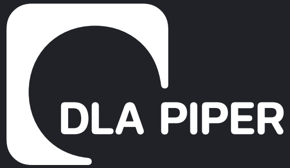

DOING BUSINESS IN AUSTRALIA

ABOUT DLA PIPER

DLA Piper is a global law firm with lawyers in the Americas, Asia Pacific, Europe, Africa and the Middle East, positioning us to help companies with their legal needs around the world.

We strive to be the leading global business law firm by delivering quality and value to our clients.

We achieve this through practical and innovative legal solutions that help our clients succeed.

GLOBAL REACH, LOCAL EXPERIENCE

Our Australian team works seamlessly between our offices and in collaboration with international colleagues to provide you with a genuinely integrated solution for your legal needs in Australia and beyond.

Our global reach also means that you have access to one of the largest legal services organisations in the world.

We advise clients already operating overseas or looking to expand into emerging markets.

OUR CLIENTS

Globally, our clients range from multinational, Global 1000, and Fortune 500 enterprises to emerging companies developing industry-leading technologies. They include more than half of the Fortune 250 and nearly half of the FTSE 350 or their subsidiaries. We also advise governments and public sector bodies.

In Australia we are trusted legal advisors to approximately a third of the ASX 100 companies or their subsidiaries and all levels of government.

Our lawyers are experienced in complex, multijurisdictional matters and provide practical, innovative outcomes for our clients across the full spectrum of business needs.

We offer our clients deep knowledge of the regulatory frameworks and issues specific to major Australian industries.

We take the time to get to know you, your business and the sectors in which you operate. We work collaboratively with you as a trusted legal partner, sharing your commitment to achieving the best commercial outcomes for your business.

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FOREWORD

Australia is a great place to do business, offering a powerful combination of economic, legal and geographic advantages.

Our 25 years of uninterrupted GDP growth, effective national institutions, triple-A sovereign credit rating and diverse, globally competitive industries, make a compelling case for investment.

A stable, efficient and well-regulated business environment, for example, ensures Australia is ranked 13th out of 189 economies for ease of doing business by the World Bank – and fifth when compared to economies with a similar or larger population.

Australia offers significant business opportunities in sectors such as agribusiness, education, tourism, mining and resources and wealth management. There are also significant opportunities in the development of Australia's north.

Our sophisticated financial services industry – with total assets of over AU$7 trillion – has grown more than 10 per cent a year over the last two decades, making it the largest contributor to our economy, generating 9.3 per cent of Australia's total gross value added (GVA).

Professional services, in areas such as science and education, together make up almost 15 per cent of total output, reflecting Australia's highly skilled, well-educated and innovative workforce.

Innovation and science underpin the country's prosperity and there is strong support for research and development from public and private sector organisations, aided by generous R&D tax incentives.

Australia's competitiveness and medium-to-long-term growth outlook is supported by increasingly strong ties to the rapidly growing Asian region, including recently concluded free trade agreements with China, Japan and Korea.

Its proximity and close economic links with Asia-Pacific nations are further advantages for international investors and multinationals expanding their business or seeking a base in the region.

By 2020, the regional economy is expected to account for 43 per cent of global output, more than double the ratio in 1980. The combined economies of China and India are expected to represent 28 per cent of the world's GDP, compared to 5 per cent in 1980.

Australia's robust and dynamic economy is set for continued expansion, creating significant scope for investment in a low-risk environment. There is no better partner for trade, investment and collaboration than Australia.

To find out more about what Australia can offer your organisation, visit www.austrade.gov.au

BRUCE GOSPER
Chief Executive Officer
Australian Trade and Investment Commission (Austrade)

OVERVIEW OF AUSTRALIA

Australia is in one of the world's fastest-growing economic regions, the Asia Pacific. Spanning some 7.7 million square kilometres, it is the world's sixth largest country in land area, with a population of more than 24 million.

Australia has increasingly strong business and cultural ties within the Asia Pacific. It is the fourth largest economy in the region, and the 12th largest economy in the world.

Australia enjoys a prosperous market economy, a stable political climate, strong governance and a transparent and robust regulatory environment.

A competitive and vibrant economy is fundamental to Australia's economic goals, and Australia actively promotes business, economic development and employment growth.

Foreign investment is key to Australia's economy. The World Bank Group's ***Doing Business 2016*** ranked Australia 13 out of 189 countries in its Ease of Doing Business ranking.

Culturally rich and diverse

Australia has one of the world's oldest continuous cultures – that of the Aboriginal and Torres Strait Islander peoples – and is recognised as one of the most culturally diverse countries in the Organisation for Economic Co-operation and Development (OECD).

Australians come from a rich variety of cultural, ethnic, linguistic and religious backgrounds. While Aboriginal and Torres Strait Islander peoples are the original inhabitants of the land, Australia is home to immigrants from around 200 countries.

Until the 1970s, the majority of Australia's immigrants were from Europe. Today, many more immigrants come to Australia from Asia, and the number of immigrants from the Middle East and Africa has almost doubled since the late 1990s.

Highly educated workforce

Australia has one of the most educated and skilled labour forces in the world, with almost 40 per cent of the workforce of 12.5 million people holding a tertiary qualification.

Australia also enjoys one of the world's most multicultural and multilingual labour forces in the world. Almost 30 per cent of Australia's workers were born overseas. One in ten Australians speak an Asian language and around 1.3 million speak a European language in addition to English.

Australia ranks in the world's top 10 for the talent of the people it produces, attracts and retains, according to the Global Talent Competitiveness Index.

Globally significant industries

Integration with the dynamic Asia Pacific region continues to drive wealth creation and overall growth in Australia. Ten of the nation's top 12 export markets are within the growing Asia Pacific region.

Australia's key trading partners are China, Japan, the United States, the Republic of Korea and Singapore. Existing and new trade agreements continue to drive the flow of goods, services and investments between Australia and its major trading partners across Asia, Europe and North America.

Australia is globally successful in five significant and diverse sectors – agribusiness, education, tourism, mining and wealth management. Ongoing demand across these sectors is expected to drive trade and investment in Australia and internationally.

Mining remains a major contributor to Australia's international trade profile, however the services sector is growing faster than any other industry, generating the majority of the nation's economic output. Education is Australia's largest services export.

Culture of innovation

Australia has always been an early adopter of new technologies and innovations, embracing ideas to harness new sources of economic growth and job creation.

Australia's quality research institutions are among the best in the world, offering significant opportunities for industry partnership and bringing new ideas to life.

An increasing number of innovative international companies have recognised these strengths and established facilities in Australia.

Significant international engagement

Australia is an outward looking country, strongly engaged with the rest of the world.

Australia continues to build on its strong and enduring ties with many countries, and is active in many global and regional institutions including the United Nations, G20, World Trade Organization (WTO), Association of Southeast Asian Nations (ASEAN), East Asia Summit and Asia-Pacific Economic Cooperation (APEC).

Beyond its region, Australia enjoys strong economic, security, political, social and cultural ties with the United States, Canada, the United Kingdom and Europe.

GOVERNMENT

The Commonwealth of Australia is a federation comprising six states – New South Wales, Queensland, South Australia, Tasmania, Victoria and Western Australia, and two territories – the Australian Capital Territory and Northern Territory.

Australia is both a representative democracy and a constitutional monarchy, with Her Majesty Queen Elizabeth II as Australia's head of state, represented by Australia's Governor-General.

The Australian Government follows the British, Westminster tradition.

The Australian Constitution of 1901 established a federal system of government. Each of the six Australian states also has its own constitution, and the two territories have self-government Acts, passed by the Australian Parliament. Under this federal system, powers are distributed between the federal (Commonwealth) government and the six states.

The Prime Minister is appointed by the Governor-General who, by convention under the Constitution, must appoint the parliamentary leader of the party or coalition of parties, which has a majority of seats in the House of Representatives (see 'The Australian Parliament'). This majority party forms government. All Australian citizens over the age of 18 must vote in federal and state elections.

Australia operates under a Cabinet system of government. The Prime Minister leads a Cabinet of ministers, each with a portfolio of government duties. Cabinet is the key decision-making body of the government. The Governor-General acts on the advice of the Prime Minister, and other ministers.

The Australian Parliament

The Constitution established the composition of the Australian Parliament – also known as the Federal Parliament or the Commonwealth Parliament – what powers it has, how federal and state parliaments share power, and the roles of the Executive Government and the High Court.

The Australian Parliament consists of the Queen, represented by the Governor-General, the Senate and the House of Representatives. There are 150 members of parliament (MPs) elected to the House of Representatives, and 76 senators represent Australian states and territories – 12 senators from each state, and two senators from each territory.

The Parliament has four main functions – law-making, representing the people, formation of government, and scrutiny on the work of government.

Law-making

The Australian Parliament is constitutionally empowered to make laws in certain areas including foreign affairs, defence, immigration, quarantine, communication, currency, trade and commerce, banking, insurance and taxation.

