considering establishing a presence in Australia should reserve the company's name by lodging an application with ASIC to ensure that the name is available.

To thereafter register as a foreign company, an entity must lodge with ASIC a certified copy of the company's constitution as well as copies of the company's certificate of registration, appointment of a local agent and information regarding the powers of those directors resident in Australia. On registration, ASIC will allot an Australian Registered Body Number to the foreign company, and this number must be displayed on all public documents (including websites) and negotiable instruments of the company.

As a general rule, registered foreign companies must lodge with ASIC a copy of their annual accounts and they must notify ASIC when any change in company details occur (for example, the appointment or resignation of directors or changes to the company's issued share capital). They must also lodge any other documents which they are required to prepare, in accordance with the laws of their place of incorporation.

Partnerships

Partnership law is governed by the various acts enacted in each state and territory of Australia, known as the '*Partnership Acts*' (for example, the *Partnership Act 1891* (Qld)).

A partnership is generally formed by an association of two or more partners who decide to carry on business with a view towards making a profit. The provisions of the Partnership Acts tend to be generic and in many cases may be overridden by provisions contained in any specific agreement that has been entered into by the partners. It is standard practice for a partnership to be documented and governed by a partnership agreement or other similar document.

In Australia, the number of partners permitted to form a legal partnership is limited to 20 (except in the case of certain professional partnerships, such as legal and accounting firms). Partners may be individuals or companies and may be resident in Australia or otherwise. There is no specific requirement for registration of partnerships, although trading names are registrable.

Strictly speaking, a partnership is not a separate legal entity, although recent changes have been made to the Partnership Acts of some states and territories by allowing the registration of ILPs as separate legal entities. An ILP has a legal identity separate to that of the partners. This provides passive investors with protection from liability akin to investors in a company through reliance on the aforementioned '*corporate veil*'.[1]

Only '*Venture Capital Limited Partnerships*' and '*Australian Venture Capital Funds*' (within the meanings prescribed by the *Venture Capital Act 2002* (Cth)) may be registered as an ILP. ILPs have been introduced as a method to attract international venture capital investment to Australia by removing tax impediments. International venture capitalists are able to access the capital gains tax (**CGT**) exemptions and '*flow through*' tax treatment available under the Australian taxation legislation. The key characteristics of ILPs are that there is at least one general partner who is responsible for the management of the business of the ILP, at least one limited partner who commits capital to the ILP and who is not permitted to take part in the management of the business of the ILP, and a separate legal identity that provides full protection from liability for its limited partner investors.

Partners are collectively and individually liable for the debts and obligations of the partnership. The primary advantage associated with partnerships as business vehicles is the fact that they are not burdened by the initial and ongoing public disclosure and reporting requirements associated with large proprietary and public companies. In this way, partners may keep their financial records and performance more confidential.

Various states have passed legislation allowing a partnership to limit the liability of a partner to a specified amount, provided that there is at least one general partner whose liability is not limited. Although there are differences amongst the states, generally speaking, a partnership will become a limited liability partnership upon registration with the relevant state department, and the partnership must include the words, '*limited partnership*' in its public documents and negotiable instruments.

[1] Explanatory Notes, Partnership and Other Act Amendment Bill 2004 (Qld) <http:// www.legislation.qld.gov.au/Bills/51PDF/2004/PartnerOLAmdB04Exp.pdf>.

For taxation purposes, a partnership will be deemed whenever there is a joint receipt of income, even if some other aspects of a formal or common law partnership, such as a partnership agreement, are not present. A partnership is not taxed as a separate entity, although it is required to lodge a partnership tax return with the Australian Taxation Office (**ATO**) to report the taxable income or loss of the partnership for each financial year. Each partner, in his or her personal tax return, must declare their respective shares of the taxable income or loss generated by the partnership. Profits and losses of the partnership are therefore brought back to the individual partners' tax returns.

This separate taxation treatment for each partner is seen as an advantage, as is the ability to have losses flow through to partners, which they may then off-set against their taxable income from other sources. On the sale of a partnership interest, partners can also access the 50% CGT discount as they hold an interest in each partnership asset as an individual. The capital of each of the partners can be increased or withdrawn without limit, subject to any relevant provisions of a partnership agreement. Against this, however, is the increased risk for partners due to their being jointly and severally liable for the debts of the partnership. This joint liability does not apply to directors or shareholders of a corporation.

When contrasted with that of companies, the lower level of regulation of partnership relationships can be seen as both an advantage and a disadvantage: an advantage because it allows partners much greater freedom to determine their relationship with each other and the level of formality used, and a disadvantage because the reduced levels of regulation and formality can cause uncertainty as to the strict rights of the partners in the event of dispute or dissolution.

Joint ventures

Joint ventures (**JV**) are a common form of business association in Australia, particularly in the energy and resource industries and commercial property development. They are often used on a project by project basis. A joint venture can be unincorporated or incorporated and therefore in the latter case enjoy the benefits of limited liability.

By entering into a JV arrangement with Australian entities to carry out commercial activities, foreign investors may avoid the need to incorporate an Australian subsidiary or register as a foreign corporation.

There is no legislation directly regulating JV agreements. JV are governed by contract law and common law. JV agreements need to be carefully drafted so as to avoid being treated as a partnership for taxation purposes, if that is not desired. As mentioned earlier, a partnership for taxation purposes will be created where there is a joint receipt of income. In theory, under a JV, the product of the JV is distributed to each of the joint venturers (as contrasted to a partnership, which involves a distribution of the profits). This allows each joint venturer to control how they turn that product into profit and to adopt differing accounting and tax treatments for the income and expenses of their part in the JV. The individual participants of a joint venture can lodge separate tax returns and adopt different taxation strategies in respect of the income and expenses of the joint venture business in accordance with their own needs.

Often, to facilitate dealing with third parties, the title to the property of a JV may be held by a separate entity which may also serve as the manager of the JV operation. This structure is referred to as an incorporated JV. Shares in the management company are then held by the JV parties and the relationship between the venturers is usually governed by a written shareholders agreement. An incorporated JV company will be taxed in the same way as any other Australian company.

Trusts

Trusts are widely used by small businesses in Australia due to the potential flexibility in distributing trust income, the availability of CGT concessions, the lower levels of regulation when compared with companies and the ability to segregate business assets from personal assets.

The separation of legal and beneficial ownership, as well as the taxation treatment of trusts, makes trusts a popular structure for both business succession and tax planning reasons.

In simple terms, a trading trust is a business structure where a trustee (usually a company) carries out the business on behalf of the beneficiaries of the trust, with the trust being set up through a trust deed that regulates how the trustee deals with the trust property for the benefit of the beneficiaries (or some object permitted by law such as a charitable cause). In this regard, the benefit of the property does not accrue to the trustee.

In Australia, trusts are regulated by Trusts Acts of the various states and territories, and under the rules of equity and common law. There is no provision for registration of trusts (other than public unit trading trusts), and therefore, the provisions of the trust deed primarily remain private between the trustee and beneficiaries.

Generally, there are two types of trusts used for business purposes in Australia, discretionary trusts or fixed trusts. Discretionary trusts are widely used as a legitimate means of minimising income taxation.

A discretionary trust provides for maximum flexibility as it allows the trustee to determine how the trust's income and capital will be allocated from time to time amongst the beneficiaries. A discretionary trust is a widely used and popular structure for operating a family business. In contrast, the rights of beneficiaries of fixed trusts to share in the trust's income and capital are fixed under the trust deed.

In a unit trust, the beneficial interest in the trust is divided into units, which may be transferred in similar fashion to shares in a company. The holder of a unit is entitled to a proportionate entitlement fixed share of the profit of the trust. Fixed trusts or unit trusts are more popular with public investment in property and equities and those trusts can be listed on the ASX.

As a trust is not a separate legal entity in the same way a company is, business must be carried on for the trust by the trustee. The trustee will hold the assets of the trust business and trade on behalf of the beneficiaries of the trust.

Trust income is usually taxed in the hands of the beneficiaries according to their respective share of the trust income, however, some unit trusts are taxed as if they are companies. Also, where there are non-resident beneficiaries, the trustee may be taxed.

When a company acts as trustee of a trust, the company will be subject to the usual regulation of companies under the Corporations Act as with any other company.

CORPORATE GOVERNANCE IN AUSTRALIA

There are two primary sources of corporate governance regulation in Australia, the Corporations Act and the ASX. The internal affairs of all Australian incorporated companies are regulated, to some extent, by the Corporations Act. Overlaying this, companies whose shares are publicly traded on the ASX (including companies that are not incorporated in Australia) must also comply with the ASX Listing Rules, which require them to comply, on an *if not, why not basis*, with the '*Principles of Good Corporate Governance and Best Practice Recommendations*' (**ASX Guidelines**).

A summary of some of the most important corporate governance requirements of the Corporations Act and the ASX Guidelines is discussed below.

Directors

A proprietary limited company, the most common form of company, must have at least one director, who must be ordinarily resident in Australia. A public company must have at least three directors, at least two of whom must ordinarily reside in Australia. This is provided for under the Corporations Act.

Constitution

The internal affairs of a company, including the powers of its directors, are primarily governed by the company's constitution. A company can either choose to adopt its own constitution or use the '*Replaceable Rules*' (**Replaceable Rules**), which are a truncated body of rules that are set out in the Corporations Act. It is also common for a company to rely on both its own constitution and the Replaceable Rules (for example, where the constitution is silent on a particular matter that is provided for in the Replaceable Rules). In any event, the company must also comply with certain other corporate governance requirements of the Corporations Act.

Corporate decision making

The directors of a company are primarily responsible for determining the manner in which a company is managed and operated. The Corporations Act, however, reserves certain decisions to the company's shareholders. These reserved matters include deciding on amendments to the company's constitution, altering the rights of shareholders, approving reductions in the company's capital or a change to the company's name and, in the case of a public company, authorising the giving of benefits to related parties (who include directors) of the company.

Related party benefits

The Corporations Act prohibits a public company (as opposed to a proprietary limited company) from giving a financial benefit to a related party of the company, unless the giving of the benefit is either approved by the company's shareholders or is exempt from the requirement to obtain shareholder approval. A related party of a company includes its directors and immediate family members, entities controlled by them and an entity that controls the company. The main exceptions to the requirement to obtain shareholder approval are where any benefit would be reasonable in the circumstances if the benefit is given on arm's length terms and/or on commercial terms or if it constitutes reasonable remuneration to, or a reimbursement of expenses of, the related party in their capacity as an officer or employee of the company or a related entity.

Financial reporting

All companies are required by the Corporations Act to maintain appropriate financial records that correctly record and explain the company's financial position and performance, and that would enable true and fair financial statements to be prepared and audited.

However, whether a company is required to prepare financial statements, or have them audited, depends on the size and nature of the company. The Corporations Act requires that a company must annually prepare a financial report and directors' report, have the financial report audited (unless exempted), and send the financial report and directors' reports to shareholders and lodge them with ASIC if the company is:

- a '*disclosing entity*' (these are typically companies whose securities are publicly traded on a recognised stock exchange);
- a public company; or
- a '*large proprietary company*'.

A proprietary company will be a large proprietary company, and required to prepare a financial report and directors' report, if it satisfies two of the following three tests:

- the consolidated revenue of the company is greater than A$25 million; or
- the value of the company's consolidated gross assets is A$12.5 million; or
- the company and its controlled entities employ more than 50 people.

A proprietary company that is not a large proprietary company is a '*small proprietary company*'.

A small proprietary company must also prepare a financial report and directors' report if directed by ASIC or if shareholders controlling more than 5% of its voting shares request it to do so. A small proprietary company controlled by a foreign company will also be required to prepare these reports unless it satisfies certain conditions.

The Corporations Act requires that a company's financial report must comply with applicable accounting standards making the necessary disclosures in order to be transparent. It also requires various matters to be addressed in the directors' report. For example, the directors' report must include a review of the entity's operations, outline any significant changes that have occurred in the entity's affairs and discuss any likely developments in the entity's operations and the expected results of those operations.

Companies that are listed on a securities exchange are also required to prepare a remuneration report that contains prescribed information relating to the remuneration of executives and directors. The required disclosures include details of the remuneration of each director and the five highest paid executives of the company. Where an element of the remuneration of those persons consists of securities in the company, certain information in relation to those arrangements, and the details of any termination payments agreed to by the company should also be disclosed.

Audit

Unless exempted, all public and large proprietary companies must have their financial report for a financial year audited. An auditor who conducts an audit must form an opinion about certain prescribed matters, including whether:

- the financial report was prepared in accordance with the Corporations Act;
- the auditor has been given all information and assistance necessary to conduct the audit;
- the entity's financial records were sufficient; and
- the entity has kept other records and registers required to be maintained by the Corporations Act.

An auditor is also required to give a declaration as to the auditor's independence and compliance with independence requirements, which broadly:

- require auditors to avoid conflicts of interest (which in general terms will exist if the auditor is not capable of exercising objective and impartial judgment in relation to the conduct of the audit, or a reasonable person would conclude that the auditor is not capable of doing so);
- prohibit auditors from owning interests in the entities they audit (whether directly or through family members or associates);
- restrict an auditor's ability to move to an 'in-house' position with an audit client; and

- restrict an auditor from providing non-audit services to audit clients in certain circumstances.

There are also strict requirements for rotation of auditors to prevent auditors being significantly involved in the audit of a particular audit client for more than five years in succession.

An auditor is required to attend a listed company's annual general meeting to answer the questions of members regarding preparation of the entity's financial reports and the conduct of the audit.

Integrity of financial reporting – certification of financial reports

The Corporations Act requires that the Chief Executive Officer and Chief Financial Officer of a listed entity make a written declaration to the board of directors stating that the financial records of the company have been properly maintained, that the annual financial statements present a true and fair view of the company's financial position, and that the financial records have been kept in accordance with the Corporations Act.

Reporting to members

All companies that are required to prepare a financial report and directors' report must, within the prescribed period after the end of their financial year (which is no more than four months), provide to their members an annual financial report comprising the financial report, directors' report and auditor's report for the relevant year. The annual report may be provided to members either in hard copy or electronically and, unless a member requests a full annual report, an entity may satisfy its reporting obligations by providing members with a concise report that contains a less comprehensive level of disclosure.

ASX best practice recommendations

Under the ASX Listing Rules, companies listed on the ASX are required to provide a statement in their annual report disclosing the extent to which they have complied with the best practice recommendations set out in the ASX Guidelines. Where the best practice recommendations have not been followed, the ASX Listing Rules require ASX listed companies to provide reasons for not doing so.

The ASX Guidelines were first published in 2003, revised in the second half of 2007 and then further revised in 2014. The ASX Guidelines are predicated on the assumption that there is no '*one-size fits all*' model of good corporate governance and that what amounts to good corporate governance will differ from organisation to organisation, and must be tailored to the circumstances of each entity.

A complete copy of the 3rd edition of the ASX Guidelines (2014) can be accessed through the website of the ASX: <http://www.asx.com.au/documents/asx-compliance/cge-principles-and-recommendations-3rdedn.pdf>.

On 2 May 2018, a 4th edition of the ASX Guidelines was released for consultation, which is due to come into effect from 1 July 2019. Later editions of this guide will incorporate a description of any updates made by the final form of the 4th edition of the ASX Guidelines. Set out below is a brief discussion of a number of the recommendations contained in the current (i.e. 3rd edition) ASX Guidelines.

Independence of directors

The ASX Guidelines recommend that a majority of the directors and the chair of a listed company should be '*independent*'. An independent director is described as a director who is independent of management and free of any business or other relationship that could interfere (or be perceived to interfere) with their exercise of unfettered judgment. The board must consider any relationships that could affect the independent status of a director including whether a director is a substantial shareholder of the company, has been employed by the company, has been an advisor to the company or has had a contractual relationship with the company. Family connections and cross-directorships may also be relevant. It is recommended that, in the interests of independence, a procedure be established to allow directors access to independent professional advice at the company's expense. Non-executive directors should also meet regularly without management.

Ethical and responsible decision-making

The ASX Guidelines recommend that companies clarify the ethical behaviour standards that they expect, comply with all legal obligations and publish their policy concerning diversity. Companies should establish a code of conduct with practices which not only adhere to their legal obligations but which maintain confidence in the company's values. A diversity policy should include measurable goals for gender diversity and means for the board to assess them.

Term of directorship

Under the ASX Listing Rules, no director (aside from a managing director) is permitted to hold office, without being re-elected, for more than three years. The ASX Guidelines recommend that non-executive directors be appointed for a specific term subject to re-election and subject to the ASX Listing Rules. Reappointment of directors should not be automatic.

Integrity in financial reporting and audit committee

The ASX Guidelines recommend that companies put in place a structure of review to ensure accurate and factual presentation of the company's financial position. A company's board should establish an audit committee, whose role is to focus on issues relevant to the integrity of the entity's financial reporting and oversee the independence of the external auditor. Consistent with international trends, it is recommended that:

- the audit committee consist of only non-executive directors;
- the majority of members be independent;
- the committee be chaired by an independent chair; and
- there be at least three committee members.

Timely and balanced disclosure

Policies that ensure ASX Listing Rule requirements are met should be put in place. This should ensure timely access to important material concerning the company and include financial information, ownership, performance and business administration information.

Rights of shareholders

Companies should respect their shareholders by efficient communications, giving them access to clear information about the company and by enabling them to be active in general meetings.

Risk management

The recommendations suggest monitoring and identifying risk and identifying major changes to the company's risk management system. The establishment of policies for the management of risk, the disclosure of these policies and the establishment of risk management committees is suggested. The board should require the company management to report to them on the progress of the risk management system.

Directors' remuneration

Under the ASX Guidelines, non-executive directors should not participate in schemes designed to remunerate executives, receive options or bonus payments, nor be provided with retirement benefits other than superannuation. Many listed companies have a remuneration committee to determine the appropriate remuneration.

BANKING AND FINANCE

Banking in Australia

Australia has a highly developed, stable banking system regulated by the Australian Prudential Regulation Authority (**APRA**), the Reserve Bank of Australia (**RBA**) and ASIC.

APRA's primary responsibilities are to authorise entities to conduct banking business in Australia and to ensure entities in the banking and financial services sector appropriately manage risk. APRA's prudential standards require banks to maintain a minimum proportion of capital based on a specified percentage of total assets they hold. These capital adequacy standards are designed to maintain the stability and integrity of the Australian banking and finance environment.

A company authorised by APRA to carry on banking business in Australia is called an Authorised Deposit-taking Institution (**ADI**). There are legal restrictions on using certain terminology relating to banking (such as an entity describing itself as a '*bank*') without ADI status or APRA's prior consent. ADIs provide a full range of financial services to businesses including business lending, corporate finance, project finance, asset and structured finance and derivatives. There are four major ADIs, or banks, in Australia: Australia and New Zealand Banking Corporation (ANZ), the National Australia Bank (NAB), Commonwealth Bank of Australia (CBA) and Westpac Banking Corporation. Between them, these banks dominate the Australian banking industry. Other minor industry players include regional banks, credit unions, merchant banks and Australian branches of global banks such as HSBC and Citibank. Investment banks such as Credit Suisse, UBS, Deutsche Bank and Macquarie Group provide financial services in relation to such activities as capital raising, placements, underwriting issues of equity or debt securities and so forth.

The RBA is Australia's central bank and its responsibilities include advising the Australian Government in relation to monetary policy (including managing inflation and setting official RBA interest rates), managing market liquidity and Australia's gold and foreign exchange reserves and issuing notes and coins. The RBA also has responsibility for foreign exchange control and RBA consent may be required to complete foreign exchange transactions with governments and nationals of countries subject to United Nations sanctions.

Together with APRA, ASIC has the responsibility of enforcing laws regulating the Australian financial services industry and it oversees the licensing and conduct of financial services and consumer credit industry participants.

Licensing requirements

Financial services licensing regime

In order for a person or entity to carry on a business of providing financial services in Australia, an Australian financial services licence (**AFSL**) must first be obtained from ASIC or an existing AFSL holder must appoint that person or entity as an '*authorised representative*'. In very limited circumstances, an exemption from licensing requirements may apply. This form of licensing does not cover money lending, which involves a separate regulatory regime discussed later in this chapter.

The AFSL regime covers a broad range of financial services such as providing advice in relation to shares, insurance, superannuation or other financial products, dealing in financial products such as foreign currency exchange contracts or derivatives and operating a registered managed investment scheme. Examples of businesses that carry on a financial services business, and must hold an AFSL, include stockbrokers, ADIs, insurance companies, responsible entities of managed investment schemes, superannuation fund trustees who provide advice, financial advisers or planners and fund or investment managers.

Obtaining an AFSL involves submitting a detailed application to ASIC which must demonstrate satisfaction of prescribed licensing criteria. The time and resources required for obtaining a new licence can be significant. ASIC may require licensing proofs to be submitted on topics such as risk management and compliance or demonstration of adequacy of an applicant's human, financial and technological resources. ASIC may attach conditions to the granting of a licence, such as restricting the scope of financial services the licensee is permitted to engage in. Once an AFSL is obtained, extensive training and compliance obligations must also be satisfied on an ongoing basis.

Foreign entities may be deemed to carry on a financial services business in Australia without having a physical presence in Australia. This may be the case where a foreign entity:

- issues shares, bonds, debentures or other financial products such as insurance to persons in Australia;
- enters into financial derivative transactions (such as swaps, options or forward contracts) linked to the value of currency, commodities or indexes with persons in Australia; or
- executes secondary market trades on behalf of persons in Australia.

Credit licensing regime

There are similarities in the regulatory approaches taken for the credit licensing and financial services licensing regimes, however the two are separate. The consumer credit industry is subject to the licensing and conduct regime established under the *National Consumer Credit Protection Act 2009* (Cth), which incorporates the National Credit Code (**NCC**). Generally speaking, the NCC applies to credit contracts under which credit is provided to individuals or strata corporations wholly or predominately for personal, domestic or household purposes or for investment in residential property.

In order for a person or entity to engage in '*credit activity*' in Australia, an Australian Credit Licence (**ACL**) must first be obtained or an existing ACL holder must appoint that person or entity as a '*credit representative*'. In very limited circumstances, an exemption from licensing requirements may apply.

The NCC prescribes the types of activities which constitute '*credit activity*', which include the provision of credit under a credit contract, providing a credit service by suggesting a consumer should, or assisting a consumer to, enter into a credit contract with a particular credit provider, or acting as an intermediary between a credit provider and a consumer with the aim of securing the provision of credit. The breadth of the term '*credit activity*' captures a wide range of participants in the credit industry, including banks, building societies and credit unions, lessors under consumer finance leases (such as car or vehicle leases) and other credit intermediaries (such as finance brokers and mortgage managers).

The credit licensing system is based on the AFSL regime in terms of process and is administered by ASIC. Like applications for an AFSL, applications for an ACL are detailed, require the applicant to demonstrate satisfaction of certain licensing criteria and can require extensive supporting evidence to be submitted to ASIC. ACL holders have an extensive range of ongoing obligations imposed on them by the governing legislation, including in relation to responsible lending, disclosure and reporting. Licence holders are also responsible (and liable) for credit representatives authorised to operate under their ACL.

Depending on the scope of business activities a foreign entity has with Australia, it is possible for a foreign entity to engage in a credit activity without having a physical presence in Australia. This may be the case where a foreign entity provides credit to Australian individuals for wholly or predominately personal, domestic or household purposes.

Taking security

It is usual for lenders in Australia to require a borrower's repayment obligations to be secured over property owned by an Australian entity or assets located within Australia. Depending on the nature of the property secured, differing registration requirements may need to be satisfied to ensure that the security is valid and enforceable in the event of default or insolvency of the party providing the security.

Security interests over real property (including land and buildings), usually referred to as '*mortgages*', require registration under the relevant state or territory based land registration system, with forms and procedures differing between states and territories.

Security interests in personal property other than land (and other specifically excluded property such as water rights and mining tenements) are regulated on a national basis by the *Personal Property Securities Act 2009* (Cth) (**PPSA**). The PPSA commenced on 30 January 2012 and creates a comprehensive set of rules relating to security interests in personal property, modelled on similar legislation in force in New Zealand and Canada. The broad concepts of '*security interest*' and '*personal property*' under the PPSA are relevant to a range of businesses, not simply those dealing with the banking sector. '*Security interests*' include traditional security interests such as charges but also transactions which in substance secure the payment or performance of an obligation – such as hire purchase agreements, finance leases and retention of title arrangements, or arrangements which are deemed to be security interests, such as '*PPS leases*'. Secured parties must register their security interest on the Personal Property Securities Register to ensure priority over other competing securities interests. Consequences of failure to register can include loss of priority, another person being able to take the relevant personal property free of the unregistered security interest or inability to enforce a security interest against an insolvent grantor.

Business lending

Apart from the banks, the availability of finance to business relies upon some specialist investment firms or merchant banks. Lending to business does not require an ACL, which is restricted (subject to some exceptions) in application to consumer lending. However, lending to businesses, whilst often a more sophisticated process than a mortgage transaction, can involve conduct scrutiny of the lender under the *Competition and Consumer Act 2010* (Cth) (**CCA**), particularly for unconscionable conduct and misleading statements (see ch 5).

Anti-money laundering

Australia's anti-money laundering (**AML**) regime operates by regulating '*designated services*' within the Australian banking and finance industries. The *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) (**AML/CTF Act**) provides that an entity undertaking designated services carried on through a permanent establishment in Australia (which includes through an agent based in Australia) owes certain key obligations as a reporting entity under the AML/CTF Act. Designated services include:

- deposit taking and lending transactions;
- issuing and selling securities and derivatives;
- foreign exchange contracts;
- providing custodial or depositary services;
- certain finance leasing; and
- dealing in interests in managed investment schemes, pensions, annuities and life policies.

The key obligations imposed on reporting entities include customer identification and ongoing customer due diligence responsibilities, record keeping and submitting compliance reports and other information to the Australian Transaction Reports and Analysis Centre (**AUSTRAC**).

There are no general restrictions on the amount of currency that may be brought into Australia (whether physically or via electronic fund transfer), although certain mandatory notification obligations may be triggered under either (or both of) financial transaction reporting and AML legislation. The *Financial Transaction Reports Act 1988* (Cth) requires certain '*cash dealers*' (including financial institutions, financial intermediaries and securities and derivatives dealers) to report cash transactions of A$10,000 (or the foreign currency equivalent) or more to AUSTRAC. Cash dealers must also notify AUSTRAC if reasonable grounds exist to suspect that a transaction relates to an evasion or breach of taxation or other federal laws or involves dealings with the proceeds of crime.


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FOREIGN INVESTMENT IN AUSTRALIA

Australia has focused on developing a business environment suitable for growth and investment. In particular, the Australian Government has adopted a foreign investment policy aimed at welcoming investment in Australian businesses and property, recognising the economic advantages of encouraging foreign investment in Australia. A summary of Australia's foreign investment policy can be found on the Foreign Investment Review Board's (**FIRB**) website (www.firb.gov.au).

Community concerns about foreign ownership of Australian assets are addressed through the operation of the *Foreign Acquisitions and Takeovers Act 1975* (Cth) (**FATA**) and the *Foreign Acquisitions and Takeovers Regulation 2015* (Cth) (**FATR**). The FATA requires proposed acquisitions of Australian assets by '*foreign interests*' to be notified to FIRB if they fall within a specified category or are valued above a specified monetary threshold.

Who is a foreign person?

As stated in s 4 of the FATA, with certain exceptions, a '*foreign person*' means:

- a natural person not ordinarily resident in Australia;
- a corporation in which a natural person not ordinarily resident in Australia, or a foreign corporation, or a foreign government holds a substantial interest;
- a corporation in which two or more persons, each of whom is either a natural person not ordinarily resident in Australia, a foreign corporation, or a foreign government, hold an aggregate substantial interest;
- the trustee of a trust in which a natural person not ordinarily resident in Australia, a foreign corporation, or a foreign government holds a substantial interest;
- the trustee of a trust in which two or more persons, each of whom is either a natural person not ordinarily resident in Australia, a foreign corporation, or a foreign government hold an aggregate substantial interest;
- a foreign government; or

- any other person, or any other person that meets the conditions, prescribed by regulations.

Further persons are included as a '*foreign person*' in s 18 FATR:

- general partners of limited partnerships where:
  - a natural person not ordinarily resident in Australia, a foreign corporation, or foreign government holds at least 20% in the limited partnership; or
  - two or more persons each of whom is an individual not ordinarily resident in Australia, a foreign corporation or a foreign government, hold an aggregate interest in at least 40% in the limited partnership.

A person will be regarded as having a substantial interest in a corporation if the person controls at least 20% of the voting power or holds interests in at least 20% of the issued shares; or the person, together with other persons, controls at least 40% of the voting power or holds interests in at least 40% of the issued shares, unless the Australian Government Treasurer is satisfied that the person, whether alone or together with associates, is not in a position to determine company policy.

The thresholds for determining a substantial interest in a trust estate is 20% of the beneficial interest in the capital or income of the trust for a single person and an aggregate of 40% for the person and his or her associates. If the trust is a discretionary trust, each potential beneficiary is taken to be beneficially entitled to receive the maximum amount that the trustee is empowered to distribute to them.

The interests of an associate of a natural person, not ordinarily resident in Australia or a foreign corporation noted above, will be taken into account when determining their interest in the corporation or trust, as the case may be.

Role of FIRB

The role of FIRB is to examine foreign acquisition proposals, and then make a recommendation to the Australian Government as to whether each particular proposal is suitable for approval under Australia's foreign investment policy. The Australian Federal Government Treasurer may then either approve the proposed acquisition, or block the proposed acquisition if determined to be contrary to the national interest. Applicants are usually advised of the FIRB's decision within 30 days of making the application, although this time may be extended by up to 90 days.

The Treasurer's assessment for the national interest will be conducted on a case-by-case basis. Usually, the government will consider the following factors:

- **national security**: the extent to which the foreign investment affects Australia's ability to protect its strategic and security interests;
- **competition**: whether the foreign investment may cause an investor gaining control over market pricing and production of goods and services in Australia or globally;
- **government policies**: the extent foreign investment will impact the Australian Government policy objectives, including the impact on revenues;
- **economy and community**: the likely impacts on the general Australian economy and the Australian community at-large; and
- **character of the investor**: whether the investor operates on an open commercial basis and is subject to relevant regulation and supervision.

The Australian Government is likely to further consider the following factors for foreign government investors:

- whether the investment is wholly or partly foreign government owned, including whether it conducts business on a commercial arm's length basis;
- whether the investment is political or commercial in nature; and
- the scale, importance and impact of the proposed investment.

Investments requiring approval

Notifications depend on the type of investment proposed, the monetary value of the investment, the industry sector of the investment, and the nationality of the investor. Specific restrictions are in force in industries considered sensitive, such as the media, telecommunications and transport. The policy encourages foreign investment in real estate that increases the supply of new housing to maintain greater stability of house prices, whilst discouraging speculative investment.

As a result of various Free Trade Agreements, separate thresholds apply for acquisitions by investors from certain trading partner countries including the United States of America (**USA**), New Zealand (**NZ**), Chile, China, Japan, South Korea, Malaysia, Singapore and Thailand. Under these Free Trade Agreements, Australia has made commitments relating to foreign investment screening.

The monetary thresholds are indexed annually on 1 January each year. The following table shows the relevant amounts for acquisitions in 2018 (excluding foreign government investors):

Investor	Type of Investment	Threshold
Land		
All investors	Residential land	$0
	Vacant commercial land	$0
	Australian land corporations or trusts, where the land is at least 10% of the entity's total assets	$0
Privately owned investors from FTA countries	Agricultural land	Chile, NZ, USA: $1,134 million
		China, Japan, Korea: $15 million
	Developed commercial land	$1,134 million
	Interests in at least 10% of listed Australian land corporations or trusts	$1,134 million
	Interests in at least 5% of unlisted Australian land corporations or trusts	
	Mining and Production tenements	Chile, NZ, USA: $1,134 million
		$0 otherwise
Non-FTA privately owned investors	Agricultural land	Thailand: $50 million
		$15 million, otherwise
	Developed commercial land	$261 million
	Sensitive land (including mines and critical infrastructure)	$57 million
	Interests in at least 10% of listed Australian land corporations or trusts	$261 million
	Interests in at least 5% of unlisted Australian land corporations or trusts	
	Mining and Production tenements	$0

Investor	Type of Investment	Threshold
Non-Land Acquisitions		
Privately owned investors from FTA countries	An acquisition of a '*substantial interest*' in: ■ non-sensitive businesses; or ■ sensitive businesses.	$1,134 million for sensitive businesses or $261 million for non-sensitive businesses
	At least 5% in the media sector	$0
	Direct interest in agribusiness	Chile, NZ, USA: $1,134 million
		China, Japan, Korea and Singapore: $57 million
Non-FTA privately owned investors	Sensitive or non-sensitive business acquisitions	$261 million
	At least 5% in the media sector	$0
	Direct interest in agribusiness	$57 million

Exemption Certificates

Where the Treasurer is satisfied that an acquisition is not contrary to the public interest, a foreign person (including a foreign government investor) may obtain an exemption to obtaining FIRB approval for certain land acquisitions.

Foreign Ownership Register of agricultural land

The *Register of Foreign Ownership of Water or Agricultural Land Act 2015* (Cth) set up the Agricultural Foreign Ownership Register administered by the ATO which requires foreign persons with interests in agricultural land to register (regardless of the value). Investors are required to notify the ATO within 30 days if:

- the foreign person holds or ceases to hold agricultural land;
- becomes a foreign person whilst holding agricultural land;

- ceases to be a foreign person whilst holding agricultural land;
- the land becomes agricultural land or it ceases to be agricultural land whilst held by a foreign person.

For the purposes of the above, '*agricultural land*' means land in Australia that is used, or that could reasonably be used, for a primary production business.

Australian government support for foreign investment

All foreign trade and investment enquiries are managed by the Australian Government's trade and investment development agency, the Australian Trade Commission (**Austrade**). Austrade provides a single point of contact for all prospective investors and provides a range of free services to assist investors. Services offered by Austrade include introducing prospective investors to key industry contacts, providing information about the business environment and regulatory environment in Australia and advising on government approval processes and government assistance programs.

Foreign resident capital gains tax withholding regime

This regime requires the withholding of CGT by foreign resident vendors disposing of certain property (real property, or indirect real property interests via the acquisition of shares in a land-rich entity) after 1 July 2016.

For contracts entered into after 1 July 2017, the relevant tax rate is 12.5%, which applies to real property disposals of over $750,000. The purchaser must withhold this amount at settlement, to be paid to the ATO, unless a clearance certificate (issued by the ATO) or other declaration is provided by the vendor to prove Australian residency.

CORPORATION AND CONSUMER LAW

Fundamental to Australia's economic goals and achievements is a competitive and vibrant economy. The market economy is fostered by a key federal government law, the CCA, administered by an independent statutory authority, the Australian Competition and Consumer Commission (**ACCC**).

Based on the assumptions that markets must be encouraged to perform efficiently, the CCA aims to improve business conduct by promoting competition and fair trading and providing consumer protection. The CCA includes complementary state and territory legislation so that its anti-competitive conduct prohibition applies to virtually all businesses in Australia.

The ACCC is the only national agency dealing generally with competition matters and the only agency with responsibility for enforcing the CCA and the state and territory applicable legislation. The ACCC has maintained a very visible public profile through its conduct of high profile civil cases and prosecutions. Private litigants can also sue under the CCA.

In broad terms, the CCA covers anti-competitive and unfair market practices, mergers or acquisitions of companies (in the sense of preventing monopolies), product safety and liability, and third-party access to facilities of national significance. Part VIIA of the CCA enables the ACCC, in limited circumstances, to hold price inquiries, examine proposed price rises and monitor the prices, costs and profits of an industry or business under the direction of the federal government minister.

Prohibiting anti-competitive conduct

The CCA contains specific provisions prohibiting activities that limit competition, such as:

- mergers or acquisitions that have the effect of substantially lessening competition;

- exclusive dealing, which is the imposition of various vertical restraint practices – generally this type of conditional dealing will only breach the CCA if it has the purpose, or likely effect, of substantially lessening business competition in a relevant market in Australia;
- resale price maintenance, where a wholesaler specifies a minimum resale price to a retailer;
- contracts, arrangements or understandings between corporations that have the purpose, or likely effect, of substantially lessening competition in a relevant market;
- a corporation with a substantial degree of market power taking advantage of that market power for an anti-competitive purpose; and
- cartel behaviours, including price fixing, restricting freedom in the production and supply chain such as by market sharing and bid rigging.

In some circumstances, the CCA prescribes criminal penalties for cartel behaviour, including jail terms for individuals.

Access to essential facilities

Part IIIA of the CCA establishes a national framework for access to infrastructure services considered to be of national significance. Most significantly, this access regime establishes legal rights for third parties to share these services on reasonable terms and conditions.

Access to significant infrastructure services can occur through:

- an existing effective access regime, generally a state or territory legislative regime; or
- under terms and conditions set out in a voluntary undertaking approved by the ACCC.

Unfair trade practices

Unfair trade practices, such as misleading or deceptive conduct and unconscionable conduct, are prohibited by the CCA and under the complementary Fair Trading Acts, which are state legislation administered by state consumer and business affairs offices.

Unconscionable conduct is prohibited in consumer and commercial transactions. While '*unconscionable*' is not defined in the CCA, there are two kinds of such conduct prohibited in the context of commercial transactions. The first is where a weaker party is in a position of special disadvantage that the stronger party knew about, and takes unfair advantage of that special disadvantage. A special disadvantage may arise where a person's ability to understand and assess what is in their best interests may have been affected by circumstances such as infirmity of mind or body, illiteracy or extreme financial need. This type of conduct often involves unsophisticated consumers who are taken advantage of by unscrupulous businesses.

The second type of unconscionable conduct applies in transactions of up to A$10 million. Typically, this occurs in '*business to business*' transactions. This allows the court to assess, against a list of non-exhaustive factors, whether the conduct was unconscionable in all circumstances. To amount to unconscionable conduct, there must be more than unequal bargaining strengths between the parties and more than merely a hard bargain.

Also prohibited under the CCA are:

- false or misleading representations in trade or commerce;
- component pricing;
- pyramid selling;
- bait advertising;
- referral selling;
- payment without supply; and
- harassment or coercion.

Product liability

Schedule 2 of the CCA (known as the Australian Consumer Law) contains a no-fault product liability regime for consumers, which imposes strict liability on a manufacturer if goods have a defect, i.e. their safety is not as one is generally entitled to expect. The importer is deemed to be the manufacturer when the manufacturer does not have a business presence in Australia.

The pitfalls arising from product liability claims highlights the importance of having adequate product liability controls in place if you are a manufacturer or importer in Australia.

At a state level, remedies are available based on terms implied into contracts and negligence. These terms involve merchantable quality, compliance with description or sample and fitness for purpose. Negligence involves a failure to take reasonable care.

States have introduced proportionate liability legislation in negligence cases where claims of economic loss are made. Under this legislation, a party is liable only for an amount reflecting the proportion of the loss that the court considers just, taking into account that party's responsibility for loss and damage. For example, if a court finds a party is 25% liable, then damages are limited to 25%. Proportionate liability does not apply to personal injury loss or in matters where there is a strict obligation.

There is also other federal and state consumer protection legislation that addresses consumer information and safety standards and consumer protection related measures.

Privacy

Privacy law in Australia is a mixture of federal and state instruments. For most businesses operating in Australia, the key law is the *Privacy Act 1988* (Cth) (**Privacy Act**).

The Privacy Act sets out 13 Australian Privacy Principles (**APPs**) regulating the collection, use, storage, disclosure of and access to personal information. Under an exemption for small business, businesses with an annual turnover of less than A$3 million are exempt from the Privacy Act (although businesses which provide health services, businesses which receive payment or benefit for disclosing or collecting personal information, and businesses which are contracted service providers to the Commonwealth remain bound regardless of size). Employee records are also exempt. These two significant exemptions mean that Australia's privacy law is not considered equivalent to that of the European Union.