In some of these areas, power is shared with state or territory parliaments, while in others, power is held exclusively at the federal level. Where both federal and state governments may legislate, and in the case of conflict, Australia's Constitution provides that Commonwealth (federal) law takes precedence.

Only the Australian Government is empowered to impose customs and excise duties and levy income tax, sharing the proceeds of this tax with states.

State and territory governments primarily govern the day-to-day lives of most Australians, covering areas such as health, education, energy, mineral resources and agriculture, and retain all powers other than those vested by the Constitution to the Australian Government.

State and territory laws apply to people, businesses and events within the state or territory and to its residents.

The powers of Australia's local councils are defined by Acts of Parliament passed by state and territory parliaments, and include responsibility for building regulations and approvals, rubbish collection and local roads. Local councils collect taxes (rates) from all local property owners, and receive grants from federal and state and territory governments to spend on local needs.

SYSTEM OF LAW

Australia has a common law system, similar to that of the United Kingdom. It comprises common law developed by the judiciary, and statutes and regulations made by the Australian Parliament.

A body of common law is developed and interpreted by a judiciary, which also has the role of interpreting statutes and regulations made by the Parliament.

Courts are operated at federal and state levels. Judges are appointed by federal and state governments and serve until retirement age (unless removed for misconduct).

A comprehensive appeals system exists at both levels. Australia's legal profession is modelled on the British system and most states distinguish between barristers, who mainly appear in court, and solicitors, who are professionals authorised to practice law, conduct lawsuits and give legal advice to their clients.

FULL TITLE
Commonwealth of Australia

POPULATION
24 million (June 2016)

FEDERATION
Six states: New South Wales (NSW), Queensland, South Australia (SA), Tasmania, Victoria and Western Australia (WA); and two territories: Australian Capital Territory (ACT) and Northern Territory (NT)

CAPITAL CITY
Canberra, ACT

LARGEST CITY
Sydney, NSW population 4.92 million (June 2015)

SURFACE AREA
7.69 million square kilometres

MAIN LANGUAGE
English, and more than 300 others

CURRENCY
The Australian dollar (AUD) floats freely and trades internationally. Australia has a decimal system of currency, with 100 cents to the dollar

GLOBALLY SUCCESSFUL SECTORS
Agribusiness, education, tourism, mining and wealth management

MAIN TRADING PARTNERS
China, Japan, United States, Republic of Korea, Singapore

TIME ZONES
Australia is divided into three separate time zones. Australian Eastern Standard Time (AEST) covers Queensland, NSW, Victoria, Tasmania & the ACT. Australian Central Standard Time (ACST) covers SA, the town of Broken Hill in western NSW and the NT. Australian Western Standard Time (AWST) covers WA
AEST: GMT+10hrs ACST Central: GMT+9.5hrs
AWST: GMT+8hrs

CLIMATE
Australia experiences temperate weather for most of the year but the climate can vary due to its size. The northern states typically experience warm weather much of the time, while the southern states experience cooler winters. Temperatures can range from below zero in parts of southern Australia, to extreme heat in the north-west of the continent.

REFERENCES:

Australian Government www.australia.gov.au
Australian Trade and Investment Commission – Austrade www.austrade.gov.au
Australian Bureau of Statistics www.abs.gov.au
Australian Securities and Investments Commission www.asic.gov.au
Department of Foreign Affairs and Trade www.dfat.gov.au
Foreign Investment Review Board www.firb.gov.au
Tourism Australia (corporate website) www.tourism.australia.com/statistics.aspx
World Bank Group Doing Business www.doingbusiness.org

INVESTMENT IN AUSTRALIA

FOREIGN INVESTMENT POLICY

Australia recognises that foreign investment can contribute substantially to developing its industries and resources, and has framed its foreign investment policy to encourage it. The policy aims to ensure foreign investments are both consistent with Australia's needs and enhance its economic development.

Foreign investment is seen as contributing to the economic objects of enhancing domestic savings, providing scope for higher economic growth, creating employment opportunities, providing access to new technology, skills and overseas markets, as well as helping develop internationally competitive and export-oriented industries.

Regulatory framework

The Australian Government's regulation of foreign investment has two main aspects. The first is the *Foreign Acquisitions and Takeovers Act 1975* (Cth) (FATA) and the regulations made under FATA. The second consists of various ministerial statements and policy guidelines issued from time to time. The Treasurer, assisted by the Foreign Investment Review Board (FIRB), administers this regulation.

The Australian Government has the power to block notifiable proposals determined to be contrary to the national interest or may impose conditions on an approval.

FIRB is a non-statutory body, established in 1976 to advise the Treasurer and the Australian Government on Australia's foreign investment policy and its administration. FIRB examines foreign investment proposals and advises the Treasurer whether or not they comply with the policy. It also generally advises the Australian Government on foreign investment matters and can assist foreign investors to ensure their proposals (and their associates) conform with government policy, including Australia's taxation laws.

Applications are usually considered within 30 days but this period may be extended by up to a further 90 days.

Business acquisitions

Foreign persons should obtain approval for the acquisition of:

A substantial interest in an Australian corporation or in an offshore company having Australian subsidiaries or Australian assets, or

Control of an Australian business, the value of which exceeds the prescribed limits.

A substantial interest exists if the foreign person (and any associates) has 20 per cent or more or several foreign persons (and any associates) have 40 per cent or more of the share capital or voting power in the corporation.

For non-land proposals, the thresholds are:

From FTA partner countries that have the higher threshold	Acquisitions in non-sensitive businesses	AU$1,094 million
	Acquisitions in sensitive businesses	AU$252 million
	Media sector	AU$0
	Agribusinesses	For Chile, New Zealand and United States, AU$1,094 million.
		For China, Japan, and Korea, AU$55 million
Other investors	Business acquisitions (all sectors)	AU$252 million
	Media sector	$0
	Agribusinesses	AU$55 million (based on the value of the consideration for the acquisition and the total value of other interests held by the foreign person [with associates] in the entity)
Foreign government investors	All direct interests in an Australian entity or Australian business	$0
	Starting a new Australian business	$0

Source: Foreign Investment Review Board

Real estate

Foreign persons should obtain approval for the acquisition of interests (which is widely defined) in certain types of Australia real estate depending on its value.

For land proposals, the thresholds are:

All investors	Residential land	$0
Privately owned investors from FTA partner countries that have the higher threshold	Agricultural land	For Chile, New Zealand and United States, AU$1,094 million
		For China, Japan, Korea, AU$15 million (cumulative)
	Vacant commercial land	$0
	Developed commercial land	AU$1,094 million
	Mining and production tenements	For Chile, New Zealand and United States, AU$1,094 million
		Others, $0
Privately owned investors from non-FTA countries and FTA countries that do not have the higher threshold	Agricultural land	For Singapore and Thailand, where land is used wholly and exclusively for a primary production business AU$50 million (otherwise the land is not agricultural land)
		Others AU$15 million (cumulative)
	Vacant commercial land	$0
	Developed commercial land	AU$252 million
		Low threshold land (sensitive land) AU$55 million
	Mining and production tenements	$0
Foreign government investors	Any interest in land	$0

Source: Foreign Investment Review Board

Acquisitions of rural land used wholly and exclusively for carrying on a business of primary production are generally assessed under the assessed as business acquisitions (see above).

Approval is generally required for the acquisition of interests in prospecting, exploration, mining or production tenements with a term likely to exceed five years or involving the sharing of profits or income. Operational mines are usually regarded as developed commercial real estate (see above).

Established forestry businesses are generally treated as rural land (see above).

All investors require approval to make investments of five per cent or more in the media sector regardless of the value of the investment.

Other specific legislation may impose other limits on foreign investment (such as banking, international airlines, airports, Australian registered ships and Telstra Corporation Limited).

Foreign government investors

Regardless of the above, all foreign government investors must obtain approval before making a direct investment in Australia, starting a new business or acquiring interests in land regardless of the value of those acquisitions. Foreign government investors includes bodies politic, entities in which foreign governments or their agencies and related entities have an interest of 20 per cent or more (or such entities from more than one foreign country having an aggregate interest of 40 per cent or more) and entities that are controlled by foreign governments or their agencies or related entities.

Substantial interest, aggregate substantial interest and controlling interest

A foreign person will hold a substantial interest upon (either alone or with associates) controlling 20 per cent of the actual or potential voting power in the corporation, or by holding 20 per cent of the issued shares of the company.

Foreign persons will jointly hold an aggregate substantial interest upon controlling (including together with their associates) 40 per cent of the actual or potential voting power in the corporation, or by holding 40 per cent of the issued shares of the company.

A substantial or aggregate substantial interest will be described as controlling unless the Treasurer is satisfied the relevant party or parties are not in a position to determine the policy of the corporation.

Notification of proposals

Foreign investors should seek FIRB's approval in specific circumstances. Proposals for which FIRB approval should currently be sought include:

- Acquisitions of substantial interests in existing Australian businesses whose gross assets exceed AU$252 million or where the proposal values the business at over AU$252 million. For Free Trade Agreement (FTA) partner countries that have higher thresholds notification threshold of AU$1,094 million, except for investments in prescribed sensitive sectors, which are subject to the AU$252 million threshold. For acquisitions involving agribusiness, see the thresholds referred to above.
- All investments in the media of five per cent or more, irrespective of value

- Takeovers of offshore companies whose Australian subsidiaries or gross Australian assets are valued at AU$252 million or more, or the FTA partner country threshold of either AU$1,094 million or AU$252 million for prescribed sensitive sectors
- Direct investments by foreign governments or their related entities (including sovereign wealth funds), regardless of size
- All proposals by foreign governments concerning either the establishment of new businesses, or obtaining of interests in urban land, in Australia
- Acquisitions of interests in urban (non-rural) land including interests that arise via leases, financing, and profit-sharing arrangements and companies in which Australian urban land makes up more than 50 per cent of the value of its total assets that involve the:
  - Acquisition by an investor from a non – FTA partner country of developed non-residential commercial real estate valued at AU$252 million or more, or if the property is sensitive land at AU$55 million or more
  - Acquisition by an investor from an FTA partner country of developed non – residential commercial real estate, where the property is valued at AU$1,094 million or more
  - Acquisition of vacant real estate, regardless of value
  - Acquisition of residential real estate, regardless of value
  - Acquisition of shares or units in Australian urban land corporations or trust estates
- Acquisitions involving agricultural land:
  - For Chile, New Zealand and US investors – AU$1,094 million
  - For China, Japan and Korean investors – AU$15 million
  - For investors from non-FTA partner countries, being Singapore and Thailand, where the land is wholly and exclusively used for a primary production business – AU$50 million
  - For all other private investors from non-FTA partner countries – AU$15 million
- Acquisitions of prospecting, exploration, mining or production tenements – AU$0
- Acquisitions involving key infrastructure assets sold by State and Territory Governments including pubic infrastructure, existing and proposed roads, rail, intermodal transfer facilities, telecommunications and nuclear facilities
- Proposals where any doubt exists as to whether they are notifiable, including various funding arrangements that include debt instruments potentially entered into with foreign persons.

Agreements pursuant to which a corporation not controlled by a foreign person becomes subject to a foreign person's control, or by which a company already under the control of a foreign person subsequently arranges for an additional foreign person to share control, should also be notified to FIRB. Advice should be sought prior to entering into arrangements of this type. A fee is payable ranging between AU$5,000 and AU$100,000 and applications should be lodged electronically on the FIRB website.

Contractual arrangements

Where parties propose entering into a notifiable transaction, the transaction should be made conditional on receiving approval under FATA. FATA stipulates that agreements involving foreign persons must be made conditional on approval.

National interest

In practice, offshore takeovers do not normally raise national interest issues. This is assessed on a case by case basis. National interest considerations include:

- National security
- Competition in Australian markets
- The effect on Australian tax revenues
- The impact on the economy and the community and the character of the investor.

Proposals to acquire agricultural assets will also be considered having regard to a number of factors including the quality, sustainability and availability of Australia's national agricultural resources, agricultural production and productivity, land access and use, biodiversity and employment and prosperity in Australia's local and regional communities.

Though investments by foreign governments, state-owned enterprises and sovereign wealth funds are assessed on the same basis as private proposals, consideration is given to the foreign investor's commercial, strategic and political objectives in making the investment, for the purpose of identifying whether the transaction is in Australia's national interest. This includes an assessment of the level of independence from foreign governments.

Processing applications and providing approvals

FIRB deals with proposals quickly and aims to provide a decision within 30 days of being notified. Once formally notified, the Treasurer has 30 days to make a decision and a further 10 days to notify the parties concerned of the outcome.

If these timeframes are not met, the Australian Government loses the ability to block the proposal or impose conditions on it. The Government may, however, extend the process by up to 90 days by issuing an interim order.

On occasion, FIRB's workload means that it is not able to examine proposals within the normal 30-day time frame. Rather than issuing an interim order for a 90-day extension, FIRB has developed a practice of inviting a party to withdraw and resubmit their application to initiate a new 30-day review period.

Approval of proposals may be subject to the parties meeting certain conditions including compliance with Australian taxation laws.

CONFIDENTIALITY

Sensitive commercial-in-confidence information is respected and appropriate security is given to all proposals submitted to FIRB. In assessing proposals, FIRB does consult with other government departments and authorities. If third parties take action to obtain access to confidential information held by FIRB, the information will not be made available without the approval of its owner, unless a court orders otherwise. The government will normally defend any action through the courts to maintain the confidentiality of the information.

GOVERNMENT ASSISTANCE AND INCENTIVES

Australia supports foreign investment. The Australian Government and all states and territories offer support and, in some cases, investment assistance schemes, most of which require that the investment result in a net economic gain. No financial assistance or incentive is provided as 'a right', and all applications are rigorously assessed and sometimes open to competition.

Useful references

Department of Foreign Affairs and Trade www.dfat.gov.au

Foreign Investment Review Board www.firb.gov.au

The Treasury www.treasury.gov.au

BUSINESS STRUCTURES

With Australian law based on the British system, forms of business entities are similar to those in the United Kingdom, United States, New Zealand and other English-speaking countries.

Businesses usually take the following forms:

- Company: private (proprietary limited, Pty Ltd) or public (Ltd)
- Branch or subsidiary of a foreign corporation
- Partnership
- Joint venture
- Trust
- Sole proprietorship.

COMPANIES

Companies in Australia are subject to the *Corporations Act 2001* (Cth) (Corporations Act), administered by the Australian Securities and Investments Commission (ASIC). ASIC regulates the incorporation, operations, management and control of companies and imposes obligations on directors and other corporate officers.

A company may be incorporated either as a private (proprietary) company or public company (listed or not listed on the Australian Stock Exchange). The liability of a company's shareholders may be limited by shares or by guarantee, or may be unlimited. In some cases, mining companies may be incorporated as no liability companies.

Proprietary and public companies are distinguishable in several ways.

Proprietary companies:

- Must have at least one shareholder but no more than 50, not including employee members whose number is not limited
- Cannot engage in fundraising activities (by offering to issue or sell securities) that would require disclosure to investors under the Corporations Act (e.g. requiring a prospectus to be issued). However, proprietary companies may offer securities to existing shareholders of the company, employees of the company or its subsidiaries, or via small-scale offerings (up to AU$2 million raised from up to 20 investors in any 12 month period) or offerings to sophisticated or professional investors
- Usually restrict the right of shareholders to transfer shares pursuant to an agreement between the shareholders
- Must have at least one director who must ordinarily reside in Australia
- Are not required to have a company secretary, but if it does have one or more, at least one of them must ordinarily reside in Australia.

Public companies:

- Must have at least one shareholder, but can have any number
- Can offer shares to the public, but must comply with requirements of the Corporations Act, including issuing a disclosure document such as a prospectus
- Normally have no restriction on transfer of shares made on shareholders
- Must have at least three directors, at least two of whom must ordinarily reside in Australia
- Must have at least one company secretary, one of whom must ordinarily reside in Australia

Liability to creditors

A company's liability to its creditors is limited to the value of its assets. Should a company be unable to pay its debts in full as and when they fall due (become insolvent), its creditors may not be repaid all of the debt they are owed. Similarly, a company's shareholders' liability is generally limited to the extent of their initial investment (a limited liability company), and liability is limited to the amount, if any, unpaid on a shareholder's shares.

In certain circumstances, directors of an insolvent company may be held personally liable for a company's debts. Directors' responsibilities for a company's debts are set out in the Corporations Act and certain defences are available. Generally, directors will be liable for their company's debts if the debts were incurred when no reasonable expectations existed that the company could pay its debts from its own resources as and when they fell due.

Other requirements

A company must have a registered office in Australia where all communications and notices may be sent. The Corporations Act has specific requirements about a company's registered office. For example, a public company must keep its office open on each business day for a specified period. There is no such requirement of proprietary companies.

A company is treated as a separate legal person for tax purposes. Different tax treatments apply to proprietary and public companies in some circumstances.

FOREIGN CORPORATIONS

A company or entity incorporated or formed outside Australia may carry on business in Australia, provided it has registered or applied to be registered with ASIC under the Corporations Act. The Foreign Investment Review Board (FIRB) may also need to be notified of larger proposals, subject to the *Foreign Acquisitions and Takeovers Act 1975* (Cth). See also the Investment in Australia chapter.

Generally, registering a foreign company requires the appointment of at least one local agent – an Australian company or resident in Australia – which is authorised to accept notices on the company's behalf. The local agent will be responsible for acts, matters and things that the company is required to do under the Corporations Act and may be held personally liable for any penalties imposed should a company contravene the Corporations Act.

The foreign company must also maintain a registered office in Australia, perhaps the agent's office, and lodge documents with ASIC, as specified by the Corporations Act.