Organisations in the federal public sector are subject to the APPs under the Privacy Act. Businesses with contracts to supply services to them will often be required to comply with these APPs.

Most states have privacy laws regulating their state-run public sector organisations. Most states also regulate the use of surveillance in workplaces including the use of cameras, listening devices and monitoring of employee internet use and emails.

Other federal laws impacting on the issue of privacy are those regulating Tax File Numbers, restrictions on recording or intercepting telecommunications and privacy provisions in various government programs, for example Medicare and other social services. There is also a federal law restricting electronic marketing or '*spam*' emails and faxes and which enforces substantial penalties. Consent to collection of a person's personal information does not allow electronic marketing or spam to be sent to that person. Consent to receive electronic marketing must be specific and on an '*opt-in*' basis. Also, all electronic marketing must include a functional unsubscribe mechanism.

All privacy laws give a person the right to see, subject to limited exceptions, what personal information is held about them by businesses and to seek correction of incorrect information.

While possibly confusing, the APPs and other state privacy laws all broadly follow the same approach:

- businesses can only collect personal information where such information is reasonably required for the specific business purposes for which it is being collected;
- the person concerned should be made aware at the time of collection that their personal information is being collected, who it is being collected by, the purposes for which it will be used and should consent to such;
- personal information should be retained only for as long as reasonably necessary for the specific business purposes for which it was collected and to which the individual consented; and
- the business should take reasonable steps to protect the confidentiality, security and accuracy of the personal information it holds.

All of Australia's privacy laws are administered by privacy commissioners, who can receive and investigate complaints alleging a breach of privacy. If a business fails to abide by a commissioner's determination, the business can be taken to a court or tribunal and enforceable orders, including compensation, can be made.

Notifiable data breaches scheme

From 22 February 2018, certain entities that hold personal information must comply with strict obligations in relation to reporting of data breaches. If there has been any unauthorised access of personal information that may result in serious harm to the affected individual, the breach must be reported to the relevant individual and the Privacy Commissioner. The scheme applies to all entities that have existing obligations with respect to personal information under the Privacy Act.

INSOLVENCY REGIMES IN AUSTRALIA

In Australia, different laws apply to an individual becoming insolvent and to cases where a company becomes insolvent. Individuals are dealt with under the federal *Bankruptcy Act 1966* (Cth). Corporate insolvencies are regulated under the Corporations Act.

There are three principal regimes that apply to corporate insolvency in Australia – liquidation, voluntary administration and receivership. The law relating to corporate insolvency in Australia is set out in ch 5 (External Administration) of the Corporations Act.

Corporate liquidation

Liquidation involves the control and realisation of a company's property by a liquidator and the application of that property to discharge the debts of the company. Upon the conclusion of the process, the company is deregistered and ceases to exist.

A company can enter liquidation in a number of ways. If the company is solvent, the shareholders can resolve to wind up the company (this is particularly useful to foreign companies seeking to wind up a solvent Australian subsidiary). If the company is insolvent, the creditors may appoint a liquidator at a creditors' meeting or, on the application of a variety of parties including a creditor, shareholder or director, a court may order that the company be wound up and a liquidator be appointed. It is usual for the applicant (in particular a creditor) who is applying for the company to be placed in liquidation to nominate a preferred liquidator.

In principle, all unsecured creditors of a company in liquidation are to be treated equally. Secured creditors have their own recourse to secured property. Where the security is not sufficient to meet the whole amount of the secured creditor's debt, the surplus above the amount recoverable under the security can be claimed as an unsecured debt in the liquidation.

There is a moratorium period preventing most unsecured creditors' actions, and the liquidator has statutory rights to avoid certain pre-appointment creditor transactions that are proved in court to comprise unfair preferences or uncommercial transactions. The liquidator has powers to investigate the affairs of the company and persons who have dealt in those affairs to establish any wrong-doing. In Australia, directors can be personally liable for the debts incurred by the company whilst it was insolvent in the lead up to collapse of the company (subject to certain defences). The directors' powers are suspended following the appointment of a liquidator.

Subject to complex rules, priority is also afforded to the costs of the liquidation and then employee entitlements before distribution is made on a '*pari passu*' basis to those unsecured creditors who have lodged a proof of debt in the liquidation and whose proofs have been admitted at least in part by the liquidator. In the uncommon event that there is a surplus after the creditors are paid in full, the shareholders (members) receive the surplus.

A provisional liquidator may be appointed where there is a risk of dissipation of company property, pending the court's determination as to whether the company should be wound up.

Voluntary administration

A voluntary administration is usually initiated by the directors of the company in circumstances where they consider the company is insolvent or likely to become insolvent. An administrator is appointed to assume control of the company's business with a view to maximising the chances of the business continuing by way of sale or a restructure, or if that is not possible, entering into a Deed of Company Arrangement (**DoCA**) in order to achieve a better return to the company's creditors than what would have otherwise been achieved through liquidation.

The directors' powers are suspended during the administration and, subject to certain exceptions, there is a moratorium on creditor action. Secured creditors may still enforce a charge and appoint a receiver without the consent of the administrator or the court, provided the charge extends over at least almost all of the assets of the company and the appointment is made within the first 13 business days of the administration. The powers of directors are substantially limited, but not wholly suspended, during administration.

The courts have only a limited supervisory role in relation to administrations, and the decision as to whether the company should be wound up, returned to its directors (uncommon) or made the subject of a DoCA is left to the creditors who vote after considering the report and subsequent recommendation of the administrator. If the creditors vote in favour of a DoCA, all unsecured creditors, and those secured creditors who voted in favour of the DoCA, will be bound by its terms. The administration process is required to be completed within the short period of approximately five weeks, although this period can be extended by the court. It is fair to say that the motivation behind directors agreeing to appoint a voluntary administrator or provisional liquidator is the potential liability of the directors to personally pay the company's debts if the company is allowed to continue trading while insolvent.

Receivership

A receiver is usually appointed by a secured creditor of the company in accordance with the terms of the relevant security documentation (for example, a charge or a mortgage). Upon an event of default under the security documentation, the receiver will be appointed to take over possession and control of the assets that are the subject of the security. This may include continuing to trade the company's business.

Although the receiver is the agent of the company and not of the appointor (unless the company is also in liquidation), a receiver will be concerned primarily with realising the value of the secured assets for the benefit of the appointor, and not the interests of the general body of unsecured creditors (contrary to the duty of an administrator and liquidator). The courts also have the power to appoint a receiver.

If the receiver's appointment extends to most of the company's assets, the directors' powers will be effectively superseded by the powers of the receiver. Unlike liquidation and administration, no moratorium applies where a receiver is appointed, although if the receiver controls all of the assets of the company, there may be little incentive for a creditor to proceed with action against the company.

Recognition of foreign insolvency regimes in Australia

In 2008, the Australian Parliament enacted the *Cross-Border Insolvency Act 2008* (Cth) (**CBIA**), which to a large extent adopts the United Nations Commission on International Trade Model Law (**UNICITRAL**). This legislation therefore implements a regime of recognition and assistance to '*foreign proceedings*' that relate to insolvency administrations and reorganisations that arise from a foreign insolvency law and which involve the control or supervision by a foreign court of the assets and affairs of the debtor.

As a result, foreign representatives can apply to the Australian courts for recognition of the foreign proceeding as a foreign main proceeding or a non-main proceeding. If recognition as a foreign main proceeding is achieved, the proceeding is availed automatic assistance and stays and suspensions can operate in relation to the debtor and its assets.

The relief available to non-main proceedings is more limited. Whether a foreign proceeding is recognised as a foreign main proceeding requires an examination by the court of the debtor's Centre of Main Interests (**CoMI**). CoMI is not defined in the legislation, but the courts are guided by the body of case law that is developing throughout overseas jurisdictions on this issue.

This CBIA does not apply to foreign proceedings concerning banks and insurance companies. Assistance in relation to these proceedings can be obtained by a letter of request to the Australian courts requesting the appointment of a liquidator to the debtor, or by proceeding under the applicable local laws.

Debt recovery in Australia

Recovery of debts can be achieved through the various federal and state courts of Australia, subject to various jurisdictional limits.

Creditors of debtor companies may issue a statutory demand for A$2,000 or more in a form prescribed by the Corporations Act, which gives rise to a statutory presumption that the debtor is insolvent, if within 21 days of service, the demand is not satisfied by the debtor or the debtor does not apply successfully to the court to have the demand set aside on the basis that there is a genuine dispute as to the debt or the debtor is owed an offsetting debt by the creditor. The presumption of insolvency entitles the creditor to commence an action in the court to wind up the debtor company and appoint a liquidator to wind up the company and realise the assets.

A secured creditor has the rights conferred by its security, in particular to take possession of the secured property or to appoint a receiver to those assets of the debtor that are secured by the creditor's security. A mortgagee of occupied real estate generally requires an order of the court to obtain possession of the property.

Australian courts recognise that a successful verdict results in a judgment against the defendant. Judgments can be enforced against the property of a debtor and often a judgment is the platform for bankruptcy proceedings against an individual or liquidation proceedings against a company.

'*Ipso Facto*' regime

The *Treasury Laws Amendment (2017 Enterprise Incentives No. 2) Act 2017* (Cth), which came into operation on 1 July 2018, introduces new restrictions on the operation of '*ipso facto*' provisions in the context of insolvency events. The new regime operates to effectively put a stay on a party's right to terminate or suspend a contract that arises as a result of threatened or actual insolvency. These restrictions should be kept in mind when negotiating provisions in contracts that will activate on insolvency events.

taxes,
To provide and maintain a navy ;
To make rules for the government and regulation of the land and naval forces ;
To provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions ;
To provide for organizing, arming and disciplining the militia, and for governing such part of them as may

TAXES AND SIMILAR IMPOSTS

Australian taxes are levied at the federal, state and local levels of government. This chapter focuses on federal and state taxes.

Federal taxes come in direct and indirect forms. For example, in addition to income tax being levied on revenue, other taxes such as goods and services tax (**GST**) can be levied as a tax on goods and services sold within Australia. Another major taxation item is capital gains tax (CGT) which can apply to tax profits made on selling property. Income tax is a direct tax and is currently administered under the *Income Tax Assessment Act 1936* (Cth) and the *Income Tax Assessment Act 1997* (Cth) (**Tax Acts**) and associated legislations, rulings and regulations.

Income tax is payable on an annual basis on ordinary and on statutory income. Ordinary income includes salary or wages, business profits, dividends and interest.

Tax rates

A resident of Australia is generally subject to income tax on assessable income from all sources, that is, worldwide income.

A non-resident is subject to income tax on income earned from Australian sources and on capital gains from disposal of direct or indirect interests in Australian land (including mining rights) and disposal of assets used in carrying on a business in Australia through a permanent establishment. Certain types of income paid to non-residents are subject to the withholding tax rules. The source of income is mainly a matter of fact to be determined according to principles developed by the courts.

Tax is imposed at varying rates (see tables 1 and 2 on following pages) on taxable income and is calculated as follows:

Gross Income (e.g. before tax and deductions)	A$
Less: Exempt income and non-assessable non-exempt income	A$
Assessable income	A$
Less: Allowable deductions	A$
Taxable income	A$

Note: Tax on taxable income at rates depending on the type and residence of taxpayer

Less: Tax offsets (rebates)	A$
Tax credits	A$
Income tax payable	**A$**

The Tax Acts are administered by the ATO which levies and collects tax, in addition to enforcing compliance, and investigating suspected non-compliance, with the Tax Acts. The website of the ATO is an ideal place to find more information about tax issues, tax rulings and is where ATO interpretations can be found (www.ato.gov.au).

Income tax rates – individual

Table 1 – Resident individuals
Rates of income tax payable for the 2018/2019 financial year:

Taxable Income (A$)	Tax
$18,200	Nil
$18,201 to $37,000	19% on excess above $18,201
$37,001 to $90,000	$3,572 plus 32.5% on excess above $37,000
$90,001 to $180,000	$20,797 plus 37% on excess over $90,000
$180,001 and over	$54,097 plus 45% on excess over $180,000

Table 2 – Non-resident individuals
Rates of income tax payable for the 2018/2019 financial year:

Taxable Income (A$)	Tax
Up to $90,000	32.5%
$90,001 to $180,000	$29,250 plus 37% on excess over $90,000
$180,001 and over	$62,550 plus 45% on excess over $180,000

Notes

A Medicare levy surcharge at the rate of 2.0% of taxable income is payable by most resident taxpayers unless an exemption or reduced levy applies. For people not covered by private hospital insurance a Medicare surcharge will apply of between 1% and 1.5% on taxable income. Single persons and couples with incomes of not more than A$90,000 (single) or A$180,000 (family) are exempt from the Medicare surcharge. The Medicare levy surcharge will also not apply where a person's family income exceeds the threshold but their personal income was $21,980 or less.

Special rules and rates apply to the following types of taxpayers/ persons:

- trustees liable to tax in lieu of tax paid by beneficiaries of the trust;
- primary producers (for example, farmers);
- sports people, authors, artists and similar taxpayers with fluctuating income; and
- individuals who are resident for only part of a year, or ceasing a course of full-time education, for whom the amount on which no tax is payable may be apportioned.

The ability of individuals and families to claim a tax rebate for private health insurance and for claiming part of their medical expenses as a tax rebate are topics outside the scope of this publication.

Companies

The prevailing tax rate for companies in the 2018/2019 financial year is dependent upon the company's annual turnover. On 1 September 2016, the Federal Government introduced legislation that proposed to cut the corporate tax rate with turnover of less than $25 million for the 2017/2018 financial year and less than $50 million for the 2018/2019 financial year. The base rate is as follows:

Year	Turnover threshold	Rate	Rate for all other entities
2017/18	$25 million	27.5%	30%
2018/19	$50 million	27.5%	30%
2019/20	$50 million	27.5%	30%

The Federal Government has introduced a second Bill into parliament to extend corporate tax cuts to large entities, with the intention to reduce the corporate tax rate to 25% for all companies by 2026/2027. However, as at the date of this Guide that Bill has not yet received approval from the Senate.

Australian resident companies may pay to their shareholders either franked or unfranked dividends. A franked dividend is broadly paid out of profits upon which the company has already paid tax. The payment of franked dividends essentially allows companies to pass on to its shareholders the benefit of tax paid by the company. Unfranked dividends do not have a tax credit to benefit the recipient. This is called the dividend imputation system but it does not apply to non-resident companies operating through an Australian branch.

Losses incurred by a company can be deducted only from future income of the company. Losses cannot be distributed to shareholders. There are rules preventing companies from trafficking losses.

Companies, trusts and individuals are identified for tax purposes by a number called a Tax File Number or TFN. Companies are required to have a public officer whose role is to liaise with the ATO.

Consolidation

Wholly owned groups of companies can elect to consolidate and be treated as a single entity for tax purposes. The main features of the consolidation regime are:

- the head entity will prepare and lodge a single income tax return for the group;
- all transactions between members of the group (including distribution of income) will be ignored for income tax purposes;
- all assets of the subsidiary entities will be deemed to be acquired and held by the head entity; and
- all losses, franking credits and foreign tax credits will be pooled and remain with the head entity if a group member leaves the group.

To consolidate, a group must generally consist of an Australian resident head company and all its resident wholly-owned subsidiaries. A subsidiary may be a partnership, a fixed trust or non-fixed trust, but the head must always be a company.

Trusts

A trust is not a separate legal entity but rather a trust is a relationship between a party who holds property, being the trustee, and the persons for whose benefit the trust property is held, being the beneficiaries. Under Australian trust law, the trustee holds any income earned from the trust property on behalf of one or more of the beneficiaries in accordance with the terms of the trust deed. The income is taxed once it is in the hands of either the trustee or the beneficiaries. Because the trustee is taxed at the highest marginal tax rate, income is usually distributed to beneficiaries who are subject to lower tax rates (see tables 1 and 2 earlier).

Like companies, losses remain in the trust for deduction against future income of the trust. There are rules restricting the utilisation of losses in a trust.

An Australian resident who is a beneficiary of a trust not resident in Australia is liable to Australian income tax on income or property distributed or applied to, or dealt with for, the benefit of that beneficiary.

There are certain types of trusts that are taxed like companies, but the scope of this publication does not permit further commentary.

Capital gains tax

Capital gains from certain events (mainly involving asset disposals but also relate to other prescribed events or dealings) (**CGT Events**), occurring in respect of assets acquired by resident taxpayers after 19 September 1985 attract CGT. Non-residents are liable for CGT on capital gains from CGT Events occurring in respect of taxable Australian property. Taxable Australian property is confined to:

- a direct interest in real property situated in Australia;
- Australian mining, quarrying or prospecting rights;
- indirect ownership interests in entities owning Australian real property; and
- assets used at any time in carrying on a business through a permanent establishment in Australia.

Taxable Australian property further includes an option or right over the above listed property.

The amount of capital gain subject to income tax is the excess, if any, of the consideration received or deemed to have been received in respect of the CGT Event over the cost or deemed cost of the asset. For an asset acquired before 21 September 1999 by a company, the cost is indexed for inflation. Indexation does not apply if the consideration for the sale is less than cost (unindexed).

Only a proportion of the capital gains derived by individuals, trusts and retirement funds on assets acquired on or after that date is subject to CGT if the individual, trust or retirement fund held the assets for at least 12 months (profits gained from sales of assets held for less than 12 months are treated as income). Usually, resident individuals and trusts will be entitled to discount their capital gain by 50%, whilst retirement funds may reduce net capital gains by 33.3%. These concessions are not available to a company as the CGT rules include net capital gains in assessable income (i.e. ordinary corporate tax rate of 27.5% or 30%).

Further CGT concessions for business assets are available to small businesses with yearly business turnovers of less than A$2 million or a net asset value of not more than A$6 million, provided they can satisfy certain other requirements. These further concessions are available to individuals, companies, trusts and partnerships.

Capital losses may only be offset against future or current year capital gains. However, ordinary losses can be offset against capital gains and income. There are rules restricting the utilisation of capital losses.

Thin capitalisation

Thin capitalisation rules apply to both inbound and outbound investors: foreign controlled Australian operations or investments are inbound investors and Australian entities investing overseas are outbound investors. The rules seek to limit the amount of debt used to fund Australian operations or investments. These rules apply to all debts of the investor instead of only related party interest-bearing debts. The level of debt is measured against assets rather than equity of the enterprise. For non-financial institutions, the acceptable debt to equity ratio will be 1.5:1 or 60% (**Safe Harbour Test**).

If the Safe Harbour Test is not met, the alternative test (**Arm's Length Debt Amount**) may be used. The Arm's Length Debt Amount is the notional amount which, having regard to certain facts and assumptions:

- would be the amount representing the maximum amount of debt the enterprise would reasonably be expected to have throughout the year;
- represents the debt interests in respect of that which unrelated commercial lenders would reasonably be expected to require under similar circumstances; and
- for inbound investors control by non-residents is limited to 40%, with alternative control tests also applying.

If neither the Safe Harbour Test nor the Arm's Length Debt tests are met, a new inbound Worldwide Gearing Ratio Debt test has been developed. The test allows a non-ADI entity to gear its Australian operations up to the level of gearing of the entity's worldwide group. An entity may only use the Worldwide Gearing Ratio Debt test where the entity's Australian assets represent no more than 50% of the consolidated group's assets.

The substance (rather than form) of a transaction will determine whether it is to be treated as a debt of an equity interest for the purposes of applying the thin capitalisation rules. Broadly, the returns on equity investments will be frankable dividends and will not be able to be deducted from gross income in arriving at the taxable income for a tax period. Conversely, the returns on debt interests will be deductible but not frankable. The thin capitalisation rules are complex and interpretation usually requires specialist advice.

Transfer pricing

The Tax Acts contain provisions imposing arm's length standards to transactions under international agreements between separate legal entities, and between members of multinational entities. These provisions have anti-tax avoidance purposes and operate to prevent enterprises from shifting profits out of Australia by over-pricing or under-pricing goods or services supplied or acquired by resident entities, or by non-resident entities deriving income from Australian sources.