PARTNERSHIPS

Partnerships are generally covered by contract law and do not require registration. However, trading must generally be registered. Partnerships are not considered separate legal persons and partners are jointly and severally liable for a partnership's debts and obligations to its creditors.

In some states, limited liability partnerships can be registered with state regulatory authorities. This type of partnership includes a general partner who conducts the business and other special partners who contribute capital only. In such partnerships, special partners are liable only to the extent of their capital contributions.

A limited liability partnership is treated as a company for tax purposes, whilst in an ordinary partnership partners are taxed on their respective share of the partnership's profit or loss.

It is advisable that a written partnership agreement indicating the intentions of the partners be prepared. Partnerships without written agreements or contracts are governed by the Partnership Act of the state in which the partnership is formed. In an ordinary partnership, partners are taxed on their respective share of the partnership's profit or loss.

JOINT VENTURES

Joint ventures are normally entered into for a limited time or to carry out a specific activity. These ventures are not recognised as a separate legal entity and, for the same reasons that a written partnership agreement is advisable, the relationship between joint venture parties should be set out in writing. Participants in a joint venture are usually taxed individually. Where a separate legal entity is required, the joint venture may be carried out using a company or trust.

SOLE PROPRIETORSHIP

Sole proprietorship is a reference to a natural person who runs their own business. This is not suitable for foreign investors considering investment in Australia. Sole proprietorship does not provide limited liability for the sole proprietor.

TRUSTS

A trust is a relationship or association between two or more persons or companies in which one party (trustee) holds property on trust for the other party (beneficiary). The trustee holds legal title to the property (land, shares, money, real property etc.) and must deal with the property for the benefit of the beneficiary. Trustees have similar fiduciary duties to those of a company director.

Establishing a trust in the context of a business may provide tax incentives for the beneficiaries, asset protection and limit liability in the context of a business. Trusts should be made expressly in the form of a written trust deed and must have a registered Australian Business Number, Tax File Number and business name.

In the context of a business run through a trust structure, the business will generally be carried by a trustee company for the benefit of the beneficiaries. The most commonly used types of trust structures used to carry on businesses are discretionary trusts and unit trusts.

Discretionary trusts allow the trustee to determine which of the beneficiaries are to receive income and capital of the trust estate (i.e. the business) and in what proportions, on a year-by-year basis, thereby allowing the earnings of the business to be distributed, taking into account the tax attributes of the beneficiaries on a year-by-year basis. Use of discretionary trusts is most typically in the context of closely held private businesses.

In a unit trust, the beneficiaries hold units in the trust and their entitlement to distribution from the trust is determined by the number and class of units held. The issuing of units allows the trust to raise capital for the business of the trust and provides unit holders with a liquid asset. Unit holders may increase their investment in the trust by purchasing more units, derive income from their investment via distributions from the trust, or make a capital profit from the units by selling them to other unit holders. Unit trusts are generally used for the carrying on of businesses that derive income primarily from the management and investment of capital assets. They may be widely held (for example, a Managed Investment Schemes – see below). Some unit trusts that meet certain regulatory requirements under the Corporations Act may be listed on the Australian Stock Exchange.

MANAGED INVESTMENT SCHEMES

Managed Investment Schemes (MIS) are collective investment vehicles commonly used in the carrying on of businesses that derive income primarily from the management and investment of capital assets, where the investors are unrelated and do not have day-to-day control over the management of the scheme's investments.

The custodial nature of this business arrangement lends MIS to typically being structured as widely held unit trusts (which can be listed or unlisted). However, company structures are also sometimes used.

In consideration for their contribution, investors receive an interest in the scheme, which entitles them to distributions of income and capital from the MIS and which can typically (subject to any contractual restrictions) be sold to third parties. Interests in an MIS are a type of "finance product" and are regulated by the Corporations Act.

A "responsible entity" operates the MIS and is generally required to hold an Australian Financial Services Licence. The granting of such licenses is tightly regulated by ASIC and the applicant responsible entity is required to show a good degree of experience and knowledge in managing the types of investments that the MIS proposes to acquire and manage. The license is generally limited to the entity operating the particular MIS, although more experienced entities are able to obtain licenses, allowing the entity to operate a wider range of schemes.

MIS are especially common in the commercial real estate sector, where investors contribute funds to a real estate investment trust, which invests in and manages a portfolio of commercial properties. Apart from being prevalent in the commercial property section, MIS may cover a wide variety of investments.

Some of the popular MIS that may be offered include:

- Cash management trusts
- Australian equity (share) trusts
- Many agricultural schemes (e.g. horticulture, aquaculture, commercial horse breeding)
- International equity trusts
- Some film schemes
- Timeshare schemes
- Some mortgage schemes
- Actively managed strata title schemes.

To encourage foreign investment into Australia, certain MIS operating as unit trusts (managed investment trusts) are afforded a much reduced withholding tax rate on certain payments made to qualifying overseas investors. See also the Taxation chapter.

FRANCHISE AND DISTRIBUTORSHIP

Franchising has emerged as a popular and effective business structure in Australia. A franchise is a structure under which a franchisor grants a franchisee the right to carry on the business under a system or marketing plan of the franchisor and under which the franchisee will be associated with a particular brand.

Franchises in Australia are subject to a mandatory Franchising Code of Conduct, which is established under the *Competition and Consumer Act 2010* (Cth).

Useful references

Australian Securities and Investments Commission www.asic.gov.au

Foreign Investment Review Board www.firb.gov.au

BUSINESS TRADE PRACTICES

As with a number of aspects of doing business in Australia, federal and state laws and regulations combine to regulate businesses in Australia's open market economy.

The *Competition and Consumer Act 2010* (Cth) (CCA) is the key federal legislation in respect of trade practices. It seeks to protect competition and fair trading on the assumption that this will assist markets to function efficiently, and thus improve the welfare of Australians.

In broad terms, the CCA covers anti-competitive and unfair market practices, mergers or acquisitions of companies, consumer protection (including and product safety) and third-party access to facilities of national significance.

Complementary state and territory legislation in respect of consumer protections ensure that both the anti-competitive and consumer protection prohibitions apply to virtually all business dealings impacting markets in Australia.

The Australian Competition and Consumer Commission (ACCC) is the national agency responsible for enforcing the CCA. State and territory enforcement agencies also have jurisdiction to enforce consumer protection provisions in applicable state and territory legislation.

REGULATION OF 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 restraints – generally this type of conduct will only breach the CCA if it has the purpose, or likely effect, of substantially lessening competition in a relevant market in Australia
- Resale price maintenance, which prohibits vertical restraints imposing a minimum price, such as, for example, where a wholesaler specifies a minimum resale price to a retailer
- Contracts, arrangements or understandings between corporations that have the purpose, effect, or likely effect, of substantially lessening competition in a relevant market
- Misuse of market power, which is where a corporation with a substantial degree of market power takes advantage of that market power for an anticompetitive purpose
- Cartel behaviour, which covers agreements between competitors in respect of price fixing, restricting outputs in the production and supply chain, market sharing and bid rigging.

There are very serious penalties available for contraventions of the CCA including, for corporations, fines of up to AU$10 million, three times the benefit obtained from the contravention or 10 per cent of the relevant body corporate's annual turnover and, for individuals, criminal penalties, including jail terms.

ACCESS TO ESSENTIAL FACILITIES

Part IIIA of the CCA establishes a national framework for access to infrastructure services considered to be of national significance. This access regime provides three routes by which access seekers may seek legal rights to use these services on reasonable terms and conditions in three ways:

- Declaration of those services
- Access in line with an existing effective access regime, generally a state or territory legislative regime
- Access under terms and conditions set out in a voluntary undertaking approved by the ACCC.

UNFAIR TRADE PRACTICES

Unfair trade practices, such as unconscionable conduct and misleading or deceptive conduct, are prohibited by the CCA and Fair Trading Acts.

Unconscionable conduct is prohibited in business to consumer and business to business transactions. The word “unconscionable” is not defined in the CCA, and its scope is necessarily flexible to cover a broad range of conduct which is contrary to good conscience. Relevant factors include the relative strengths of the bargaining positions of the parties, whether undue influence or pressure was exerted, whether unfair tactics were used and the terms of the transaction. For example, it has been applied in circumstances where large commercial entities use their bargaining power and unfair tactics to enter into transactions with smaller entities that are so one sided as to be considered contrary to good conscience.

The prohibition on misleading or deceptive conduct applies to a wide variety of circumstances, including claims made in advertising. The purpose of the provision is to ensure that economic activity is based on accurate information.

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
- Harassment or coercion.

PRODUCT LIABILITY

The CCA contains a no-fault product liability regime under which consumers who suffer injury, loss or damage because of a safety defect in goods have a statutory right to bring an action for compensation against the manufacturer of those goods. The term ‘safety defect’ as defined as a level of safety which is below that which 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.

Manufacturers customarily hold product liability insurance indemnifying for loss or damage caused by products. There is also other federal and state consumer protection legislation that addresses consumer information and safety standards and consumer protection related measures.