Double taxation treaties

Australia has entered into a number of tax treaties for the prevention of double taxation and fiscal evasion. If these treaties conflict with the Tax Acts, the treaties prevail.

These treaties apply to various types of income derived from residents of one country from sources in that country. The thrust of these treaties is to give the country in which an entity is resident the right to impose tax on the income of the resident regardless of the country of source. Alternatively, a treaty allows the country of source to tax the income and, to the extent that the country of residence also taxes the income, the treaties require the country of residence to give a credit for the tax paid in the country of source.

Withholding tax

Australian sourced income from unfranked dividends, interest and royalties derived by non-residents is subject to withholding tax at the following rates:

Dividends

Withholding Tax Rate	Category
0%	Fully franked dividends
Up to 30%	Unfranked – varies from treaty country to treaty country
30%	Unfranked – non-treaty countries

Interest

Withholding Tax Rate	Category
10%	All, unless tax treaty allows lesser percentage
Up to 10%	Variable according to identity of tax treaty country

Royalties

Withholding Tax Rate	Category
30%	For residents of non treaty countries
Up to 30%	For residents of tax treaty companies (variable)

Other taxes

Customs duty

Rates vary, but this is a federal tax imposed on imports into Australia.

Fringe benefits tax

The fringe benefits tax (**FBT**) is a federal tax administered under the *Fringe Benefits Tax Assessment Act 1986* (Cth). FBT is payable by employers on the value of non-cash benefits provided to either their employees or associates of their employees. Fringe benefits may also be provided by associates of employers, or any other person under an arrangement with the employer or an associate of the employer. For a benefit to be a fringe benefit, it must be provided to an employee (or associate) in respect of employment. The value of the fringe benefit is not taxable to the employee.

The most common types of fringe benefits are:

- cars made available to employees for their private use;
- interest-free or low-interest loans to employees; and
- discounted or free goods and other property provided to employees.

The FBT rate is currently 47%, increased by the maximum Medicare surcharge levy of 2%. FBT is calculated on the grossed-up value of the fringe benefit provided by an employer to an employee. The gross-up method treats the employee as receiving both the value of the benefit and the value of the FBT paid by the employer.

The real after-tax cost of providing fringe benefits is reduced by the tax deductions which may be claimed by the employer for:

- the cost of providing the fringe benefit; and
- the FBT paid by the employer.

The FBT year is a 12 month period commencing on 1 April and ending on 31 March.

There are significant concessions available to employers for fringe benefits provided to expatriates and employees of certain charitable, religious and public benevolent institutions.

Goods and services tax

GST is a broad-based tax calculated at the rate of 10% on the value of the supply of a broad range of goods, services, rights and other things acquired in, or in connection with, Australia (referred to here as GST items). It is conceptually similar to the value added taxes operating in many Organisation for Economic Co-operation and Development (**OECD**) countries.

GST is paid at each step in the supply chain. The liability to pay GST to the ATO is generally on the supplier of the GST items (which is usually the seller). However, the supplier will usually seek contractually to recover its GST liability from the recipient as a matter of commercial practice.

If an entity is carrying on an enterprise and is registered (or required to be registered) for GST purposes, in most cases it will be able to claim an input tax credit (**input tax credit**) for certain acquisitions that it makes. The input tax credit is calculable with respect to the amount of the GST included in the price paid for those acquisitions for which the supplier is liable. The input tax credit generally has the effect of offsetting the GST included in the price of the GST items that the entity acquires for use in carrying on its enterprise. Accordingly, it is intended that the GST liability will flow through the supply chain to the end consumers who will ultimately bear the cost of the GST (because they are not registered or required to be registered, and so cannot claim input tax credits). However, there are different rules applicable to financial services providers (e.g. banks) which are not entitled to claim input credits for some acquisitions which relate to their provision of financial services or other supplies.

Except in certain circumstances including where the recipient of the supply is not registered for GST or the supplier acquires the goods or services for making an input taxed supply, the recipient of a supply is generally eligible to obtain an input tax credit for any GST included in its cost of acquiring goods or services that the recipient supplies to its own customers. The entitlement to an input tax credit is intended to exclude the GST paid on acquisitions from the costs of carrying on a business. It is intended that the tax is borne by the ultimate consumer who consumes goods or services for private purposes and who is not entitled to an input tax credit.

Input taxed supplies are specifically identified in regulations to the GST Act and are not liable for GST when made. The GST included in the costs of acquiring goods and services for making input taxed supplies is not eligible for an input tax credit. The main types of input taxed supplies are financial services, used residential property and residential rent. Some supplies of financial services are eligible for a partial input tax credit.

There is a range of supplies that are specified in the GST Act as GST-free. The main types of GST-free supplies are exports, food, health, education, international travel and certain charitable activities. A supplier of GST-free supplies can claim Input tax credits for the GST included in the costs of its acquisitions for making GST-free supplies.

Suppliers pay their GST liability to the ATO either quarterly or monthly depending on the size of the turnover of the supplier.

There are registration requirements under the GST Act. An Australian Business Number is required. Registration is compulsory if the entity's annual turnover is more than A$75,000 or A$150,000 in the case of a non-profit body. The registration requirement applies to all types of enterprises carrying on business, including individuals, companies, trusts, partnerships or unincorporated associations.

Imports

Imported goods will normally be subject to GST on importation. GST may also be payable by the importer on the domestic transport within Australia of imported goods, to their place of consignment in Australia under the primary agreement.

Imported services and other non-tangible supplies will generally not be subject to customs duty, nor to GST, unless they are connected with Australia (e.g. where they are provided through an Australian enterprise of the overseas supplier). However, these types of supplies (unless they would be GST-free or input taxed if connected with Australia) will be subject to GST where they are provided by overseas suppliers to entities in Australia which are not entitled to full input tax credits (e.g. financial institutions such as banks). In these cases, the GST liability will generally fall on the Australian recipient.

GST is payable on most goods imported into Australia. This is payable by businesses, organisations and private individuals, whether they are registered for GST or not. However, GST-registered businesses and organisations may be able to claim GST credits on imported goods.

From 1 July 2018, GST will extend to low value imports of physical goods imported by consumers. The reforms:

- make supplies of goods valued at less than $1,000 liable to GST where the goods are purchased by consumers, but brought into Australia with the assistance of a supplier;
- provide that where goods are purchased through operators of electronic distribution platforms that operator will be treated as a supplier for GST purposes;
- treat re-deliverers as the suppliers if the goods are delivered outside Australia as part of the supply, and the re-deliverer assists with the goods re-delivery back into Australia; and
- allow non-resident suppliers connected with Australia to elect to access the simplified registration and reporting system.

GST Withholding

From 1 July 2018, purchasers who purchase new residential property or potential residential property will be required to withhold an amount of the contract price to be paid directly to the ATO as part of settlement. Purchasers will usually be required to remit 1/11th of the total supply price, unless the following applies:

Circumstance	Amount payable by purchaser
The margin scheme applies	7% of the Contract Price
A supply between associated persons without consideration	10% of the GST exclusive market value
Mixed supply (e.g. partly a supply of new residential premises)	The Contract Price is apportioned by the applicable rate
Multiple purchasers (not joint tenants)	7% (margin scheme) or 1/11th of the Contract Price or price for the persons interest in the purchase property.

Research and development tax incentives

The Australian Government introduced tax incentives for research and development initiatives in 2011 to actively attract and encourage innovation and investment in research and development (**R&D**).

For entities with a turnover under A$20 million and which are not controlled by a tax exempt entity, a 43.5% refundable tax offset applies. For other eligible entities, there will be a 38.5% refundable tax offset.

Other important state and territory taxes

Duties

Each Australian state and territory imposes duty on certain transactions. These duties can be assessed on transfers of land and interests in land, and in some states transfers of some items of personal property, and sales of business assets. The rates of duty vary between the states and territories, and also vary depending on the nature of the transaction. Duties of this nature are commonly called '*stamp duties*'.

Payroll tax

Employers are liable to pay payroll tax at a fixed percentage of their total annual payroll in the applicable state or territory. Payroll tax rates and the thresholds above which payroll tax becomes payable vary from state to state and from year to year. The rates range from 4.65% to 6.85% with some states having graduated rates. The thresholds vary from A$550,000 to A$1,500,000. In Queensland, for example, no payroll tax is payable until the yearly total exceeds A$1,100,000 after which a 4.75% rate applies.

Land tax

Land tax is levied by each state and is paid on the value of lands situated within that state and owned by an entity. There are certain types of land and types of taxpayers that are exempt from land tax.

Municipal rates

These are imposed by local government and represent the cost imposed by the local government for providing water, sewerage, roads, parks etc. These rates are imposed on the land owner rather than occupier.

Other payment obligations by businesses

Businesses and, in particular, employers are liable to pay imposts in relation to their employees.

Compulsory workers' compensation insurance

Each state has legislation requiring employers to provide insurance cover for their employees against work related injuries or diseases. As the arrangements vary from state to state, employers obtain workers compensation insurance from various insurance providers. There is a minimum contribution rate of 9% of an employee's salary (though this is expected to increase).

Superannuation

Employers must make contributions to Australian resident regulated funds of a prescribed minimum amount for their employees. The minimum rate of contribution is 9.5% of an employee's gross salary (subject to a maximum threshold).

Employers failing to provide the minimum superannuation support are liable to pay a '*superannuation guarantee charge*' (in effect a tax) to the ATO to meet the requirements. This failure also results in penalties and interest charges being payable. The superannuation guarantee charge is not an allowable deduction for income tax purposes.

Employers of some temporary resident employees are not required to contribute superannuation.

LAND TITLE

Interests in land will commonly be involved in a material manner with any significant business activity or transaction in Australia – whether land is being acquired as a business or investment asset, or whether interests in land are required for business premises and operations. As the systems and law used to determine interests in land differ so widely around the world, this section provides a brief outline of the system of land tenure in place in Australia. For this purpose, '*land*' can be freehold, where title has been divested from the Crown or government to a person, or leasehold or where title remains with the Crown or government subject to tenancy or use rights vested in a person.

State-by-state regime

The system of title to land in Australia is essentially dealt with on a state-by-state (and territory) basis – that is, there is no single national regime for the regulation and registration of interests in land.

The principal system of recording and regulating interests in land which is used in each state and territory throughout Australia is a system of land title registration. There are variations to the land title registration system used in each state and territory, but the common essential features are:

- a public register of land maintained by each state or territory government, which contains details of each parcel of land (known as a lot or section);
- the exact location and dimensions of each lot are described by reference to registered survey plans prepared by qualified surveyors;
- the public register shows details of each registered proprietor of the land, and details of all registered interests and encumbrances over the land (such as mortgages, leases or easements);
- ownership or title in the land is evidenced by registration, so the owner need not prove a chain of ownership back to the original grant of land from the Crown;

- certainty of the details on the register is provided through a principle known as '*indefeasibility of title*', which entitles any person to rely on the details in the register as evidence of ownership or the interest shown;
- priority of dealings in respect of land is dealt with in order of lodgement of the dealing in the register, not the date of the documents or transaction;
- each state, other than Queensland, issues duplicate (or paper) title deeds in the name of the registered owner of the land. In Queensland, the general position is that no duplicate title deed will be issued, however a registered owner of the land can apply to the Titles Office for one to be issued; and
- the register may be searched to obtain details of the history of ownership of the land, and details of all registered encumbrances.

This system of land titling (known as the Torrens system, after the South Australian, Sir Robert Torrens, who devised it in the mid-1800's) has been very successful in creating a simple and certain manner of regulating and recording interests in land, and it has been adopted in some other countries.

All of the land in Queensland, South Australia, Tasmania and the Northern Territory is dealt with under their respective land titling systems. In New South Wales, Victoria and Western Australia there remains some small amount of unregistered land which is outside the land titling system, known as '*general law land*' (also referred to as '*common law land*', or '*old system land*'). For that general law land, it is necessary for the owner to prove a continuous chain of title since the original grant from the Crown. There is a separate land law system in place in these states to deal with general law land, however this land is gradually being brought under the titling system.

Land which is owned by the federal government, or any state or territory government or statutory authority, is generally referred to as '*Crown land*', '*state land*' or '*unallocated state land*', and is held pursuant to relevant legislation.

Native title

Alongside the land titling system, and general law relating to land, is the law of native title. Native title is a significant body of law in its own right relating to recognition of ownership of land, and interests in land, by the traditional indigenous owners. It exists where the traditional owners can show a continuous connection with the land dating back to the date of European settlement (in the latter years of the 18th century), and provided the government has not taken any clear and unambiguous act to extinguish native title. For the certainty of freehold landowners, it has been established and confirmed by legislation and the High Court of Australia that grants of freehold land are not subject to native title, for the reason that the grant of freehold title is taken to be an act by the government to extinguish native title.

Land ownership and typical interests in land

The highest form of private ownership of land in Australia is known as an estate in '*fee simple*' by grant from the Crown (freehold land). An estate in fee simple is held subject only to sovereign rights reserved by the Crown (largely being mineral rights). Under the land titling system, the holder of the fee simple is recorded in the land title register as the registered owner. Fee simple ownership entitles the holder to complete rights of exclusive possession and occupation of the land free from interference from other parties, including the government, and also entitles the owner to grant other interests in the land.

Typical interests which may be granted or taken in relation to freehold land, and which may be recorded on the land title registers include:

- co-ownership – whether by joint tenancy or tenancy in common;
- leases – the grant of exclusive possession to another party for a specific period;
- mortgages – the creation of a security interest in the land; and
- easements – the grant of non-exclusive access to or use of the land for a particular purpose.

Subdivision and development of land

Interests in land may be taken not only over a physical area of land, but also in respect of buildings and parts of buildings, whether divided horizontally, vertically or volumetrically, and in respect of airspace.

Subdivision and development of land, and the creation of community or strata title schemes, are also regulated at state level and local government level (rather than under any single federal regime).

The permitted use of land, and the right to subdivide or undertake construction or development on land, is regulated in each state and territory by a combination of:

- land title legislation and regulations;
- local authority town planning schemes and by-laws;
- state legislation relating to planning and environment;
- state or territory Planning and Environment Courts or Land Courts; and
- state legislation relating to the creation and regulation of community or strata title schemes.

Environmental obligations

As with planning legislation and policy, environmental obligations relating to land and development are primarily regulated at both state and local government level. However, in respect of certain environmental matters of national significance, there is federal legislation that will also impact land and development. The primary environmental federal legislation is the *Environmental Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**). The EPBC Act seeks to protect Australia's key natural resources, such as listed endangered species of plants and animals by regulating:

- impacts on matters of national environmental significance (such as declared World Heritage-listed areas);
- environmental impacts on Commonwealth Land;
- the killing of protected marine species; and
- international trade in wildlife.

Development in areas containing plants or animals that are of national environmental significance will require a stringent environmental impact assessment to be undertaken to seek approval, and if approved, will be the subject of rigorous conditions.

Issues associated with land ownership and development

For any party interested in taking an interest in land in Australia, associated issues to be aware of include:

- the obligation to pay stamp duty – a state-based transaction tax in connection with acquisition of interests in land, and certain dealings in land interests;
- the obligation to pay registration fees on documents to be recorded in the land titling system;
- limits on foreign investment in land (see the earlier '*Foreign Investment in Australia*' chapter in this Guide);
- the obligation to pay state-based land tax on land held, where value is above certain thresholds;
- imposition of federal capital gains tax upon disposal of land where a capital gain is realised on sale of the land; and
- imposition of municipal rates by the relevant local authority.

Any potential land investors should investigate these issues and taxes before proceeding, as they can have a significant impact upon the overall cost of acquiring or holding land in Australia.

ENERGY AND NATURAL RESOURCES

Introduction

The energy and natural resources industry in Australia is a significant contributor to the Australian economy.

It is a general rule that ownership of minerals vests in the Crown and, as a result, each state and territory has developed its own detailed legislative framework regulating exploration and production of mineral resources. These regimes usually involve the requirement that licences first be granted for the exploration and production of resources, usually through a first-come, first-served basis or through a tender-based process. Access to land on which exploration or production is to occur is regulated by both legislation and private agreement with landowners.

A licence will usually be granted with accompanying obligations on the licence holder to comply with requirements regarding rent and royalty payments, mine rehabilitation, employment and occupational health and safety standards and environmental reporting and protection.

Oil and gas resources are regulated in a similar fashion to mineral resources. The relevant state or territory legislation regulates on-shore operations, whereas oil and gas resources located more than three nautical miles from the coast of Australia are deemed to be off-shore and are owned and regulated by the federal government.

Environmental protection from hazards connected with exploration and mining procedures are regulated at both state and federal levels through detailed legislative and regulatory regimes. In most instances, projects may only proceed once they receive approval at both the state and federal level.

The legal landscape surrounding the exploration for and production of natural resources is therefore quite challenging as explorers and producers may be required to navigate myriad interwoven legislative regimes. Additionally, explorers and producers of natural resources face increased public scrutiny and are required to manage relationships with impacted landholders and traditional landowners, government regulators, employees and other tenement holders.

Explorer's Guide to Queensland

To assist companies wishing to undertake exploration activities in Queensland, Carter Newell Lawyers has published the '*Explorer's Guide to Queensland*' to assist in understanding the processes and procedures involved. Please contact us if you would like a copy of this publication, which is now in its second edition.

WORKPLACE RELATIONS AND EMPLOYMENT LAWS

The regulation of workplace relations in Australia has undergone extensive reform over the past decade and will remain an area of regular legislative change for the foreseeable future in the current Australian political environment. As a result, foreign entities considering doing business in Australia are strongly urged to seek up-to-date legal advice on their intended employment arrangements. A basic understanding of the current framework is an essential element of contemplating and doing business in Australia, particularly as an employer.

The main current legislation is the *Fair Work Act 2009* (Cth) (**Fair Work Act**). The Fair Work Act introduced two independent bodies, the Fair Work Commission and the Fair Work Ombudsman, to regulate workplace relations and to resolve workplace disputes with a third party '*umpire*' role and an advocacy/prosecutor's role.

State and federal jurisdictions

Although Australia does not technically operate under a single unitary industrial relations system, the state workplace relations systems now have limited real application to most businesses. This is because:

- using the '*Corporations*' power in the Australian constitution, the federal government was able to pass legislation ensuring that the federal workplace relations system applied to all foreign, financial and trading corporations in place of the state systems; and
- most Australian state governments have referred/delegated much of their residual workplace relations powers to the Commonwealth, their significant retention being in relation to their respective state public services and wholly government owned authorities and instrumentalities.

In summary, as at July 2018 the Fair Work Act covers:

- Nationally – all employment by constitutional corporations (which includes all public and private companies);
- Victoria, the Australian Capital Territory and the Northern Territory – all other employment, including public sector employees;

- New South Wales, Queensland and South Australia – all other private sector employment (partnerships, sole traders); and
- Tasmania – all other private sector and local government employment.

A limited number of entities remain outside Fair Work Act coverage, as follows:

- Western Australia – state public sector employment and employment by non-constitutional corporations in local government and the private sector;
- New South Wales, Queensland and South Australia – state public sector and local government employment; and
- Tasmania – state public sector employment.

Employers not covered by the federal workplace relations system are covered by the applicable state industrial relations systems, although national entitlements to paid parental leave and protection from adverse action do extend to employees who remain covered by a state industrial relations system. In addition, union right of entry rules apply to both state and federal system employers.

Courts and tribunals

The Fair Work Commission is the national workplace relations tribunal, with legislated power to carry out a range of functions, most importantly:

- setting and enforcing a safety net of minimum conditions relating to employment, including leave entitlements, referred to as National Employment Standards (**NES**);
- setting and enforcing the terms of industry or profession specific guidelines operating in lieu of the NES, referred to as '*awards*';
- facilitating good faith bargaining and the approval of enterprise agreements (special tribunal approved agreements acting for specified employers and employees in lieu of a general application award);
- granting remedies for unfair dismissal and adverse action claims (although, in the case of adverse action claims, both parties must consent to the Fair Work Commission arbitrating the matter);

- regulating and monitoring industrial action (primarily but not limited to strikes and disputes); and
- resolving a range of collective and individual workplace disputes through conciliation, mediation and arbitration.

The Federal Court of Australia has jurisdiction over a range of matters arising in the Fair Work jurisdiction. The portion of this jurisdiction relating to contravention of general protections against adverse action with respect to a workplace right must be initially dealt with in the Fair Work Commission before progressing to the Federal Circuit Court, Federal Court or High Court.

The Fair Work Ombudsman

The Fair Work Ombudsman is a statutory office created by the Fair Work Act to operate independently of the federal government to promote constructive workplace relations and ensure compliance with the Fair Work Act. The services of the Fair Work Ombudsman are government funded and available free of charge to all workers and employers.

Minimum legal entitlements and sources of employment regulation

Wage rates

Employees in Australia are entitled to certain minimum legal entitlements. The national minimum wage in Australia is currently A$18.93 per hour, although lower rates may apply to under-age and disabled workers. Modern awards, operating based on industries and occupations, are legal instruments and specify minimum rates of pay for different categories of workers. Casual employees, who do not have the security of continuing employment or the benefit of entitlements such as annual leave, are entitled to a 25% uplift or loading.

Superannuation

Employers are legally required to pay superannuation into an approved fund for each employee, essentially a form of compulsory pension contribution. The current rate of superannuation is 9.5% of an employee's salary or wages. Contractors engaged individually who work primarily for labour only are also entitled to superannuation contributions. Employers must directly contribute to the employee's account and cannot rely on employees making their own contribution.

Sources of employment regulation

The relationship between employees and employers in Australia is governed by four primary sources of regulation:

- the NES;
- modern awards;
- enterprise agreements; and
- individual common law employment contracts.

National Employment Standards

The NES form part of the Fair Work Act and cover all employees subject to the federal workplace relations system. The NES came into effect from 1 January 2010.

The NES cover 10 minimum sets of conditions for employees. Along with the national minimum wage, the NES forms a minimum safety net for employees. Only some NES entitlements apply to casual employees.

In summary, the NES involve the following minimum entitlements:

- **Maximum weekly hours of work** – Full time work constitutes 38 ordinary hours of work per week, plus reasonable additional hours. Whether additional hours are '*reasonable*' will depend on a variety of factors, such as an individual employee's personal circumstances, their role, any notice given in relation to the requirement to undertake the work, compensation provided by the employer, and the needs of the workplace.
- **Flexible working arrangements** – Employees are entitled to request changes to work hours, patterns of work and the location of work in order to accommodate the needs of an employee who has responsibility for the care of a child of school age or younger, is a carer, has a disability, is 55 or more years old, is experiencing domestic violence, or provides support to a family member who is experiencing domestic violence. An employer may only refuse a request for flexible working arrangements on reasonable business grounds.

- **Parental leave entitlements** – Following 12 months of continuous service with an employer, employees are entitled to parental leave associated with the birth or adoption of a child. Pursuant to the NES, employees are entitled to up to 12 months unpaid leave and a right to request an additional 12 months unpaid leave, with some additional and ancillary entitlements. In addition, a pregnant employee who is able to present evidence (for example, a medical certificate) that it is inadvisable to continue in her role due to pregnancy-related risks may request a transfer to a lower risk job (‘*safe job*’). In those circumstances, employers must transfer the employee to an appropriate and safe job. If no safe job is available, the employee may be entitled to paid ‘*no safe job*’ leave.
- **Annual leave** – Employees are entitled to four weeks paid leave per year for full time workers (pro rata for part time workers but not casual workers), and an additional week for certain shift workers. Annual leave accrues from year to year and any accrued balance must be paid out upon cessation of employment. (Note: Leave loading, being an additional allowance on top of an employee’s usual wage, may be required and payable during annual leave in accordance with the terms of many modern awards).
- **Personal, carer’s and compassionate leave** – Full time employees are entitled to 10 days paid personal/carer’s leave per annum, two days unpaid carer’s leave as required, and two days paid compassionate leave as required. Part time employees receive a pro-rata allowance and casual employees are entitled to unpaid leave as appropriate. Personal leave accrues from year to year, however any accrued balance is surrendered upon cessation of employment.
- **Community service leave** – Employees are entitled to partially paid leave for jury service and unpaid leave for voluntary emergency management activities.

- **Long service leave** – The NES recognises that employees are entitled to long service leave as set out in applicable industrial instruments or applicable state or territory legislation. Each Australian state and territory currently maintains its own legislation regarding the accrual and taking of long service leave. In general terms, a pro rata entitlement on cessation of employment may arise after seven years, with a full entitlement vesting after 10 years. Legal advice on specific entitlements should be sought on a case-by-case basis given the differences across jurisdictions.
- **Public holidays** – Employees are entitled to be absent from work on a public holiday without loss of pay (except casual employees, who are not entitled to payment except in respect of time actually worked). An employer may request that an employee work on a public holiday if the request is reasonable in all the circumstances.
- **Notice of termination and redundancy** – Employees are entitled to up to five weeks notice of termination of employment and up to 16 weeks severance pay on redundancy (with both entitlements calculated based on length of service).
- **Fair Work Information Statement** – Employers must provide all new employees with a copy of, or access to, a prescribed Information Statement. It contains information about the NES and the safety net minimum entitlements contained therein, modern awards, agreement-making, the right to freedom of association, lawful termination of employment, individual flexibility arrangements, union rights of entry, transfer of business rules, and the respective roles of the Fair Work Commission and the Fair Work Ombudsman.

Modern awards

Modern awards are legal instruments that set minimum employment entitlements additional to the NES for specific industries or occupations.

There are currently 155 modern awards that cover most Australian employees, excepting those employees who have traditionally not been subject to award coverage (for example, senior managers) and employees who have guaranteed earnings of more than A$145,400 per annum (adjusted at 1 July each year).

Modern awards do not apply to employers who have negotiated and had approved by the Fair Work Commission a form of enterprise or collective agreement (which applies in lieu of the otherwise applicable modern award).

Modern awards may include terms and conditions with respect to minimum wages, incentive schemes, skill classifications, types of employment, arrangements for the performance of work, transition between classification levels, allowances, annual leave arrangements and overtime and penalty rates.

Modern awards must also include flexibility terms providing for alternative arrangements to be made between individual employees and employers in order to meet the employee's genuine needs. Such alternative arrangements must then be documented in an Individual Flexibility Agreement (**IFA**), for which there are a number of specific statutory requirements as to form and content. For example, employers must ensure that the IFA results in the applicable employee being better off overall as a result of the altered arrangements than continuing under the existing modern award.

Modern awards and enterprise agreements which purport to provide terms that are supplementary, ancillary or incidental to provisions of the NES are valid but only to the extent that those terms do not result in any disadvantage or detriment to the employee when compared to the relevant NES provision, or where the NES provides for a modern award to specify an alternate arrangement.

Enterprise agreements

Enterprise agreements set out the employment conditions specifically bargained for under a set of strict rules and are approved and registered by the Fair Work Commission to apply to the parties in lieu of the otherwise applicable modern award.

Enterprise agreements can be classified as:

- single-enterprise agreements, which relate to a particular business operation and is entered into between a group of employees (no less than two) and one or more co-operating employers (such as in a joint venture);

- multi-enterprise agreements – involving two or more employers in respect of two or more business operations; or
- greenfield agreements – for new business operations where a workforce has not yet been recruited, one or more employers negotiate an applicable agreement with one or more unions. Non-union greenfield agreements are not currently permitted.

When an enterprise agreement comes into force, the application of the otherwise applicable modern award is suspended.

The main reason parties enter into enterprise agreements is to tailor an agreement to the specific needs of a particular business enterprise and give the business certainty for up to four years (the maximum duration an enterprise agreement can run – otherwise referred to in the enterprise agreement as its '*Nominal Expiry Date*' (**NED**), as to its wage and entitlement obligations to employees.

Enterprise agreements generally traverse the same range of matters as the modern award it will supplant. Some additional matters may be covered, however certain content, deemed unlawful, cannot be included. Unlawful content includes discriminatory and objectionable terms and terms that are inconsistent with certain core entitlements under the Fair Work Act. Enterprise agreements may vary the terms and effects of some aspects of the NES where the NES allows for variation; and may otherwise supplement the NES by providing more generous entitlements.

Enterprise agreements, once approved and registered by the Fair Work Commission, continue to operate beyond their NED until the agreement is replaced by a newly negotiated enterprise agreement or terminated by order of the Fair Work Commission (on application by one of the interested parties).

Enterprise agreements result from a process generally referred to as enterprise bargaining. While the process is designed to allow for the relevant parties to be self represented, bargaining representatives are often engaged to represent one or more of the parties. Enterprise bargaining commences upon the occurrence of a number of events, most typically by a trigger contained in a provision in an enterprise agreement nearing expiry, a notification from an employer of an intention to bargain or a request to do so from or on behalf of employees. Where the majority of employees wish to bargain for an enterprise agreement and the employer is resistant, an application may be made to the Fair Work Commission to determine whether the employer should be ordered to enter bargaining.

The bargaining process (detailed below) is regulated, with a number of provisions in the Fair Work Act imposing requirements which, if not met, may result in the process ultimately being invalidated.

Bargaining must be carried out in good faith and the Fair Work Act sets out a number of requirements that the parties must demonstrate, including:

- attending and participating in bargaining meetings with other bargaining representatives on reasonable notice and at reasonable intervals;
- disclosing relevant information (excluding confidential or commercially sensitive information) to other bargaining representatives in a timely manner;
- responding to proposals of other bargaining representatives about the terms of the agreement under negotiation in a timely manner;
- giving genuine consideration to the proposals of other bargaining representatives and giving reasons for those responses (and counterproposals where considered appropriate);
- refraining from capricious, unfair and inflammatory conduct that undermines freedom of association or collective bargaining; and
- giving due recognition to and bargaining with the other bargaining representatives.

The requirements for good faith bargaining do not however require a bargaining representative to make concessions or to otherwise reach an agreement contrary to its interests.

Where a bargaining dispute remains unresolved, a bargaining representative may apply to the Fair Work Commission to intervene and assist in resolving the dispute with a bargaining order, scope order or serious breach declaration. In certain limited circumstances the Fair Work Commission may intervene to the extent of making a workplace determination. The technicalities of such orders and intervention are beyond the scope of this guide.

Once bargaining has concluded (either with agreement amongst the bargaining representatives or an unresolvable impasse at the limit of the representatives' instructions), the enterprise agreement can be readied for approval. The relevant pre-approval steps include:

- the employer ensuring that the agreement terms and the effect of those terms are explained to all employees to be covered by the agreement in a manner that is appropriate and understood (having regard to the age and backgrounds of employees);
- the employer arranging for a ballot to vote on the final proposed draft of the enterprise agreement not less than 21 days from giving notice;
- the employer ensuring within seven days prior to the vote that all employees are given a copy of the version of the agreement to be voted on; and
- the employer notifying all employees of the time, place and voting method.

An enterprise agreement is successfully voted on by a majority of eligible voters endorsing the agreement by way of valid vote (with certain additional requirements for greenfield and multi-enterprise agreements). A bargaining representative must then apply to the Fair Work Commission within 14 days for approval (and registration) of the agreement.

In considering final approval of the enterprise agreement, the Fair Work Commission must be satisfied that there is a '*genuine agreement*', the agreement includes no unlawful terms, employees are '*better off overall*' (when the agreement is compared to the otherwise applicable Modern Award), the employees to be covered are '*fairly chosen*', and the agreement includes a dispute settlement procedure, flexibility clause and consultation clause. Where the Fair Work Commission has any concerns about any perceived ambiguity of the agreement or how it will operate in practice, approval can be granted subject to the provision of a written undertaking on behalf of the employer addressing those concerns.

Once an enterprise agreement has been approved by the Fair Work Commission, it will be listed on the Fair Work Commission website and be available for public access.

Once made, an enterprise agreement may only be varied by agreement between the parties (and then approved by the Fair Work Commission) or by application to the Fair Work Commission to remove any perceived ambiguity or uncertainty.

Common law contracts

Common law employment contracts are the final tier of regulation of the employer-employee relationship.

Individual common law contracts cannot derogate from the terms and conditions provided by modern awards (assuming that a modern award will apply to the employment) or the statutory minimum entitlements set out in the NES. Many Australian employees (for the most part, '*white collar*', managerial, and professional employees) use common law contracts to set out the terms and conditions of employment, which may provide additional benefits to the employee beyond the award minimums and additional duties and obligations not covered in the NES or a modern award. Such terms might include provision of employer supplied benefits, such as provision of a motor vehicle, mobile phone, business credit card and computer and employer protections such as restrictions on the use of confidential information and intellectual property and restraints on post employment competition. An employment contract will generally detail the entitlement to terminate the employment relationship and the notice period required to do so.

Under the Fair Work Act, employees with guaranteed earnings of (currently) A$145,400 or more per annum (including entitlements but excluding superannuation) are generally exempt from modern awards (although their employment will still be subject to the safety net provided by the NES and any other statutory minimum entitlements). It therefore follows that common law contracts play a prominent role in the employment of those employees.

Trade unions and freedom of association

Freedom of association, being a freedom to join or participate, or not to join or participate, in a union or employer organisation, remains a prominent aspect of the Australian workplace relations system although trade union memberships have been declining over the last decade. The Fair Work Act provides trade union representatives with a range of powers to intervene in the workplace. These are predominantly associated with a right of entry, which is subject to an initial grant of permit by the Fair Work Commission to the trade union representative (which can be subject to conditions or revocation).

Generally permit holders must give at least 24 hours, but not more than 14 days, notice prior to exercising a right of entry (except where the right of entry involves a workplace health and safety issue other than the inspection of records, in which case an immediate right of entry may be available). Notice must be given during working hours and must specify the premises to be entered, day of entry and the organisation of the permit holder.

Trade unions must be registered as a representative body and identify the areas and industries in which they can be recognised. Trade unions in Australia are corporate entities and are able to sue and be sued. Consequently, those unions which engage in unlawful industrial action or otherwise contravene the Fair Work Act may be subject to proceedings being issued against them.

Industrial action

Industrial action can take a variety of forms and may be taken by either employees (strikes, work bans) or employers (lock out). For industrial action to be lawful it must be '*protected*' under the Fair Work Act. In general terms, industrial action is protected in limited circumstances to support an enterprise bargaining process, and is not available for the duration of an enterprise agreement (e.g. before the NED).

Protected industrial action by employees is initiated by an application to the Fair Work Commission for a protected action ballot, which if approved is followed by the ballot on the type of industrial action proposed to be taken (requiring a vote in favour of at least 50% of those voting, who themselves constitute more than 50% of those entitled to vote), followed by required written notice to the employer of the nature of the intended action and the day it will begin.

The Fair Work Commission has the power to suspend or terminate protected industrial action and to prevent unprotected (unlawful) industrial action. Reasons to suspend or terminate protected industrial action are that the industrial action is or threatening to cause significant economic harm to the parties; to a third party; or to the Australian economy, or is actually or potentially endangering to the health, safety or life of a party.

Termination of employment

Employment in Australia is not ‘*at will*’. Employment relationships may be terminated by giving the requisite notice to the other party. The NES as contained within the Fair Work Act establish statutory minimum notice requirements, which vary depending on the employee’s length of continuous service with the employer and the age of the employee (between one and five weeks). Modern awards will generally reiterate the statutory minimum, although may be more generous. Common law employment contracts may also contain terms dealing with notice, but such terms cannot provide for periods of notice of termination of less than the NES, or any applicable modern award. Summary termination (without notice) may be available in the event of serious misconduct.

Where an employment relationship is terminated by the employer, if the termination is harsh, unjust or unreasonable, the employee may have recourse to bring an unfair dismissal claim under the Fair Work Act.

Unfair dismissal

Under the federal workplace relations system, the Fair Work Act sets out specific rules and protections regarding the termination of the employment relationship. These rules determine whether a termination is unlawful or unfair, the entitlements an employee may be owed on termination and additional requirements in circumstances of redundancy.

Under the Fair Work Act, an employee is protected from unfair dismissal where the Fair Work Commission is satisfied that:

- the worker is an employee (not a contractor) and is covered by the Fair Work Act; and
- the employee has worked with the employer in excess of the minimum employment period (for a small business of less than 15 employees this period is one year, or for an employer with 15 or more employees, a period of six months); and
- the employee is covered by a modern award, an enterprise agreement/industrial instrument or earns less than the high income threshold of A$145,400 (indexed at 1 July annually).

An employee has 21 days from the date the dismissal took effect to apply to the Fair Work Commission for relief.

It is then a matter for the Fair Work Commission to determine whether the employee is protected from unfair dismissal, and whether certain other jurisdictional objections might apply, namely:

- was the employee dismissed/terminated at the initiative of the employer?
- if the employer is a small business with less than 15 employees, was the dismissal consistent with the Small Business Fair Dismissal Code? (published under the Fair Work Act); and
- was the dismissal a case of genuine redundancy? (e.g. the employer does not require the employee's job to be performed by anyone, and the employer has complied with any consultation obligations arising under an applicable modern award or enterprise agreement).

If these jurisdictional objections also do not apply, a hearing will be held before the Fair Work Commission to determine whether the dismissal was harsh, unjust or unreasonable. In considering this, the Fair Work Commission must take into account all of the following factors:

- whether there was a valid reason for the dismissal related to the employee's capacity or conduct;
- whether the employee was notified of the reason for the dismissal and was given an opportunity to respond prior to termination;
- was there any unreasonable refusal by the employer to allow the employee to have a support person present to assist in any discussions relating to the dismissal;
- if the dismissal related to unsatisfactory work performance, whether the employee had been given any or any adequate warning and a reasonable opportunity to modify their performance (where appropriate) prior to dismissal;
- the size of the employer's business and whether or not the business engaged the services of a dedicated human resource management specialist whose expertise would be likely to impact on the procedures followed in effecting the dismissal; and
- any other matters that the Fair Work Commission considers relevant.

Should the employee establish that they have been unfairly dismissed, the primary remedy is reinstatement, with or without an order for back-pay. Where reinstatement is inappropriate (for example, because the employee has gained alternative employment or because the relationship of trust and confidence is irredeemable), then compensation of up to 26 weeks at the employee's pre-termination rate of pay or up to A$72,700 (whichever is the lesser amount) may be awarded. Any award of compensation is made in accordance with a list of criteria set out in the Fair Work Act and cannot include any component for hurt or humiliation.

Unlawful termination

Under the federal workplace relations system, it is prohibited to terminate an employee on certain grounds, most commonly discriminatory reasons based on race, colour, religion, marital status, sex, sexual preference, family or carer's responsibilities, pregnancy, politics, age and mental or physical disability.

The Fair Work Ombudsman has power to investigate unlawful termination complaints and prosecute employers where the complaint is established.

Aggrieved employees can seek recourse under the Fair Work Act if their employment is terminated as a result of unlawful discrimination (by way of a general protections or unlawful termination complaint lodged with Fair Work Australia). Alternatively, aggrieved employees may pursue a claim in the respective state or Commonwealth jurisdictions such as anti discrimination tribunals or the Australian Human Rights Commission.

Redundancy

Under the federal workplace relations system, where an employer determines that a particular job is no longer required to be performed by any employee and there are no other suitable roles to which an otherwise superfluous employee might be redeployed, termination of such superfluous employees is classified as a redundancy. Circumstances leading to redundancy include workforce downsizing or restructuring (downturn in business, merger, restructure, introduction of new workplace efficiencies, or new technology/automation), business insolvency or bankruptcy.

An employee who has been made redundant may be entitled to a severance payment, depending on their length of continuous service with the employer, of up to 16 weeks wages under the NES. This is in addition to payment of accrued entitlements and either notice or payment in lieu of notice (if applicable).

Redundancy/severance pay is not payable where:

- the employer employed less than 15 staff (subject to any individual employment contract or modern award specifically providing for redundancy/severance pay);
- the employee was employed for a fixed period or for a specified task;
- the employee is a casual employee;
- the termination was due to the employee's serious misconduct;
- an industry specific redundancy scheme under a modern award applies; or
- the employee's length of continuous service is less than 12 months.