PRIVACY LAW

Australia takes privacy seriously. 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) which was the subject of significant reform in March 2014 to provide enhanced protection for personal information in Australia, including providing for a new higher standard for the way in which organisations operating in Australia collect, hold, use and disclose personal information.

The Privacy Act is a “consent based, principles-based” regime with key requirements being prescribed by the Australian Privacy Principles (APPs) and which regime applies to organisations and Australian Government agencies. While in some cases the APPs provide for prescriptive requirements, in many cases organisations

will need to consider the requirements of the APPs and various guidelines issued by the Office of the Australian Information Commissioner (OAIC) in reviewing compliance. A breach of the Privacy Act and APPs can now result in a fine of up to AU$1.7 million for corporations and AU$340,000 for individuals.

The reforms to Australia's privacy laws are reflective of growing individual discontent in Australia concerning the handling of personally identifiable information by both the Australian Government and the private sector, particularly online. Internet users are becoming increasingly aware that any personal information that they disclose online may be extremely difficult to "take back" or "be forgotten" and may be used in ways that they did not anticipate when providing it. While there is no express right to "be forgotten", the impact of the Privacy Act leads largely to this outcome where particular commercial relationships cease.

Under the Privacy Act "personal information" is any fact or opinion about an individual whose identity is apparent or can be reasonably determined. While song preferences, coffee choices, viewing history and geo-location data may not constitute personally identifiable data in and of themselves, when associated with your name (or other information that can reasonably identify you) they are "personal information". For example, in 2006 Netflix publicly released movie ratings from unidentified users that listed the movie rated, the score given and the date of the rating. Researchers demonstrated that by taking this seemingly anonymous data and matching it with movie viewing histories and other habits they were easily able to identify most of the individuals who supplied the ratings.

Online businesses operating in Australia (and the organisations behind them) via social media/websites need to ensure that they comply with the APPs both generally and specifically in respect of the de-identification or destruction of personal information no longer needed for the notified purpose(s) for which such personal information was originally collected. Where a website (or organisation behind it) does not allow individuals to delete their account and all personal information connected to it, then there are four main issues that they must consider:

- Under the APPs organisations must not use or disclose information for a purpose other than the notified reasons for which it was originally collected (the primary purpose) unless the person (i) has consented to this disclosure or (ii) would reasonably expect the organisation to disclose their information in this manner and the disclosure is related to the primary purpose.

  It is difficult to envisage how a website (and the organisation behind it) could justify the continued use of personal information tied to a de-activated account for the original notified purpose for collection – given the account is de-activated, no longer active, inactive etc. other than for very limited, secondary purposes (e.g. reversal of disputed credit card charges and, in this case, any retention would need to be for a period which was consistent with the timing within which such reversals ordinarily occur).

- The APPs require organisations to actively consider whether they need to retain personal information about an individual once such information has been used for the primary notified purpose(s) and to take reasonable steps to destroy or de-identify personal information that is no longer needed for the notified purpose(s) for which it was originally collected, unless certain limited exceptions apply.

  Again, it is hard to see how an organisation that retains personal information related to a de-activated account for any significant length of time after de-activation will not be in breach of the APPs other than in very limited circumstances.

- Organisations are obliged to keep personally identifying data secure from loss, interference, misuse and unauthorised access, modification and disclosure.

  Continuing to ensure that personal information related to de-activated accounts is kept safe from interference (such as through hacker activities) will

become an increasingly costly exercise as more and more of such data needs to be stored and protected. The Privacy Commissioner will not look kindly, if there is a breach incident, on personal information being accessed that should have been de-identified or destroyed (i.e. should not have been kept) in the first place.

- The APPs place an obligation on organisations to ensure that any personal information they hold, use or disclose is up to date, accurate, complete and relevant.

  Personal information held from a de-activated account for any length of time after deactivation would not meet this obligation. Also, an individual who has de-activated their account is, understandably, unlikely to welcome an organisation contacting them to update personal information held by that organisation for a de-activated account.

Websites operating in Australia and the organisations behind them must be careful to ensure compliance with the amended Privacy Act and the new APPs, especially in respect of de-activated or deleted accounts. While death and taxes may be inevitable, a website retaining personal information for an indefinite period of time is not, especially after the de-activation of the relevant account, and to do otherwise will be a breach of Australia's tough new privacy laws.

As noted above, the OAIC issues guidelines to assist agencies and organisations to comply with the Privacy Act. Some guidelines are binding legislative instruments, which agencies and organisations must comply with, others are not binding (although will be highly indicative of the OAIC's views on particular issues). Under the Privacy Act, the Australian Information Commissioner has the power to make advisory privacy guidelines.

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 OAIC may seek enforceable orders from the Federal Court, including orders for the payment of compensation to affected individuals or civil penalties.

SPAM

When sending unsolicited email or text marketing messages in Australia, requirements of the *Spam Act 2003* (Cth) (Spam Act). This regime operates in addition to the requirements of the Privacy Act. Key questions arising in considering the Spam Act's application are:

- *Are there any particular requirements that marketing emails/text messages must satisfy in Australia?*

  Yes. Marketing emails must include the name and contact information of the sender and include a functional "unsubscribe" button. The recipient must also have consented to receiving marketing emails/texts from the sender – inferred consent is possible in circumstances where a prior business relationship exists however it is important to note that it is not possible to send an unsolicited email or text marketing messages asking for such consent.

- *Is it possible simply to allow customers to "opt out" of receiving marketing emails and text messages (rather than having to "opt in")?*

  No. In Australia, an "opt out" process for marketing emails/text messages is not permitted.

  Consent must be "opt in".

  Best practice is to have a double "opt in" system whereby before being subscribed to receive marketing emails/text messages, customers must, for example, opt in by subscribing on a website (which includes clicking on a link embedded in a confirmation email/text message sent subsequently to confirm that they wish to receive marketing emails/text messages.

- *Can we collect names and emails of friends/family members/other people from our customers/employees and send marketing emails to them?*

No. Consent is required from the recipient of the email – consent cannot be obtained from another person.

- *What are the penalties for non-compliance?*

  The maximum penalty for breaching the Spam Act is AU$1.1 million per day for all messages sent in breach of the Spam Act on that day. The regulator has been active in prosecuting SPAM infringements and significant fines have been imposed.

INSOLVENCY REGIMES IN AUSTRALIA

Australia has two insolvency procedures (receivership and liquidation) and two formal restructuring tools (voluntary administration/deeds of company arrangement and schemes of arrangement). The voluntary administration regime may also be viewed as an insolvency procedure, to the extent that the outcome of the process is the liquidation of the company, rather than its survival. The law relating to corporate insolvency in Australia is set out in Chapter 5 (External Administration) of the *Corporations Act 2001* (Cth) (Corporations Act).

A significant motivator for directors in Australia when dealing with an insolvent or near insolvent company is the avoidance of onerous insolvent trading laws that expose a director to personal liability for the debts incurred by the company while it is insolvent. For that reason, Australia could be viewed as having a culture that does not promote a turnaround culture.

Significant legislative reforms are expected to be introduced in Australia in 2017 that are designed to encourage turnarounds by providing directors with a 'safe harbour' from any insolvent trading claim if they appoint a restructuring advisor with a view to implement a turnaround plan for the company. The reforms will also place a moratorium on 'ipso facto' clauses, being clauses that enable a contractor to terminate a contract immediately upon the company's insolvency. This will provide the company with a better opportunity to continue the business as a going concern.

Voluntary administration

The voluntary administration regime is aimed at allowing companies in financial distress time to develop and implement a restructuring plan with its creditors (via a Deed of Company Arrangement), or at least to plan for the orderly sale of assets via liquidation.

Voluntary administration may be commenced by the company, a liquidator or provisional liquidator of the company, or a secured creditor with security over the whole or substantially the whole of the company's property. Most appointments are commenced by the company. An appointment by the company requires the directors to resolve that the company is insolvent or likely to become insolvent, and that an administrator should be appointed.

Once appointed, the voluntary administrator takes over management of the company and conducts an investigation into its affairs in order that they can report to the creditors. All powers of the directors and other officers of the company are suspended. The voluntary administrator is given wide ranging powers to control and carry on the company's business. Only the voluntary administrator may deal with the company's property. The voluntary administrator acts as the agent of the company, and generally acts without personal liability except in limited circumstances including in relation to services rendered to, goods bought, property used and money borrowed by the voluntary administrator.

As soon as the voluntary administrator is appointed, the company becomes subject to a statutory moratorium. The moratorium stays all litigation against the company, and prevents the enforcement of security interests (save with the consent of the administrator or leave of the Court) other than those that cover the whole or substantially the whole of the company's property, and where the secured creditor enforces its rights within 13 business days of notice of the appointment.

The administration is designed to be a fast paced process to be finalised within about six weeks from commencement. There is an ability to extend the timeframes in some cases.