Where an employer is unable to pay redundancy/severance pay (due to insolvency or severe financial circumstances), an employer may apply to the Fair Work Commission for an order reducing any severance amount payable (can be down to zero). Alternatively there is a Fair Entitlements Guarantee scheme operated by the federal government which allows eligible employees to claim certain redundancy benefits.

Employee entitlements on termination

On termination, under the federal workplace relations system an employee who was not employed under a fixed term contract should receive the following payments in their final pay:

- any outstanding wages or other remuneration owed under the terms of their employment;
- any payment in lieu of any requirement to work the balance of any notice of termination period;

- any accrued but untaken annual leave (including leave loading where applicable) and long service leave entitlements (where applicable); and
- where the employee has been made redundant, payment of an amount of severance pay as determined by relevant Commonwealth or state legislation, enterprise agreement or industrial instrument or common law contract (whichever is applicable).

If an employee does not believe that they have been paid their correct entitlements on termination, they may request that the Fair Work Ombudsman investigate. An employer may be liable to pay substantial fines in addition to payment of the correct termination entitlements should the Fair Work Ombudsman determine that underpayment has occurred and prosecutes the claim.

Contractor or employee?

The Fair Work Act and the minimum standards and entitlements as detailed in the NES and any applicable modern award, apply to '*employees*'. Accordingly, certain business operations may benefit from the engagement of independent contractors rather than direct employees. However, the federal workplace relations system seeks to protect workers from being taken advantage of by having their engagement described or represented to them by an employer as being that of an independent contractor if that is not in fact the case. The label attached to the relationship by the parties is not determinative.

The relevant body of case law, including a number of decisions of the High Court, emphasises that the determination of whether a worker is an employee or a contractor is multi-factorial, and will depend on a consideration of the totality of the particular facts and circumstances. The factors which courts consider relevant, many of which are linked to the concept of '*control*', include (but are not limited to):

- does the worker perform work under the supervision and instruction of the other party – not just as to what to do but how to do it?
- does the worker determine their work hours or are these controlled by the other party?

- does the worker carry the financial risk of the work they are performing and are they responsible for indemnities and for restitution or repair of any of their faulty work?
- is the worker responsible for their own superannuation, taxation deductions and payments, insurances and workers compensation?
- is the worker obliged to render tax invoices incorporating the GST?
- is the payment received by the worker more than the equivalent minimum wage for the work if performed by a similar worker under the NES, applicable modern award or industrial instrument?
- is the worker generally entitled to leave paid for by the other party whilst away from work?
- can the worker decide how to perform the work and when to perform it?
- can the worker substitute another worker to perform the work?
- does the worker perform similar work for numerous other parties and advertise their services across the relevant industry, or do they only work for this single other party?
- does the worker maintain appropriate and complete financial records of an operating business for the services provided?
- does the worker hold themselves out to third parties as an employee of or contractor to the other party?
- does the worker supply their own plant and equipment to perform the work?
- does the worker wear the staff uniform of the other party whilst performing the work and when in contact with third parties?

The Fair Work Ombudsman has jurisdiction to investigate whether a worker has been misclassified as a contractor rather than an employee and to prosecute the employer for any failure to meet the minimum entitlements under the NES, modern award or other industrial instrument, along with associated penalties for noncompliance with the Fair Work Act and potentially also for sham contracting (see overleaf).

Incorrectly categorising a worker (or a number of workers) as a contractor rather than an employee can quickly generate an exposure to very substantial reimbursements, interest on those amounts and penalties under the Fair Work Act. As such, a misclassification may result in a worker not being paid annual leave, personal leave, superannuation, leave loading, notice in lieu and other entitlements and numerous penalties can arise in respect of each misclassified worker. It is also common practice, where the infringing employer is a corporation, for the corporation and the officers of the corporation to be prosecuted by the Fair Work Ombudsman (corporate penalty up to A$63,000 per infringement and individual penalty up to A$12,600 per infringement).

Sham contracting

Sham contracting occurs where an employer intentionally or carelessly represents to a worker that they are an independent contractor or should become an independent contractor when the relationship between the parties is actually that of employer and employee.

Sham contracting is unlawful and attracts significant penalties (up to A$63,000 for a corporation and up to A$12,600 for a director/officer) in addition to the requirement to rectify any resulting underpayment or non-payment of minimum wages and employee entitlements as detailed above.

WORKPLACE HEALTH AND SAFETY

Overview

Work health and safety is a fundamental consideration for all businesses operating in Australia. Subsequent to 2011, there has been a wave of significant legislative changes in the majority of Australian states and territories that reinforce the obligations of all businesses to take all reasonably practicable steps to ensure that the risk of injury, illness and death is eliminated or minimised for all persons present in their workplaces and that the business' officers exercise due diligence in their management of the business where work health and safety risks are concerned. The pecuniary penalties for both businesses and individuals are potentially substantial and often not covered by insurance, adding to the importance of compliance with the statutory requirements.

'*Harmonised*'[2] work health and safety legislation is in force in Queensland, New South Wales, Tasmania, South Australia, Northern Territory, Australian Capital Territory and all Commonwealth territory. Victoria and Western Australia both currently remain outside the harmonised scheme, although the latter has indicated a bill based on the harmonised legislation is expected to be introduced in mid-2019.

As already noted, the harmonised legislation is largely identical in implementing states and territories. For the purposes of this publication, the references are to the Queensland version – the *Work Health and Safety Act 2011* (Qld) (**WHSA**), whilst acknowledging its unique exclusions and operational variations.[3]

[2] Although the intent of the Council of Australian Governments (COAG) agenda for work health and safety law reform was for '*harmonised uniformity of legislation across all states and territories*', even those states and territories implementing the model legislation made a number of local amendments, exclusions and modifications. Accordingly references to harmonised legislation still require the reader to consult the legislation for jurisdiction-specific variations.

[3] In Queensland, the WHSA does not apply where the *Petroleum and Gas (Production and Safety) Act 2004* (Qld), *Coal Mining Safety and Health Act 1999* (Qld), *Mining and Quarrying Safety and Health Act 1999* (Qld), *Electrical Safety Act 2002* (Qld), *Transport (Rail Safety) Act 2010* (Qld) and/or *Safety in Recreational Water Activities Act 2011* (Qld) have application (see sch 1, pt 2, WHSA).

Important terms

The WHSA, in recognition that people on or in the vicinity of workplaces are not limited to an employer and its employees, and that businesses may be operating through a variety of legal entities (company, partnership, joint venture, sole trader and so forth), places its primary duties on a '*Person Conducting a Business or Undertaking*' (**PCBU**), which incorporates all of the above types of business operation and is not concerned with whether or not the enterprise is conducted for profit or gain.[4]

The WHSA also places obligations on '*workers*'; and the definition of '*worker*' is a very broad one. The definition includes employees, contractors and subcontractors, the employees of contractors and subcontractors, apprentices, outworkers, trainees, work experience students and volunteers.[5]

What constitutes a '*workplace*' is also widely defined, incorporating any place where '*work is carried out (for a PCBU) and includes any place where a worker goes, or is likely to be, while at work*'.[6]

Section 8 of the WHSA goes on to specify that a '*workplace*' can include '*a vehicle, vessel, aircraft or other mobile structure'*[7] or water platform or installation, such as a jetty or offshore drill platform.

To illustrate by example, a '*workplace*' for a real estate agent who travels to houses listed for sale would include the motor vehicle whilst travelling to and from listed properties in the course of performance of their work duties.

[4] *Work Health and Safety Act 2011* (Qld) s 5.
[5] Ibid s 7.
[6] Ibid s 8(1).
[7] Ibid s 8(2).

Basic principles

The WHSA does not operate on proportionate liability – multiple PCBUs and workers may owe multiple overlapping duties[8] and owe more than one relevant duty in respect of the workplace,[9] and these duties are not transferable or delegable[10] (although a PCBU might meet its obligation to do all things reasonably practicable by contracting an expert contractor and appropriately monitoring that contractor).[11]

Section 17 of the WHSA provides that:

> *'A duty imposed on a person to ensure health and safety requires the person—*
>
> *(a) to eliminate risks to health and safety, so far as is reasonably practicable; and*
>
> *(b) if it is not reasonably practicable to eliminate risks to health and safety, to minimise those risks so far as is reasonably practicable.'*

The key issue is what is *'reasonably practicable*', which is itself defined in s 18 of the WHSA as meaning:

> *'that which is, or was at a particular time, reasonably able to be done in relation to ensuring health and safety, taking into account and weighing up all relevant matters including—*
>
> *(a) the likelihood of the hazard or the risk concerned occurring;*
>
> *(b) the degree of harm that might result from the hazard or the risk;*
>
> *(c) what the person concerned knows, or ought reasonably to know, about—*
>
> *(i) the hazard or the risk; and*
>
> *(ii) ways of eliminating or minimising the risk;*
>
> *(d) the availability and suitability of ways to eliminate or minimise the risk; and*
>
> *(e) after assessing the extent of the risk and the available ways of eliminating or minimising the risk, the cost associated with available ways of eliminating or minimising the risk, including whether the cost is grossly disproportionate to the risk.'*

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[8] More than one (1) legal person can concurrently hold the same or similar duty – *Work Health and Safety Act 2011* (Qld) s 16.

[9] Ibid s 15 – a legal person can hold more than one (1) duty.

[10] Ibid s 14 – duties under the Act are not transferable/delegable.

[11] *Baiada Poultry Pty Ltd v The Queen* (2012) 246 CLR 92.

Duty of care

The primary duty of care on a PCBU[12] is to ensure, so far as reasonably practicable, the health and safety of '*workers engaged or caused to be engaged*' by the PCBU. This would extend to the PCBU's employees and contractors, workers whose work activities are influenced or directed by the PCBU including subcontractors of the PCBU's contractors, or other workers who may be at risk from the work carried out (such as workers at adjoining premises or authorised workplace visitors). This primary duty of care extends to cover the work environment, plant, structures and systems of work, the use, handling and storage of plant and substances, the provision of adequate information, training, instruction, supervision and facilities (including '*fly in, fly out*' accommodation) and the monitoring of the health and conditions of workers and the workplace.

Aside from the general duty of care, there are specific duties detailed in the WHSA for PCBUs:

- managing or controlling workplaces;[13]
- managing or controlling fixtures, fittings and plant;[14]
- designing of plant, substances & structures;
- manufacturing plant, substances or structures;[15]
- importing plant, substances or structures;[16]
- supplying plant, substances or structures;[17] and
- installing, constructing or commissioning plant or structures at the workplace.[18]

[12] *Work Health and Safety Act 2011* (Qld) s 19.
[13] Ibid s 20.
[14] Ibid s 21.
[15] Ibid s 23.
[16] Ibid s 24.
[17] Ibid s 25.
[18] Ibid s 26.

Officers

Officers of a PCBU, which include the obvious persons (directors, CEO, CFO),[19] owe a personal duty to exercise '*due diligence*' to ensure that the PCBU they control/manage complies with its duties under the WHSA.[20] It is to be noted however that the definition of '*officer*' is quite expansive due to its reference to s 9 of the Corporations Act and the inclusion of persons who have the capacity to significantly affect a corporation's financial standing or provides advice to a corporation's directors which is subsequently endorsed. As a result, '*officer*' for the purposes of the WHSA could incorporate managers at lower levels of management if, in practice, they have the necessary level of influence.

'*Due diligence*' involves the officer:

- taking reasonable steps to acquire and maintain knowledge of health and safety matters relevant to the PCBU;
- having a reasonable understanding of the PCBU's business and the hazards/risks involved in its operations;
- ensuring that the PCBU has appropriate resources and processes to eliminate/minimise those risks;
- ensuring the PCBU has appropriate processes to receive and consider internal and external reports and feedback about health and safety matters at its workplaces; and
- ensuring that the PCBU implements processes for complying with its duties.[21]

Officers of a PCBU can be prosecuted for breaches of their due diligence obligations independent of any prosecution of the PCBU itself over a breach of the WHSA. The penalties imposed against an officer can be significant under the WHSA.[22]

[19] However, see the expanded definition of '*officer*' in sch 5 of the WHSA; incorporating s 9 of the *Corporations Act 2001* (Cth).
[20] *Work Health and Safety Act 2011* (Qld) s 27.
[21] Ibid s 27(5).
[22] Up to A$600,000 or five years imprisonment under s 31 of the WHSA.

Workers

The term '*worker*' is widely defined in the WHSA[23] and includes employees, contractors, subcontractors (and their respective employees), labour hire workers, outworkers, work experience students and volunteers. Workers owe their own personal duty of care to take reasonable care for themselves and others and to reasonably ensure that their personal acts or omissions do not adversely affect the health and safety of others at the workplace and to comply with reasonable health and safety instructions and protocols issued by the relevant PCBU.[24]

Penalties

The WHSA provides for a vast variety of penalties for instances of non-compliance with the Act, with offences ranging from not maintaining records or failing to notify incidents within specified time limits. There are however three substantial penalty provisions established by ss 31 to 33 of the WHSA which do not require any actual injury, illness or death to give rise to liability.

Section 31 of the WHSA creates an offence for a PCBU, officer and/or individual engaging in conduct, without reasonable excuse, recklessly exposing a person to a risk of death or serious injury or illness. This offence is specified to constitute a crime, to which the relevant Criminal Code applies (for example, *Criminal Code 1899* (Qld)). The onus is on the work health and safety regulator (referred to simply as the '*regulator*') to prove the prosecution beyond reasonable doubt. The maximum fine for a body corporate PCBU, an officer or an individual worker under s 31 is currently A$3 million, A$600,000 or five years jail and A$300,000 or five years jail, respectively.

Under s 32 of the WHSA, it is an offence for a person to fail to comply with a workplace health and safety duty that exposes a person to a risk of injury, illness or death. Although not classified as a crime, the penalties are significant: up to a maximum of A$1.5 million, A$300,000 and A$150,000 for a corporate PCBU, officer and individual, respectively.

[23] Ibid s 7.
[24] Ibid s 28.

Section 33 of the WHSA provides for an offence of failure to comply with a WHSA duty of care. The penalties for a corporate PCBU, officer and individual are up to a maximum of A$500,000, A$100,000 or A$50,000, respectively.

The final major penalty provision is found in pt 2A of the WHSA, which deals with industrial manslaughter. While Queensland and the ACT are currently the only Australian jurisdictions to have an industrial manslaughter offence, Victoria may also introduce an industrial manslaughter bill in the short term. If found guilty of industrial manslaughter in Queensland, the maximum fine for a body corporate is A$10 million, and up to 20 years imprisonment for an individual.

Notifications and authorisations

Once there is an occurrence involving a death, serious injury or a defined dangerous incident, the PCBU must provide appropriate notifications to the regulator[25] in addition to the relevant emergency services and take steps to secure the accident scene for the regulator to investigate.[26]

In order to perform certain work or to use certain plant, equipment and substances, the WHSA requires the holding of certain certifications and authorisations.[27]

Consultation and health and safety representatives

The harmonised legislation places great weight on sharing of safety knowledge at all levels of business operations and accordingly imposes many specific obligations to consult between workers within a PCBU and amongst PCBUs where multiple businesses are engaged at the one workplace.

[25] Ibid ss 35–37.
[26] Ibid s 39.
[27] *Work Health and Safety Act 2011* (Qld) ss 41–45; also see *Work Health and Safety Regulation 2011* (Qld).

Businesses of a certain size may also have to undergo a process to internally appoint a health and safety representative to liaise with management and staff over health and safety concerns and issues in the workplace. Appointed work health and safety representatives, once appropriately trained, have certain statutory powers under the harmonised legislation to facilitate changes to workplace operations and to assist the regulator in policing work health and safety matters under the legislation.

Work health and safety regulator

The regulator and its employed inspectors are empowered to:

- provide information and advice on work health and safety matters and legislative compliance;
- enter workplaces to conduct inspections, tests and investigations;
- assist in dispute resolution;
- issue prescribed notices (see below);
- investigate contraventions/incidents;
- assist in prosecutions;
- attend inquests; and
- interview witnesses as part of the exercise of any of their functions.

Inspections, PCBU rights and notices

As a result of a workplace incident or investigation, inspectors have powers to issue a range of notices which prevent or restrict a PCBU's business operations on health and safety grounds. These can take the form of '*Improvement Notices*',[28] which require the remedy of an identified contravention or prevention of a likely contravention, and '*Prohibition Notices*', which prohibit the carrying on of an identified workplace activity until an inspector is satisfied that the identified risk has been remedied.[29] The penalties for breaching an Improvement Notice or Prohibition Notice are substantial – up to A$50,000[30] and

[28] *Work Health and Safety Act 2011* (Qld) ss 191–194.
[29] Ibid ss 195–196.
[30] Ibid s 193.

A$100,000,[31] respectively. Where an investigation requires further tests or inspections to occur without the workplace being disturbed, an inspector may issue a '*Non-Disturbance Notice*',[32] which also carries a substantial penalty for non-compliance.[33]

In the course of an investigation, inspectors have extensive powers. It is an offence to attempt to hinder or obstruct an inspector in an investigation; and to intimidate or threaten them. An investigation may involve the interview of witnesses, for which the right to refuse to answer questions on the grounds of self incrimination is abrogated.[34] Legal professional privilege in relation to certain documentation is retained.[35]

Enforceable undertakings

For prosecutions under ss 32 and 33 of the WHSA which do not involve a fatality, it is open to a PCBU to enter into a formal undertaking which discontinues the prosecution subject to the PCBU providing certain undertakings and financial initiatives designed to rectify the identified hazard/risk which resulted in the prosecution and to otherwise promote health and safety in the associated industry and community at large.[36] If the PCBU fails to comply with its own WHS undertaking the regulator can either seek enforcement of the undertaking or have the prosecution for the offence reinstated and proceeded with.

Prosecutions

Under the harmonised legislation, the applicable limitation period for the commencement of prosecutions is, as the case may be:

- within two years of the offence coming to the regulator's attention;
- within one year of the delivery of a coroner's findings in relation to a workplace death; or
- within six months of a breach or withdrawal of a formal WHS undertaking.

[31] Ibid s 197.
[32] Ibid s 198.
[33] Ibid s 200 (up to A$50,000).
[34] Ibid s 172 (note however that the right may still be asserted to prevent use of the evidence, including in a future prosecution).
[35] Ibid s 269.
[36] Ibid s 216.

Additional Consequences

The regulator also has a number of additional penalties and orders available to it under the WHSA, including adverse publicity orders (requiring a PCBU to publish an adverse public notice about its conduct in an approved form of media), restoration orders, work health and safety project orders and training orders.[37]

Summary

In summary, all Australian states and territories have onerous work health and safety legislation that require careful attention at all levels of management to minimise the risk of exposure to prosecution and substantial penalties, irrespective of whether an incident or injury actually occurs. In some states and territories the legislation is very similar due to the harmonisation process; however the obligations in the remaining non-harmonised states (Victoria and Western Australia) are not dissimilar.

As a result, it is strongly recommended that business owners and officers pay close attention to work health and safety matters in all aspects of the business in the state or territory of operation, and not simply regard it as a matter to be managed at an operational or management level.

[37] Ibid ss 236, 238 and 241.

IMMIGRATION

The Australian immigration system regulates the migration, work and residence in Australia of foreign nationals pursuant to the provisions and regulations of the *Migration Act 1958* (Cth) (**Migration Act**).[38]

The Department of Home Affairs (**DHA**) administers entry and work entitlements of foreign nationals in Australia through a variety of visa categories. These categories can broadly be classified into two groups, those visas authorising a temporary stay in Australia, and those visas authorising permanent residence.

Entry for short term business purposes

Overseas businesses that require overseas employees to visit Australia for short term business purposes may apply for one of a variety of available visas. The more common applicable visas are the Temporary Work (Short Stay Activity) visa (subclass 400), the Electronic Travel Authority (subclass 601) and eVisitor (subclass 651) visas.

The Temporary Work visa permits work in strictly limited circumstances, usually where the work is highly specialised in nature and not on an ongoing basis. This visa is usually granted for up to a three month period but may in limited circumstances be granted for a period of up to six months.