The voluntary administrator is required to issue a report to creditors setting out the results of their investigations and their recommendation as to the future of the company. A voluntary administrator can recommend one of three outcomes:

- the company to execute a Deed of Company Arrangement (DOCA);
- the administration to end and the company be returned to its directors (this rarely occurs – the company must be solvent); or
- the company to be wound up.

For a resolution as to the future of the company to be past passed, a majority in number and value of the creditors voting must vote in favour of the resolution. The administrator has a casting vote if there is a split vote.

Deeds of Company Arrangement

A DOCA is a binding agreement that regulates the arrangements between the company and its creditors. There are generally very few restrictions on the types of DOCAs that can be executed, and DOCA proposals can be adapted to meet the particular circumstances of the company and its creditors. A DOCA can only be entered into out of the voluntary administration regime – it is not available as a separate process.

If a resolution for the execution of a DOCA is passed at the second meeting of creditors, and is executed by a company, the voluntary administration ends and a new administration in relation to the DOCA begins.

Whilst there are few limitations on the terms that may be included in the deed, the terms of the deed must address a number of statutory requirements, including in particular, the property of the company that it is to be available to pay creditors' claims (which will often be constituted by the sale of assets or by a third party contribution), the extent to which the company is to be released from its debts pursuant to the deed, the nature and duration of any moratorium applicable during the deed, and the circumstances in which the deed terminates. Typically, a DOCA will provide for the compromise of creditors' claims on a cents in the dollar basis, and for a complete release of the company's unsecured debts on distribution to creditors of the deed fund in accordance with the terms of the deed. Generally, there is no need to treat all creditors equally as long as each creditor receives a better return than they would have on a liquidation.

Under statute, secured creditors rights of enforcement of their security are only bound by a DOCA to the extent that they vote in favour of it. A successful DOCA will ordinarily, as a matter of practicality, require the support or non-opposition of the company's main secured creditor. The legislation also requires the statutory priority for employee entitlement to be preserved, unless leave of the Court or the consent of the employees themselves is obtained.

There are a number of restrictions on the powers of a DOCA that may require the Court intervention or the parties to enter a scheme of arrangement including the disposition of creditors rights, the transfer of shares in the company and the ability to implement a loan to own strategies or other compulsive processes.

Directors are often keen to ensure that a successful DOCA proposal is developed, so as to avoid liquidation and also potentially avoid insolvent trading liability.

Schemes of arrangement

Schemes of arrangement are a flexible mechanism which permit a company to come to an arrangement with its creditors and its members. Schemes are a useful restructuring tool where there are complicated structures, particularly in relation to loan to own strategies, and/or where there are international aspects and/or the disposition of the rights of creditors including secured creditors and creditor claims.

It is possible for a scheme of arrangement to bind secured creditors without their consent (in contrast to the voluntary administration and DOCA regime). Furthermore, recent authorities indicate that it may be possible for a scheme of arrangement to limit the rights of creditors against third parties other than the company itself (for example, guarantors within the same group of companies). Again, this is in contrast to the voluntary administration and DOCA regime, where the terms of a DOCA can bind creditors only in relation to claims against the company the subject of the process.

Whilst there is no requirement for insolvency in order for a scheme to be proposed, it may be necessary for a scheme to be proposed out of liquidation in order to protect the company from hostile creditor action. Alternatively, while there is no example of it having yet occurred, a scheme could theoretically be propounded while the company is under a DOCA.

The scheme process is a court supervised process and also requires regulatory consent. It involves two court hearings and a meeting of creditors and/or members (or classes of creditors and/or members) to approve the Scheme. Creditors/members are provided with an explanatory statement setting out the purpose and nature of the scheme along with an accompanying independent expert report. Those documents must explain the effect of the proposal on the company, its creditors and, if necessary, its members. Once prepared, an application to Court to seek an order for the holding of a meeting of creditors must be made. The legislation requires that the company's creditors be divided into classes of creditors, and the scheme is only successful if each separate class of creditor votes in favour of it. A class of creditors will be persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interests. Examples of different classes of creditors include secured and non-secured creditors (particularly where they may have different rights in liquidation), and related and non-related party creditors. The courts will carefully scrutinise the proposed classes of creditors at the first court application to determine whether or not they are acceptable.

Assuming the Court makes an order for the holding of a meeting of creditors, the proposed scheme is put to a vote at the meeting, To be passed by the creditors, at least 75 per cent in value and more than half in number of the creditors in each class must vote in favour of the scheme. If the scheme is approved by each class of creditors, it must then be approved by the court at a second hearing. The requirement for court approval gives an opportunity for any creditors opposed to the scheme to have their views adjudicated upon. Whilst it is not necessary for a scheme of arrangement to have a scheme administrator, it is usual for one to be appointed, and if a scheme administrator is appointed then he or she must be a registered liquidator (unless the court orders otherwise).

Receivership

Receivership is the main "self-help" remedy available to secured creditors. The main rights to appoint a receiver to a company or any of its assets generally derive from the relevant security instrument, and the law relating to receivership, is therefore a mixture of private contract law and statute.

Most modern security instruments will provide for the right to appoint a receiver on the occurrence of a default by the mortgagor company, and will include a wide range of powers for the receiver to exercise once appointed (for example, trading and managing any business, and selling and disposing of the secured assets). A receiver may only be appointed to the assets that form the subject of the security agreement. To be eligible for appointment as a receiver, a person must be a registered liquidator.

A receiver owes its primary duty to its appointing chargeholder, however, there are a series of statutory duties applicable to receivers and managers. In particular, these include a specific duty to take all

reasonable care to sell the assets for not less than market value, or if no market value then the best price reasonably obtainable in the circumstances.

The security instrument will usually provide that a receiver acts as agent of the company. However, the legislation makes the receiver personally liable for the debts incurred by them in the course of the receivership and in relation to services rendered and goods purchased. A receiver will generally take a specific indemnity for such debts and any other liabilities incurred during the course of the receivership from the mortgagee simultaneously with their appointment.

The receiver will ordinarily look to sell the assets for the benefit of the appointing chargeholder. The security instrument will usually provide for their remuneration and expenses to be paid out the sale proceeds of the assets. Under legislation, a receiver is required to pay certain preferential employee debts out of any funds realised from the sale of circulating assets in priority to the holder of a circulating security interest in those assets.

Liquidation

Liquidation is a terminal process and can be entered either by court order (usually at the instigation of a creditor following service of a statutory demand) or the company may voluntarily choose to put itself into liquidation by resolution of its members and creditors.

On appointment, the liquidator, who must be a qualified insolvency practitioner, becomes the agent of the company and the directors' duties cease. It is unusual for a company in liquidation to continue to trade, although it is permitted if the liquidator believes it is necessary for the purposes of the winding up.

The objective of the liquidation process is to realise as many of the company's assets as possible and distribute the proceeds to the creditors as appropriate. A liquidator owes their duties to the body of creditors as a whole. Once all distributions have been made, the company will be dissolved.

ASSISTING FOREIGN OFFICE HOLDERS

There are two legislative bases for foreign office holders to receive assistance from Australian courts. First, the Corporations Act provides that courts must act in aid of other national and international courts that have jurisdiction in insolvency matters. Secondly, the UNCITRAL Model Law on Cross-Border Insolvency (Model Law), which is incorporated as Schedule 1 to the *Cross-Border Insolvency Act 2008* (Cth) (Model Law) provides various avenues for foreign creditors and insolvency office holders to access debtors' assets in Australia. Under the Model Law, foreign insolvency office holders may apply to the Federal Court or the Supreme Court of one of Australia's States or Territories for recognition of a foreign insolvency proceeding. Recognition entitles foreign office holders to seek relief from Australian courts including the stay of proceedings and the right to distribute assets, provided that the interests of Australian creditors are adequately protected. Foreign office holders are also entitled to challenge certain transactions under the Corporations Act upon recognition of the foreign proceeding (see challenging transactions section).

Coordinating group insolvency

Australian insolvency law deals primarily with the affairs of individual companies, however courts are increasingly willing to facilitate the coordination of corporate group insolvencies. In relation to cross-border insolvency, Australia has implemented the Model Law. Pursuant to the Model Law, Australian courts are required to cooperate to the maximum extent possible with foreign courts in relation to cross-border insolvency issues and may communicate directly in this regard. This includes cooperation in the coordination of multiple insolvency proceedings, which might involve group companies.

Debt trading and loan-to-own strategies

Compared to other jurisdictions, the distressed debt trading market in Australia is relatively new. It emerged from the global financial crisis in 2009 and is now generally accepted by banks operating in Australia. While the volume of trades is comparatively moderate

and has in the past revolved primarily around single credits in syndicated exposures, the secondary debt market, including in relation to portfolios, is becoming more active and liquid. Levels of lending provisioning in Australia remain quite high, thereby giving rise to opportunities.

There is also a gradual increase in loan to own strategies whereby an equity stake in a company is achieved by a scheme of arrangement, or to a lesser extent, a deed of company arrangement. Further, acquisition of the entire secured debt in circumstances where the secured assets are in the control of receivers, has enabled the incoming lender to achieve control of the assets.

Syndicated lending documentation is frequently standardised by reference to the Asia Pacific Loan Market Association. These documents carry large similarities with the Loan Market Association documentation. Some borrower groups will seek to negotiate a restriction or consent right in relation to the assignment or transfer of loans to certain lenders or types of distressed debt funds.

DEBT RECOVERY IN AUSTRALIA

Recovery of debts can be achieved through the various federal and state courts of Australia, subject to various jurisdictional limits, by way of litigation. Disputed debts may only be recovered in this way

Where there is no dispute as to the debt, creditors of debtor companies may issue a statutory demand 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 a larger 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.

Useful references

Australian Competition & Consumer Commission (ACCC) www.accc.gov.au

Office of the Australian Information Commissioner (OAIC) www.oaic.gov.au

BANKING

The Australian banking and financial services sector is regarded as very sophisticated and well regulated. Indeed the banking sector emerged from the Global Financial Crisis (GFC) as one of the most highly rated and stable of all of the global markets.

The Australian banking sector is relatively concentrated. It is dominated by the four major Australian banks: Australia and New Zealand Banking Group (ANZ), Commonwealth Bank of Australia, National Australia Bank (NAB) and Westpac Banking Corporation. A number of these four majors banks operate a multi brand strategy, for example Westpac also operates as St.George Bank and BankSA, and the Commonwealth Bank also operates under Bankwest.

In addition, there are a number of smaller, largely regional banks such as Suncorp, Bank of Queensland and Bendigo and Adelaide Bank, which tend to operate on a more limited basis than the four major banks.

Most of the global banks such as HSBC and Citibank are present in Australia as are many well-known investment banks, including Macquarie Bank, Credit Suisse, UBS, Bank of America/Merrill Lynch, Goldman Sachs and Deutsche Bank. Prior to the GFC, there was an emergence of nonbank lenders in the home loan market. However, due to the impact of the GFC on world securitisation markets, these lenders have lost market share to the major banks.

REGULATORY BODIES

Regulation of the financial services sector is split between the Reserve Bank of Australia (RBA), the Australian Prudential and Regulation Authority (APRA) and the Australian Securities and Investments Commission (ASIC).

Reserve Bank of Australia

The RBA is Australia's central bank. The RBA is responsible for the overall stability of the financial markets and monetary policy. The RBA does not however have responsibility for prudential supervision of Australia's Authorised Deposit Taking Institutions (ADIs). Responsibilities of the RBA include:

- Advising the government in relation to monetary policy, including setting official reserve bank interest rates
- Giving effect to the monetary policy of the government for domestic and international involvement in the capital markets
- Maintaining public confidence in the operation and stability of the financial system
- Maintaining notes and coins issue and the public debt and foreign exchange reserves
- Managing market liquidity
- Collecting statistics from financial institutions on monetary and credit developments

Australian Prudential and Regulation Authority

Since 1998, financial institutions have been supervised by APRA.

APRA's prudential statements, formulated after consultation with Australian banks and influenced by overseas supervisory policies (particularly, the Basel Committee on banking supervision) require ADIs to have a minimum proportion of capital in relation to the assets it holds. This underpins the viability and stability of banking and finance in Australia.

APRA's primary task is to ensure that organisations in the banking and financial services sector manage their risk appropriately. APRA's regulatory approach is risk-based, targeting areas such as:

- Capital adequacy
- Liquidity

- Large exposures
- Credit quality
- Ownership and control
- Outsourcing
- Audit and related arrangements for prudential reporting
- Funds management and securitisation
- Governance.

APRA has been responsible for the implementation in Australia of the Basel frameworks, including most recently the Basel III framework.

If an entity wishes to conduct a "financial business" in Australia, APRA's approval may be necessary in order to use the word 'bank' or any other restricted word.

If an entity wishes to carry on a banking business in Australia it is required by the Banking Act to be authorised by APRA as an ADI or have the benefit of an exemption. There are three options open to obtain an ADI authorisation:

- A body corporate which is incorporated in Australia can apply for ADI status.
- A non-operating holding company or group of companies that includes one or more ADIs can apply for Non-Operating Holding Company status – thus allowing a group to operate across banking, funds management securities and insurance, for example.
- A foreign body corporate can apply for foreign ADI status. If authorised by APRA as a foreign ADI then the body corporate will be required to register in Australia as a foreign company under the *Corporations Act 2001* (Cth) (Corporations Act).

Foreign banks that do not have ADI status can:

- Subject to prior approval from APRA, operate through a representative office in Australia for client liaison and research purposes.
- Access the domestic capital markets to raise funds.
- Avoid the need for an Australian Financial Securities Licence (AFSL) for some activities, such as arranging and underwriting services in 'financial products' in the wholesale markets.

Australian Securities and Investments Commission

ASIC has responsibility for the supervision of operators of financial markets, clearing and settlement facilities, and market participants. It advises the Australian Government on licensee operating rules as well as on new market and clearing and settlement facility operators. ASIC's other main role is to regulate consumer protection in the financial sector. ASIC has responsibility for consumer protection issues relating to all financial services entities, including APRA-regulated bodies such as banks. One of ASIC's chief roles is to protect consumers in the financial system against unfair practices and misleading and deceptive conduct.

ASIC is also responsible for regulating the licensing of persons who carry on a financial services business in Australia.

In 2014, the Australian Government commissioned the Financial System Inquiry. The Government has indicated that it proposes to accept almost all of the recommendations contained in the report and legislation to implement them is expected to be enacted in the coming years. This legislation is likely to affect bank risk weights, the powers of APRA and ASIC, superannuation, the giving of financial advice and the offering of credit card products, retail corporate bonds and derivative products.

FOREIGN EXCHANGE CONTROL

The RBA has responsibility for foreign exchange control under the *Banking (Foreign Exchange) Regulations 1959* (Cth). Most restrictions on foreign currency transactions were removed when the Australian dollar was floated in 1983. Generally, banks are authorised

to deal in foreign exchange and can operate foreign currency accounts. The RBA maintains general oversight of dealers in the foreign exchange market and sets conditions and prudential standards.

The flow of currency into and out of Australia is monitored through a reporting system administered under the *Financial Transaction Reports Act 1988* (Cth). This Act requires, among other things, designated cash dealers and individuals to report significant transactions – those involving AU$10,000 or more – to the Australian Transaction Reports and Analysis Centre (AUSTRAC). Similarly, where a cash dealer has reasonable grounds to suspect that a transaction may be relevant to an offence under federal law, the dealer must also report the transaction.

The RBA's express approval may be required to complete some foreign exchange transactions. For example, the RBA has restricted foreign exchange transactions with governments and nationals of countries subject to United Nations sanctions.

Anti–Money Laundering and Counter–Terrorism Finance legislation

AUSTRAC is the regulator and specialist financial intelligence unit under the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) (AML/CTF Act). The AML/CTF Act covers the financial sector, gambling sector, bullion dealers and other professionals or businesses (reporting entities) that provide particular "designated services". These designated services are defined in Section 6 of the Act. The AML/CTF Act imposes a number of obligations on reporting entities when they provide designated services, including the obligation to implement and report on compliance plans.

An individual, company or other entity that provides a designated service is a reporting entity. Such entities include banks, nonbank financial services, remittance (money transfer) services, bullion dealers and gambling businesses. Every reporting entity needs to submit an AML/CTF compliance report to AUSTRAC (with the exception of AFS Licence holders, who only provide the designated service of making arrangements for a person to receive another designated service).

The AML/CTF Act was implemented in stages to allow industry to develop the necessary systems and procedures in the most cost-efficient way to meet their obligations. However, Australia continues to take an increasingly stronger stance against AML/CTF activity and has mandatory enrolment and registration requirements for reporting entities.

All reporting entities are required to register with AUSTRAC and have their name entered into the Reporting Entities Roll before they commence providing designated services to their customers. This roll will be used to determine whether or not the business is subject to the annual AUSTRAC Industry Contribution and the amount that applies to each billable entity.

The Australian Government is considering whether it is appropriate to expand the scope of the anti-money laundering regime to other services, including digital currencies.

Consumer Credit Legislation

The *National Consumer Credit Protection Act 2009* (NCCP Act), which includes the National Credit Code, is the main source of regulation of the provision of consumer credit and consumer leases in Australia.

The NCCP Act regulates all persons who engage in credit activities in connection with credit regulated by the NCCP Act. Credit is only regulated under this legislation if such credit is provided to a natural person or strata corporation and "wholly or predominantly" for either:

a. personal, household or domestic purposes, or

b. to purchase, renovate or improve residential property for investment purposes or to refinance credit used for such purposes.

Any person engaging in the provision of “credit activities” (including supplying goods on credit) must hold an Australian credit licence. Licensees must comply with a number of general conduct obligations and must also comply with responsible lending guidelines.