The Electronic Travel Authority and eVisitor visas permit travel to Australia for business purposes such as attending conferences, and investigating, negotiating or exploring business opportunities. These visas allow holders to enter Australia for periods of up to three months each visit within a 12 month period.

[38] Immigration law is handled by specialist registered migration agents. Carter Newell does not act in this area and provides the following overview by way of commentary only.

Entry for long term business purposes

Businesses wishing to sponsor foreign employees to work in Australia on an extended basis most commonly use the Temporary Skill Shortage visa (subclass 482). This visa allows foreign employees to live (with family members) and work for the sponsor employer in Australia for a period of up to four years. A sponsored employee has no restriction on their travel in and out of Australia and family members are also allowed to work or study in Australia throughout the term of the visa.

To be eligible to apply for this visa, employees are required to be nominated for sponsorship by their employer, have the necessary qualifications, experience and English ability required of the position they will be employed in and be eligible for any licences or registrations required for the position. Further, employees are required to have health insurance.

Employers wishing to sponsor an employee under a subclass 482 visa will further be required to provide evidence of having sought to fill the relevant position with an employee from the local labour market before applying to sponsor an overseas employee.

Permanent residence

Skilled workers from outside Australia or in Australia as temporary residents may be able to apply for permanent residency through the Employer Nomination Scheme visa (subclass 186). This visa is open for applicants nominated by their employer who are younger than 45 years of age and meet skill, qualification and English requirements. An application under this scheme by an employer can only be made where the employer has a genuine need for a skilled position to be filled by a paid employee to whom they can offer the position on at least a two year contract.

Alternatively, DHA administers a variety of skilled migration visas which may be available to foreign nationals interested in working in Australia. These have differing criteria and may be suitable options depending upon an individual's skills and circumstances.

DISPUTE RESOLUTION AND THE COURTS

Australia's legal foundations and sources of law

The Commonwealth Constitution established Australia's federal system of government, dividing the nation into eight states and territories, each with the power to pass laws for their own self-governance (although the Commonwealth retains the power to pass certain laws governing the entire federation). In the event of an inconsistency between a state and Commonwealth law, the latter will prevail to the extent of the inconsistency.

Australia has two primary sources of law: statute law and common law (case law). Statute law is written law created by parliament. Statute begins its life as a '*Bill*' that is presented to and then debated in parliament. If the '*Bill*' is approved by both houses of parliament (or in the case of Queensland, the one and only house), it becomes an '*Act*' of parliament, and upon its commencement is binding in the jurisdiction in which it is enacted.

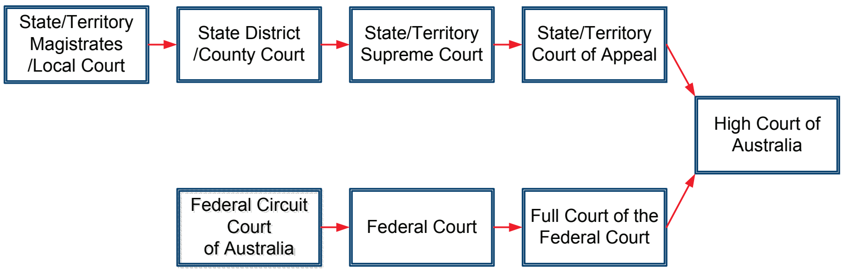
Common law (case law) is law developed by judges through decisions of the courts. It is fundamental to the common law system that courts operate in accordance with the doctrine of precedent, which is the principle that a lower court is bound to follow decisions of higher courts within the same hierarchy.

The Australian judicial system

Australia has an adversarial judicial system whereby opposing parties contest their case before an impartial judge who will determine the dispute (or the guilt of a person tried for an offence). This is opposed to an inquisitorial system, popular in European countries, where a judge takes an active role in investigating the case.

The court hierarchy[39]

The Australian judicial system consists of two hierarchies: the state and the federal. The High Court of Australia is at the apex of both hierarchies and also has jurisdiction to hear matters concerning the Commonwealth Constitution. In addition, there are a number of special purpose tribunals with limited jurisdiction to deal with particular kinds of dispute (for example, the Queensland Civil and Administrative Tribunal and the Commonwealth Administrative Appeals Tribunal).



Jurisdiction

It is important to ascertain which court has jurisdiction to hear the matter. In civil matters this is generally determined by the nature of the legal issues involved and the monetary amount of the claim. In criminal matters, this will usually be determined by the severity of the offence and maximum penalty associated with the alleged offence.

[39] In January 2019, the Federal Circuit Court of Australia and the Family Court of Australia will merge and be known as the Federal Circuit and Family Court of Australia.

Originating processes

In most jurisdictions, proceedings are initiated by an originating process (usually either an '*originating application*' or '*claim and statement of claim*') filed by the applicant/plaintiff in the appropriate court registry. An originating process often sets out the material facts necessary to establish a cause of action, substantiate why the relief sought should be granted, and prevent surprise at trial. In most cases, a defendant must then file a '*defence*' which identifies which facts are admitted and which issues will be contested. The intention is that both parties are prohibited from '*keeping something up their sleeve*' to surprise the other party at trial. Usually, if no defence is filed, that will entitle the plaintiff/applicant to default judgment.

Limitation of actions

Civil claims are subject to a limitation period in which the action must be commenced. The limitation period depends on the nature of the claim and varies significantly between jurisdictions. In limited circumstances, the limitation period can be extended.

Service of documents

After filing an originating process, all Australian jurisdictions require that a copy of the document must be served on the parties against whom the allegations are made. Australian courts will not allow a matter to proceed unless a plaintiff (applicant) has proved service. This is to ensure that a defendant or respondent has adequate notice of any action commenced against him/her, and that they are able to properly defend their position.

Discovery

Generally, once a matter is litigated the parties have a duty to disclose to each other the documents that they intend to rely on and are relevant to the issues in dispute. While the scope of the duty varies from jurisdiction to jurisdiction and court to court, courts are starting to introduce processes which require the parties to confer early on to reduce the scope and burden of discovery. Regardless, a party should, prior to commencing litigation, consider its position having regard to the fact that many documents (whether favourable or not) may have to be disclosed to the other side.

Certain documents may not be subject to the disclosure regime, such as documents containing privileged information. Privileged documents fall within three categories: client legal privilege, privilege against self-incrimination, and public interest immunity. In some jurisdictions, expert reports (including draft reports) must be disclosed, even if they would otherwise have been privileged.

In some cases, a party can apply to court for pre-litigation disclosure (for example, to determine whether a cause of action exists or to identify the appropriate party to sue).

Evidence and the burden of proof

In civil trials, the plaintiff bears the onus of adducing sufficient evidence to prove (on the balance of probabilities) the elements of a cause of action. Evidence at a hearing may be given orally or by way of written affidavits or statements. Once that evidence has been adduced, the burden of proof shifts to the defendant to adduce evidence to contradict it. When evidence is adduced in court, an opposing party will have the opportunity to test the evidence (by way of cross-examination) in an attempt to expose a weakness, and ultimately reduce the weight a judge is likely to give it in determining the fact in issue.

Costs of litigation

Litigating a matter can be very expensive. A party contemplating litigation should give careful consideration to the potential costs involved in the event that they are successful and unsuccessful. In Australia it is generally the case that in civil litigation '*costs follow the event*', meaning that an unsuccessful party to an action will bear the opposing party's costs in addition to their own. This almost invariably falls short of the actual costs incurred by the party. A general rule of thumb is that any costs recovered from an unsuccessful party will be in the vicinity of 60% to 80% of the party's actual costs.

Foreign judgments

Whether Australia will recognise and enforce a judgment of an international jurisdiction will depend largely on the particular jurisdiction from which it originated and the subject matter of the judgment. The *Foreign Judgments Act 1991* (Cth) and the *Foreign Judgments Regulations 1992* (Cth) stipulates the procedure to be followed and scope of the judgments that are able to be enforced under the statutory regime.

In the event that a particular judgment is not provided for under the statutory regime, common law principles can be applied to determine its enforceability. Under the common law, the enforceability or recognition of a foreign judgment can be complex as the court will consider a number of factors including but not limited to: the foreign court's jurisdiction to hear the matter in question, whether the judgment is contrary to Australian public policy and whether the judgment is final and conclusive.

Appeals

A party who is dissatisfied with the outcome of a court proceeding is, in some circumstances, able to appeal the decision to a higher court. Generally appeals are allowed on questions of law only, and not questions of fact. In some circumstances, leave of the court may be required to appeal.

Alternatives to litigation

Due to the high cost of running a matter to a formal conclusion at trial, parties frequently attempt to resolve a dispute before a hearing takes place (and sometimes before commencing proceedings). Due to its popularity and success, many Australian jurisdictions require parties to undertake a form of dispute resolution before a matter is considered by the courts. Some jurisdictions require certification that genuine attempts have been made to resolve a dispute before proceedings are commenced.

Domestic arbitration

Arbitration is a form of private dispute resolution whereby the parties appoint an independent person to consider their dispute and make a determination. Arbitration tends to be pre-selected by parties in a contract before a dispute arises. The arbitration process can be varied by agreement between the parties to suit the complexity of the case (for example, allowing the arbitrator to make a determination on the papers for less complex cases). Arbitration awards are final and binding and are enforceable. There is very limited scope to appeal.

The States and Territories around Australia have implemented largely uniform domestic arbitration legislation, with the intent of bringing the regimes in each of the States and Territories into line with the UNCITRAL Model Law.

The Resolution Institute, the institute responsible for the most commonly used domestic arbitration rules in Australia, has arbitration rules that are intended to complement the new commercial arbitration legislation. The rules include a requirement that the arbitral tribunal use its best endeavours to deliver the award within 365 days of appointment.

Mediation

Mediation is a process whereby an independent, objective person assists the parties in attempting to come to an agreement. This is an informal process and the rules of evidence are not required to be observed. If a settlement is reached, this is usually formalised in writing as an agreement or a deed. The mediation process itself is '*without prejudice*' which means that nothing said in the mediation is able to be used against a party later on, whether in the relevant proceeding or otherwise. Further, evidence of what took place during a mediation cannot generally be disclosed to the court.

Class actions

Part IVA of the *Federal Court of Australia Act 1976* (Cth) established a '*Representative Proceeding*' regime. Pursuant to that regime, in circumstances where seven or more persons have claims against the same person and those claims relate to a common issue, proceedings may be commenced by one or more of those persons as representative for some or all of those persons.

The bulk of Australian class actions proceed under the Federal Court regime, although there are an increasing number of class action proceedings in certain states, particularly New South Wales and Victoria which have similar regimes to the Federal Court.

Together with the rise in class action litigation in Australia, there has been a rise in third party litigation funders. Whilst litigation funders have existed in Australia for the purpose of providing funding for insolvency litigation for decades, the scope for litigation funding has more lately extended into the realm of class actions. Class actions and litigation funding have, in turn, been the subject of recent inquiries. Consideration is being given to further regulation of litigation funding, including the introduction of licensing requirements and the capping of commission rates, and permitting lawyers to charge on a contingency basis in such proceedings.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INTELLECTUAL PROPERTY

The development of intellectual property law and the ever changing world of technology warrant discussion in the context of:

- patent protection;
- copyright law;
- trade marks; and
- plant breeding rights.

Patents

The *Patents Act 1990* (Cth) provides for two forms of patents, a '*standard patent*' which has a term of up to 20 years from the date of filing of the complete specification (depending on renewals) and, since 2001, the '*innovation patent*', for inventions that are not sufficiently inventive to meet the inventiveness threshold required for standard patents, which has a duration of up to eight years. Patent terms, other than in relation to standard patents for pharmaceutical substances, may not be extended.

An application for a standard patent is subject to a full examination as a condition of grant. An application for an innovation patent is not subject to substantive examination prior to grant but will only be examined for compliance with formal requirements, and will then be registered. The innovation patent may not, however, be enforced against an alleged infringer unless it has been substantively examined and certified. An examination can therefore be requested (and paid for) at any time by the patentee, or by any third party (who might be concerned regarding infringement), or directed by the Commissioner of Patents.

Both standard and innovation patents may be challenged on various bases including lack of novelty, lack of inventive (or innovative) step and various other technical grounds. An alleged infringer is entitled to assert by way of defence to an infringement claim that a patent is invalid.

Australia is a party to the Paris Convention, under which a foreign applicant has a certain time period from the date of an original patent application in a member country within which to file in Australia an application fairly based upon the original. Australia has also accepted the Patent Co-operation Treaty, under which a single application in a member country may be treated as an application in another member country. Australia is also a party to the 1977 Treaty on the International Recognition of the Deposit of Micro-Organisms for the Purposes of Patent Procedure.

Provisional application

An applicant may choose to file a provisional application, which helps establish an early priority date for the invention. Filing a provisional application does not on its own give patent protection when lodging a provisional application. To file a provisional application the applicant must include the appropriate fee and a provisional specification that describes the invention.

A provisional application lasts 12 months. During this time, the applicant must file:

- a complete standard patent application or a complete innovation patent application in Australia; or
- an international patent application that claims priority from the provisional application; or
- separate patent applications in one or more overseas countries that claims priority from the provisional application.

Complete applications

A complete application is for either a standard patent or innovation patent and must be accompanied by:

- a complete specification which contains at least one '*claim*' that defines the invention;
- the correct application form;
- a notice of entitlement form for standard patents (if applicable); and
- the appropriate filing fee.

A complete specification must fully describe the invention and provide IP Australia with the best method of performing the invention and '*claims*' which the invention is meant to cover.

A '*claim*' is a single sentence that describes the technical features of the invention. An '*independent claim*' is a claim that does not refer to any other claim and describes the features that are essential to the invention. A '*dependent claim*' makes explicit reference to one or more previous claims and contains features that would be desirable or optional, but not essential to the invention. An '*omnibus claim*' is one that claims the most preferred form of the invention with reference to the description and/or drawings. A standard patent can have more than one independent claim, so long as they relate to the one invention. The complete specification can also include drawings made in black ink and an abstract which provides a summary of the key features of the invention.

The examination process

Innovation patents are not automatically examined by IP Australia, the federal government agency that administers IP rights and legislation. To fully enforce rights to an innovation within the marketplace, the patent must be certified following an examination. To request an examination, an applicant will need to complete a '*Request for Examination*' form and pay the required fee. A reply to a Request for Examination usually arrives within nine to twelve months of filing the correct fee. A patent examiner will inform the applicant of any deficiencies and give the applicant six months from the date of the adverse report to overcome any objections outlined in the examiner's report. If the applicant fails to rectify the application within this timeframe, the application will lapse.

For standard patents, an applicant must complete a Request for Examination form and pay the required fee.

After a patent examiner completes an examination, the examiner will inform the applicant of any deficiencies and give the applicant twelve months from the date of the adverse report to change the application. If the applicant fails to rectify the application within this timeframe, the application will lapse.

Publication

Publication of the un-examined standard patent invention occurs approximately 18 months after the priority date in the Australian Official Journal of Patents. Publication does not guarantee a grant of the patent. A member of the public has three months from the date of publication to start proceedings to show that the patent, if granted, would be invalid. If there are no objections or the objection is unsuccessful, the patents office will seal it and send a certificate to the applicant.

Innovation patents are published upon the grant, which occurs a short time after filing the application.

There are special rules for registering patents for computer related inventions, plants, micro-organisms and business schemes.

International patents

Applying for a patent to IP Australia will only grant protection of an invention within Australia. To protect a patent internationally, an applicant can file:

- a patent application in each country it wants protection; or
- a single international application which will automatically take effect in all countries that are party to the Patent Cooperation Treaty (there are currently over 180 member countries). An applicant can choose to proceed in whichever countries they want to select at a later date. There are national requirements and costs in each country, but this can be deferred for a significant period).

Copyright

Copyright in Australia is governed by the *Copyright Act 1968* (Cth) (**Copyright Act**). The types of material which may be subject to copyright are:

- literary works (which include computer programs);
- musical works (i.e. musical composition);
- artistic works (which include photographs, engineering drawings, plans, buildings and works of artistic craftsmanship, irrespective of whether the artistic content is regarded to be high);

- dramatic works; and
- cinematograph films, sound recordings, sound and television broadcasts and published editions (i.e. the typeset arrangement of printed material).

If the criteria for copyright subsistence exist, copyright arises automatically on creation, with all attendant rights, without the need for registration or any other formality, including any form of copyright notice. Such criteria include the creation of the copyright material by a citizen, national or resident of, or first publication in, Australia or one of the many countries with which Australia has multilateral or bilateral treaty arrangements.

Australia is a member of both the Berne Union and a party to the Universal Copyright Convention, as well as a number of other treaties for the protection of individual rights. Australian copyright lasts for the life of the human author plus 70 years, in the case of works, and, broadly speaking, 70 years from the date of publication in the case of all works and other subject matter in which copyright subsisted on 1 January 2005 when the amending legislation came into effect. In all other cases the earlier term of 50 years in each case remains applicable so that no '*revival*' of copyright can occur.

Ownership of copyright

The basic premise for copyright is that the author will be the owner of the copyright. The author is considered to be the person who actually makes the work and was the source of originality. A person who is merely acting as a scribe would not be considered to be the author.

The usual exceptions to this basic premise apply. If the author was an employee and the work was created in accordance with the terms of employment, then the employer will own the copyright. Alternatively, the author can assign ownership of the copyright in writing.

It is possible to have joint ownership of copyright in which case the joint owners will share the copyright equally and as tenants in common. This is subject to any agreement between the co-owners. A co-owner can commence infringement action without joining the other co-owner although each co-owner may have to account to the other for any benefits received arising from that infringement action.

Moral rights

The Copyright Act was amended in 2000 to enable an author to exercise his or her '*moral rights*' in relation to any literary, dramatic, musical or artistic work and cinematograph films created by him or her. These moral rights belong to the individual author. They cannot be transferred to another person, although the author may elect to consent to another person infringing his or her moral rights.

There are three essential moral rights bestowed by pt IX of the Copyright Act:

- the right to be attributed as the author of the work;
- the right not to have authorship of the work falsely attributed to someone else; and
- the right for the work not to be subject to derogatory treatment that prejudicially affects the reputation of the author.

In essence, the moral rights regime is aimed at giving the individual author a '*non-commercial*' benefit. Many authors will, having become aware of their moral rights, nevertheless choose not to act in a manner that would upset a commercial environment. That said, an enterprise would be foolish to disregard the power the Copyright Act gives an individual author to exercise those moral rights. The easiest solution for the enterprise is to seek consent to use the works in a manner which may otherwise constitute infringement of those moral rights.

Computer software

Computer programs are expressly addressed in the Copyright Act and comprise a '*literary work*'. Computer programs are defined under the Copyright Act as '*a set of statements or instructions to be used directly or indirectly in a computer in order to bring about a certain result*'.

Generally the copyright in relation to computer programs is expressed in the source code. Australian cases have yet to decide as to whether the '*look and feel*' of the results of a computer software application would be protected by copyright.

Designs

The *Designs Act 2003* (Cth) creates a system for registration of designs with IP Australia, the Australian organisation responsible for the registration of patents, designs and trade marks. Under the legislation, a design is '*the overall appearance of a product resulting from one or more visual features*' and will be registrable if it is '*new*' and '*distinctive*', assessed against designs publicly used in Australia or published within or outside Australia. An application for registration will not however initially be subject to substantive examination, but will be registered on compliance with formalities only. The registered design will only be examined upon request of any person, by order of a court, or at the initiative of the Registrar. It will be a condition of infringement proceedings that a registered design has been examined and, if compliant with the requirements of novelty and distinctiveness, a certificate of examination issued.

The duration of the monopoly in the design gained by registration has been reduced to a maximum of 10 years. As a party to the Paris Convention, Australia allows foreign applicants a 12 month period of grace from the date of an original application in a member country in which to file an application for the same design in Australia.

Applications to register a design

To register a design, applicants are required to complete an application form, provide five identical copies of each view of the design and pay the application fee. Applicants may decide to complete a '*statement of newness and distinctiveness*' which enables the applicant to set out the visual features that are new and distinctive. Completion of the statement is optional, but may assist IP Australia when comparing the new design with other registered designs.

An applicant may also request either to register the design or publish the design. If the applicant chooses registration, IP Australia will conduct a formalities check. If the design passes the formalities check, IP Australia will register the design (from the date the application was filed) and publish it in the Australian Official Journal of Designs and place a copy of it in the online designs database.

If an applicant chooses publication, the application will be checked and the design will be published in the Australian Official Journal of Designs and in the AU Designs Data Searching database. Choosing publication of a design is generally a strategic decision as it will not give the applicant any rights, but because it is published, it prevents others from gaining any rights to the design.

Trade marks

Australia's law of registered trade marks is governed by the *Trade Marks Act 1995* (Cth) (**Trade Marks Act**). Under the Trade Marks Act, applications for registration may be made whether or not the subject mark has been used in respect of both goods and services. Australia is a party to the Paris Convention which permits a period of grace within which an application by a foreign party may be filed in Australia for the same mark in respect of the same goods or services, while retaining the priority date of an earlier application in the convention country. Australia is also a party to the Madrid Protocol, under which a single application may be made in any member country for subsequent processing by each of the Registrars of Trade Marks in other member countries nominated in the application.

Australia operates a system of classes for goods and services, in accordance with the Nice classification system.

Since the commencement of operation of the Trade Marks Act, there is no requirement for the registration of user licences in order to protect the registration of the trade mark. For use under a licence to be deemed use of the registered owner, however, a licence must comply with certain standards, including a requirement for reasonable control to be exercised over the licensee by the registered owner. It is still possible to record any interest in a registered trade mark, and such recordable interests now include the interests of a mortgagee or a beneficiary under a trust, as well as that of a license.

Registration of a trade mark in Australia allows the owner to use, license or sell the trade mark exclusively within Australia for the goods and services for which it is registered. Registration also enables the registered owner to take action against any business whose name infringes on the trade mark.

A trade mark can be a word, phrase, letter, number, sound, smell, shape, logo, picture, aspect of packaging or a combination of these that is used to distinguish the goods and services of one trader from those of another.

It is very difficult to register trade marks that:

- denote the kind, quality, intended purpose or value of the goods or services;
- are common surnames or geographical names; or
- conflict with an earlier trade mark, or would mislead the public about the nature of the goods or services.

Applications for a trade mark

Trade mark applications are governed by IP Australia. To make an application to IP Australia, a business will need a representation of the trade mark, a list of the '*classes*' the trade mark falls under, a description of the goods or services and a translation into English, if necessary.

Applications are then examined by IP Australia to see if they meet the requirements of the Trade Marks Act. The period of time between lodging an application and its examination can be significant.

If the trade mark is accepted for registration, details of the trade mark will be advertised in the Australian Official Journal of Trade Marks. Any person who believes that the business is not entitled to the rights of the trade mark has three months from the date of the advertisement to object to the registration of the trade mark.

If there is no opposition filed against the application, or if the opposition is unsuccessful, the trade mark will be registered when the business pays the registration fee.

IP Australia will then send the applicant a Certificate of Registration and record the details of the trade mark in the Register of Trade Marks. Once registered, a trade mark is registered for a period of ten years from the date of the application was filed and can be renewed perpetually for periods of ten years.

Plant breeders rights

Under the *Plant Breeders Rights Act 1994* (Cth), new plant varieties may be registered, with the result that the registered proprietor gains the exclusive right to sell and produce for sale the registered variety, and its reproductive material, and to use the name registered for the plant. Such rights subsist for 20 years from the date of application.

Registration of electronic transactions

Electronic commerce in Australia is principally regulated by federal, state and territory Electronic Transactions Acts. The federal Act applies only to transactions to which a federal law applies. The state and territory Acts are similar to the federal Act and apply in their respective jurisdictions.

The main concepts established under these Electronic Transaction Acts are:

- transactions are not invalid simply because they rely on electronic communications or electronic signatures;
- the establishment of guidelines for determining the time and place of despatch and receipt of an electronic communication;
- allowing for the electronic recordings of information and retention of electronic documents where legislation requires information to be recorded or retained in writing; and
- provision for the use of electronic forms of authentication instead of a handwritten signature.

The Electronic Transactions Acts do not apply to all legislation or transactions. Each Electronic Transactions Act lists legislation or types of transactions which are exempt from the rules set down in that Act.

Other business related intellectual property

Confidential information

There is no statutory protection of confidential information in Australia. The law relating to confidential information has been built up over many decades and emanates from English common law.

There is no system for registration of confidential information. Although colloquial use often involves stating that confidential information is '*owned*', Australian law has yet to conclude that this is the case. This is because the courts have yet to commit to the proposition that confidential information is a form of '*property*'.

Business names

In Australia a business must register the business's trading name if the trading name is not identical to the name of its proprietors.

A business name is the name under which a business operates and registration identifies the owners and location of that business. From early 2012, ASIC took over responsibility for the administration of all business names in Australia under the *Business Names Registration Act 2011* (Cth). Previously, each Australian state and territory regulated the registration of business names in its own jurisdiction. Since all registrations of business names in Australia are now recorded in the National Business Name Register, a business need only register the business name once in order for registration to take effect nationwide. Registration must be completed before the business starts trading.

Unlike trade marks, business names do not necessarily provide proprietary rights for the use of the business name. If a business name is identical or similar to another person's registered trade mark, the person conducting business may be held liable for infringement by the trade mark owner. Businesses need to be careful, as successful registration of a business name does not guarantee that it does not breach a current trade mark. The authorities have no obligation to check the trade mark register before registering a business name.

Business name vs company name

The difference between a business name and a company name is important. A company name must be registered with ASIC. Unlike a business name, a company name is the registered name of a registered company used to identify that corporate entity. If a company wishes to trade using a name other than its registered company name, it must register that trading name as a business name.

Business name searches

A register of all business names registered in Australia is maintained by ASIC. Searches of the register can be conducted via the ASIC website at: <http://www.asic.gov.au/asic/ASIC.NSF/byHeadline/Search_business_names>.

Domain names

To obtain a '*.com.au*' domain name, the applicant must:

- be an Australian entity (that is, an Australian company or the owner of a business registered in Australia); and
- use the domain name for an appropriate commercial purpose, and

have a domain name that is:

- the exact match or abbreviated name of the company or registered business name or trade mark;
- an acronym of the business name or trade mark;
- a product that the business manufactures, or sells, or a program that the business administers;
- an activity or service the business performs, facilitates or trains;
- a venue that the business operates;
- a profession practised by employees or members; or
- an event the business sponsors.

A domain name cannot be a place name in Australia. Domain names can be two to 63 letters and words can be separated by hyphens but not spaces. In Australia, a business cannot register its trade mark as a domain name unless the trade mark is the same as its legal entity name (i.e. business or company name). The rules and policies for registration of '*.com.au*' domain names are governed by .au Domain Administration Limited and may be viewed at: <http://www.auda.org.au>.

To register a '*.com.au*' domain name, an applicant can use a number of accredited Australian Registrars, a list of which is provided on: www.auda.org.au/registrars.

Registration of IP in Australia that has already been registered in another jurisdiction

If a business has applied for protection of its IP in its own country or any other jurisdiction outside of Australia, it may be able to apply for protection of that IP on a priority basis in Australia (subject to the other country being a member of the World Intellectual Property Organisation Convention (**WIPO Convention**)), providing it is within the following time limits:

- patents and plant breeders – 12 months from the date of the first application in a member country; and
- designs and trade marks – six months from the date of the first application in a member country.

The application in Australia will have a '*priority date*' of the filing date of the original application giving the applicant protection against identical or similar registrations from that priority date.

Although it is possible to apply outside the time limits above, the benefit of the WIPO Convention cannot be obtained and any earlier disclosure of the invention or design may invalidate IP rights in Australia as well as in the other countries that are also members of the WIPO Convention.

Enforcement of IP rights in Australia

Defence provisions

Each piece of IP legislation sets out various defences to infringement actions. An important element throughout IP legislation is the degree of knowledge held by the alleged infringer. A common feature of the IP regimes is to notify the world at large of the ownership rights of the IP. Generally, this is for the purpose of ensuring that any alleged infringer of the IP rights has constructive notice, which may enable the enterprise to overcome any defence based on an innocent infringement.

Opposition procedures

In relation to the forms of IP that involve a formal registration process (i.e. trade marks, patents and designs) there is an opportunity for a competitor to oppose the grant of registration to the applicant. This potentially enables a competitor to delay the grant of IP rights. There are, however, rules that preclude parties from running frivolous actions.

Unjustified threats

Most of the IP legislation provides for a '*counter-attack*' from a party who has received a threat that it will be sued for infringement of IP rights that is unjustified. A '*threat*' is not defined in the IP legislation but it seems that it can be made in any manner, whether oral or in writing. The mere notification of the existence of a right to sue for infringement of IP rights does not constitute a threat. The unjustified threats provisions emphasise the following points when dealing with a letter of demand:

- only assert actions that can be proven;
- only refer to multiple forms of IP rights if infringement can be proved of all of those IP rights; and
- only assert infringement where and when there is a will to actually institute proceedings.

Remedies available for groundless threats may include a declaration, injunction or recovery of damages.

Remedies

Each form of IP legislation sets out the remedies that are open to a person to enforce their IP rights. Those remedies include a right to be paid damages or an account of profits. Account of profits is intended to prevent unjust enrichment to the defendant, whereas damages are designed to put the plaintiff in the same position it would have held if the infringement had not occurred. Some of the IP legislation limits the remedies available where the defendant can establish that the infringement was innocent.

Limitation periods

Most of the forms of IP legislation specify the periods within which an action for infringement must have commenced (known as the '*limitation period*'). In all cases the period is six years from the date in which the infringement occurred. A failure to commence an action within this period, means the right to enforce the IP rights in respect of the alleged infringement act will be lost.

FOREIGN ANTI-BRIBERY AND CORRUPTION LAWS

Anti-bribery and corruption laws in an international context

All Australian (federal, state and territory) governments have bribery legislation that prohibits both bribery of domestic government officials, and in certain circumstances bribery between private sector individuals and entities. Australia also has in place laws prohibiting bribery of foreign government officials, as do a growing number of other countries.

Australian companies and directors, and companies doing business in Australia are subject to Australian anti-bribery and corruption laws. However, companies engaging in overseas markets will also be subject to the anti-corruption laws of other jurisdictions. Bribery by an Australian company or individual of a foreign government official in a foreign country may give rise to liability under the laws of that country. Australian companies may also face liability under the anti-corruption laws of third party countries (e.g. USA law has wide extraterritorial jurisdiction enabling it to prosecute non-USA companies and individuals for actions outside the USA).

Australian law relating to foreign bribery

Australia's international obligations

Australia is a party to various international conventions. Australia ratified the OECD *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* on 18 October 1999, and the *UN Convention Against Corruption* on 7 December 2005 which seek, amongst other things, to criminalise bribery of foreign public officials in international business transactions.

As part of Australia's fulfilment of its international obligations, Australia introduced anti-bribery laws as part of the *Commonwealth Criminal Code Act 1995* (Cth) (**Code**) in 1999, and these laws were amended in 2010 (to include harsher penalties).

The offence of bribing a foreign public official

Bribing or attempting to bribe a foreign public official is a serious crime under Australian law. Australian citizens, residents and Australian companies who bribe or attempt to bribe a foreign public official can be prosecuted under Australian law even though the conduct occurs '*outside*' Australia.

The term '*foreign public official*' is very broadly defined under the law and includes (but is not limited to) employees and officials of foreign governments; a member of the executive, legislature, judiciary of a foreign government; police or military personnel; a person who performs official duties under a foreign law and an official of a public international organisation (such as the World Bank or International Monetary Fund). The definition also includes a person who is authorised, or behaves as if they are authorised, to act as an intermediary of a foreign public official.

Bribery comes in many forms and covers tangible and non tangible benefits (such as employment opportunities, scholarships, extravagant gifts, and lavish entertainment). The foreign bribery offence is contained in ch 4, div 70, s 70.2 of the Code. There are four main elements to the offence of bribery in Australia:

- providing, causing, offering, or promising to provide a benefit (includes inducing or encouraging others to bribe or attempting to bribe);
- the benefit is not legitimately due;
- with the intention of influencing a foreign public official in the exercise of their official duties; and
- in order to obtain or retain business or a business advantage that is not legitimately due.

In ascertaining whether a benefit or business advantage is '*not legitimately due*', the law disregards whether the benefit is perceived to be customary or necessary in the situation, the value of the benefit, or any official tolerance of the benefit in the foreign public official's country. The law pertains to illegitimate benefits given to any person, not just the foreign public official. For example, the benefit may go to a person closely related to the foreign public official. The object of the bribe must be to keep or win existing business.

Gifts, travel, hospitality and entertainment

Companies need to take care when providing gifts, travel, hospitality and entertainment to foreign public officials. Companies must have policies in place to ensure that all such expenditures are reasonable in the context and bona fide. A company should prohibit the offer, giving or receipt of gifts, hospitality, travel and entertainment whenever they could influence or reasonably be perceived to influence the outcome of business transactions. Generally speaking, gifts of more than token value, or excessive hospitality should be avoided. Travel and accommodation expenses for foreign officials must be limited to those required as part of business operations and reasonable in the circumstances.

The penalties for individuals and companies who bribe, or attempt to bribe

The maximum penalty for an individual under the Code is 10 years imprisonment and/or a fine of 10,000 penalty units which is A$1.8 million (at the time of writing). For a corporation, the maximum penalty is a fine of A$18 million (per offence) or if the value of the benefits obtained by bribery can be ascertained, three times the value of the benefit obtained, whichever is greater.

If the value of the benefits obtained through bribery cannot be ascertained, the maximum penalty is a fine of A$18 million or 10% of the annual turnover of the company and related bodies corporate (for the previous 12 months), whichever is greater. These penalties reflect the serious criminal nature of bribery and the detrimental effects it has on Australia's trade and reputation, and international governance. The penalties for foreign bribery offences essentially mirror the domestic law for bribery of a Commonwealth public official.

The foreign bribery offence applies regardless of whether or not the bribe obtains the advantages sought and whether or not the bribe was considered necessary to do business. Any benefits obtained from foreign bribery can be forfeited to the Australian Government under the *Proceeds of Crime Act 2002* (Cth). Sanctions under other legislation may also apply such as being disqualified from managing a corporation under the Corporations Act.

Defences

It is not a defence under Australian law for a person to argue that they did not realise their conduct constituted bribery. Companies must therefore be aware of the types of activities that are lawful and unlawful when interacting with foreign officials.

There are two defences to the offence under the Code. The first is the '*advantage permitted or required*' defence which applies where a written law governing the foreign public official expressly permits or requires the benefit to be given. This is a very limited defence given many countries have laws prohibiting bribery of individuals, especially public officials. The second is the '*facilitation payments*' defence. The facilitation payments defence can be used where:

- the value of the benefit is of a minor nature;
- the sole or dominant purpose is to expedite or secure the performance of a routine government action which an official would normally provide (e.g. processing visas or providing police protection);
- the payment is not made to win or retain business;
- where details of the payment are recorded (in the manner prescribed in the Code).

The Code provides that for the purposes of the defence, a '*routine government action*' is an act ordinarily and commonly performed by the official but excludes all discretionary acts. It does not involve a decision about, or encouraging a decision about, whether to award new business, continue existing business, or the terms of new business. However, the defence cannot be used if such payments are illegal in the foreign public official's country.

The former Australian Labor Government conducted consultation with industry with respect to removing the facilitation payments defence however the proposal faced fierce resistance, particularly from mid-sized Australian mining companies operating in Africa. The defence has yet to be raised in court and there is therefore no judicial consideration on which to provide guidance. It is generally understood that the quantum of such a payment is small, and a court will take into account all appropriate circumstances in any decision as to whether the nature of the payment in a particular case '*is minor*'.

It is likely the Australian Government will eventually fall in line with the law in the United Kingdom and Canada, and repeal the facilitation payments defence. In any case, companies should view facilitation payments as a business risk and aim to eliminate their use.

Corporate liability

Under the Code, companies can be held criminally responsible for the conduct of an employee, agent or officer acting within the actual or apparent scope of their employment if company board or senior executives expressly, tacitly or impliedly authorised the commissioning of the offence. A company is also liable if its corporate culture encouraged, tolerated or led to the offence, or if it failed to maintain a corporate culture that required compliance with the relevant law. A parent company may be held liable for crimes of a subsidiary or joint venture in certain circumstances. The Australian Federal Police may explore all avenues for exercising jurisdiction over related legal persons.

Further, it is worth noting that for listed companies, a corruption investigation could trigger continuous disclosure obligations if the investigation could have a material effect on the price or the value of a company's securities, and a failure to adequately disclose alleged misconduct may otherwise expose companies to shareholder actions.

Use of intermediaries, agents and business partners

Companies which operate in high risk sectors (such as the construction industry) or high risk countries, or both, are at a greater risk of being exposed to risks of foreign bribery. This is particularly the case where overseas company activities are carried out (in whole or in part) using agents, intermediaries or business partners. There are many legitimate reasons for using a third party intermediary. They help companies navigate unfamiliar operating environments and act as local representatives for business transactions within a foreign market. However, intermediaries can also be involved in illegitimate activity for which companies can be held accountable.

Without careful selection of third party intermediaries (whether they be local partners, suppliers, agents, distributors or subcontractors) there is a heightened risk that the intermediary may not act in the best interests of the company. It is therefore important that all prospective and current third parties be subject to a thorough due diligence process and on-going monitoring.

Notably, many high profile enforcement actions relate to intermediaries bribing government officials on a company's behalf in order to win or retain business.

Australia's position with respect to anti-bribery law reform

Transparency International (a global civil society organisation which fights against corruption) releases its *Corruption Perceptions Index* (**CPI**) each year. The CPI measures the perceived levels of public sector corruption worldwide by scoring and ranking 175 countries on the perceived level of corruption in the public sector, from 0, being '*very corrupt*', to 100, being '*very clean*'. In 2017, Australia ranked 13th with a score of 77.

Corporate anti-bribery and corruption compliance programs

Given the globalisation of business activities and the increasing extra-territorial application of anti-bribery laws, it is imperative for companies to have in place robust corporate anti-bribery policies and procedures to promote ethical behaviour and corporate responsibility. Any corporate bribery and corruption prevention measures must be proportionate to the risks the organisation faces, determined by the geographical and industry sector of operation, and the nature and scale of company activities.

An effective compliance program will go beyond mere legal compliance, and involve an executive level commitment to clear communication of the company's anti-bribery position and an appropriate degree of involvement by management in developing anti-bribery procedures.

Past Accolades

- 2017, 2016, 2015 Finalist Australasian Law Awards Insurance Specialist Firm of the Year.
- 2017, 2016 Finalist Australasian Law Awards Australian Law Firm of the Year (up to 100 lawyers).
- 2017, 2015 Finalist Australasian Law Awards State / Regional Firm of the Year.
- 2017 Finalist Australasian Law Awards Law Firm Leader of the Year (<200 Employees) – Paul Hopkins
- 2017 Finalist Lawyers Weekly Australian Law Awards Dispute Resolution Team of the Year and Special Counsel of the Year
- 2016 Finalist Australasian Law Awards Employee Health & Wellbeing
- 2016 Finalist Lawyers Weekly Partner of the Year Awards Insurance – Paul Hopkins
- 2013, 2012 Winner 2011, 2010, 2009 and 2007 Finalist ALB Australasian Law Awards Brisbane Law Firm of the Year.
- 2011 Winner ALB Employer of Choice Blue Award.
- 2011 Finalist ALB Australasian Law Awards Innovative Use of Technology.
- 2011, 2010, 2008, 2007, 2005 Finalist 2006 Winner BRW Client Choice Award for Best Law Firm in Australia (open to firms with revenue under $50M per year).
- 2010 Finalist Lawtech Awards for Innovation in Legal IT.
- 2009 and 2008 Independently recognised as a leading Brisbane firm in the practice areas of Insurance | Building & Construction | Mergers & Acquisitions | Energy & Resources.
- 2009 Finalist Brisbane Lord Mayor's Business Awards.
- 2008 Winner Employer of Choice Queensland Law Society.

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