European Economic Area financial institutions

EU Directive 2014/59 – often referred to as the Bank Resolution and Recovery Directive (BRRD) – recently became effective across most EU countries and contains wide ranging recovery and resolution powers for European Economic Area (EEA) regulators to facilitate the rescue of a failing EEA financial institution.

Article 55 of the BRRD requires EEA financial institutions (generally this includes any EEA incorporated credit institution or investment firm and relevant affiliates but not EEA branches of non-EEA incorporated institutions) to include a special term acknowledging the EEA regulators’ powers into almost every document to which they are a party and that is governed by the law of a non-EEA country, such as Australia.

TAKING SECURITY

In lending transactions or other transactions that are intended to be secured over property belonging to an Australian entity or located in Australia, certain registration requirements need to be considered to ensure that such security is effective in the insolvency of the security provider and provides the secured party with the priority it requires.

The Personal Property Securities Act 2009 (Cth) (PPSA) contains a comprehensive legislative regime governing a wide range of security interests in property, other than land and some property that is specifically excluded, such as water rights and certain mining tenements. The new system is based on similar systems operating in Canada, the United States and New Zealand and provides Australia with a single register for recording security interests in personal property. The PPSA applies to security interests in personal property located in Australia and to security interests granted by any person or entity located in Australia, including companies and Australian registered bodies.

Security interests in land generally fall outside the ambit of the PPSA and are registered under the applicable state or territory land registration system.

Foreign investment considerations when taking security

Foreign lenders should be aware of the application of the *Foreign Acquisitions and Takeovers Act 1975* (Cth) particularly as many foreign lenders may be classified as foreign government investors following the GFC (see the Foreign Investment Policy section in the Investment in Australia chapter). Generally, with respect to a moneylending agreement on ordinary commercial terms, no Foreign Investment Review Board (FIRB) approval or notification is required for simply taking and holding a security interest or, other than where residential land or the security holder is a foreign government investor, for the enforcement of a security.

If a foreign lender who is not a foreign government investor, wishes to take a security interest over residential land, approval may be necessary unless the lender (or its holding entity) is an ADI or otherwise licensed as a financial institution (whether or not in Australia) and either has at least 100 holders of its securities or is listed on a stock exchange (whether or not in Australia).

A foreign government investor may generally enforce a security without FIRB notification or approval where:

The foreign government investor holds the interest for less than 12 months (if it is an ADI or a subsidiary of an ADI) or otherwise six months; or

The foreign government investor is making a genuine attempt to dispose of the interest.

See the Investment in Australia chapter for further information.

SUPERANNUATION AND PENSIONS

The Australian Government places great importance on superannuation and retirement savings. Changes in these areas are leading to increasing complexity and the need for a greater depth of knowledge to address this very competitive environment.

The pool of superannuation funds in Australia is now more than its annual Gross Domestic Product. That volume of money creates vast opportunities, but it also entails significant regulation, intense competitive pressures and close media scrutiny.

Useful references

Australian Prudential Regulation Authority www.apra.gov.au

Australian Securities and Investments Commission www.asic.gov.au

Foreign Investment Review Board www.firb.gov.au

Personal Property Securities Register www.ppsr.gov.au

Reserve Bank of Australia www.rba.gov.au

The Treasury www.treasury.gov.au

CAPITAL MARKETS

OFFERS OF SECURITIES

The Corporations Act 2001 (Cth) (Corporations Act) regulates the issue of shares, options, debentures, managed investments and other securities in Australia. Offers of securities must comply with specific disclosure requirements designed to protect investors and ensure that offers and trading of securities take place in an efficient and informed market, unless a specified exemption applies.

In general, a person must not offer for subscription or purchase, or issue invitations to subscribe for or buy securities, in Australia unless a disclosure document (such as a prospectus or a product disclosure statement in the case of managed investments), is prepared and, generally, lodged with the Australian Securities and Investments Commission (ASIC), which is the primary regulator of the securities markets. The disclosure document must comply with statutory content requirements. Exemptions from the requirement to prepare a disclosure document include offers to:

- Sophisticated investors, demonstrable in a number of ways including where the investor invests more than AU$500,000 in the securities; or where the investor provides an accountant's certificate stating that they have had:
  - AU$250,000 of gross income for each of the last two years; or
  - have net assets of at least AU$2.5 million
- Professional investors, for example, an investor who controls at least AU$10 million; or a person who holds an Australian Financial Services Licence
- Personal offers to investors where no more than AU$2 million is raised in any 12-month period from no more than 20 investors

A number of other exceptions are also specified in the Corporations Act and related regulations. The Corporations Act also regulates advertisements in connection with certain offers of securities and imposes penalties for misleading or deceptive conduct in relation to all offers.

THE AUSTRALIAN SECURITIES EXCHANGE

The three regional branches of the Australian Securities Exchange (ASX) in Australia are in Sydney, Melbourne and Perth. All trading between members of the ASX is conducted electronically.

The ASX listing rules govern the admission of companies to the ASX official list and prescribe certain requirements for the operation of listed companies. Through a continuous disclosure regime, these rules ensure that companies comply with certain standards in relation to market awareness and disclosure, including requiring regular financial reporting. While a company remains listed, it is required to comply with the listing rules and to provide any explanations requested by ASX, for example in relation to trading in its securities or compliance with the listing rules.

The listing rules also ensure that a listed company's constituent documents include standard provisions embodying shareholder democracy and impose requirements to obtain shareholder approval for major transactions.

If the listing rules are not complied with, a listed company can be suspended from trading or removed from the ASX official list. The listing rules have the force of law against listed entities.

Overseas companies may apply for listing and quotation on the ASX whether or not they are currently listed on another recognised stock exchange. Except for companies formed in Australia, New Zealand, Papua New Guinea and Bermuda, foreign companies' securities trade on the ASX in the form of depositary receipts known as CHESS Depositary Interests (CDIs).

Other prescribed financial markets are Asia Pacific Exchange Limited, Chi-X Australia Pty Ltd, National Stock Exchange of Australia Limited and SIM Venture Securities Exchange Ltd.

TAKEOVERS

Takeovers fall under the scrutiny of ASIC and the Australian Takeovers Panel. Australian takeover law aims to ensure that the acquisition of a company's shares takes place in an efficient, competitive and informed market. The law's key objectives are:

- The shareholders and directors of a company know the identity of any person proposing to acquire a substantial interest in the company
- The shareholders and directors of a company have a reasonable time in which to consider a takeover proposal
- The shareholders and directors of a company are supplied with sufficient information to enable them to assess the merits of a takeover proposal

- As far as practicable, all shareholders of a company have equal opportunities to participate in any benefits accruing under a takeover proposal.

Other than as specified below, it is prohibited for a person (together with their associates) to acquire an interest in more than 20 per cent of the voting shares of a public company formed in Australia (which is listed on a financial market in Australia or has more than 50 shareholders), or for a current shareholder to acquire shares that would lift their interest to above 20 per cent but less than 90 per cent. The 20 per cent threshold has been fixed to avoid a change in the actual control of the target company. The rules also apply to listed managed investment schemes, such as Real Estate Investment Trusts.

Once the 20 per cent threshold is reached, shares (or units in managed investment schemes) may only then be acquired as permitted by the Corporations Act. For example, a person is permitted to exceed the threshold by:

- Acquiring no more than 3 per cent of the company or managed investment scheme every six months
- Making an off-market takeover offer to all security holders
- Making an on-market bid by undertaking unconditionally to acquire all securities offered on the financial market on which the securities are quoted for a period of at least one month at a specified price
- Acquiring shares under a scheme of arrangement approved by a majority of shareholders present and voting (either in person or by proxy) and 75 per cent of the votes cast and by the court
- Being given approval by the majority of the company's other disinterested shareholders
- Acquiring shares under a pro rata rights issue to all shareholders in the same class.

As soon as an acquirer holds 90 per cent of the company's shares, it may proceed to compulsorily acquire the remaining shares in accordance with the requirements of the Corporations Act. Under the Corporations Act, the primary forum for resolving disputes about a takeover bid until the bid period has ended is the Australian Takeovers Panel. The Panel is a peer review body, with part-time members appointed from the active members of Australia's takeovers and business communities. Each member has experience in one of the following areas: business, the administration of companies, the financial markets, law, economics or accounting.

Where the Panel's jurisdiction is invoked, it has the power to declare circumstances in relation to a takeover, or to the control of an Australian company, to be "unacceptable circumstances". Once such a declaration is made, the Panel can make orders to protect the rights of persons (especially target company shareholders) during a takeover bid and to ensure that a takeover bid proceeds (as far as possible) in a way that it would have proceeded if the unacceptable circumstances had not occurred.

MERGER CONTROL

Mergers and acquisitions may fall under the scrutiny of the Australian *Competition and Consumer Commission (ACCC), which administers the Competition and Consumer Act 2010* (Cth) (CCA). The key issue here is the possibility of a merger or acquisition substantially lessening competition in a market.

The ACCC's Merger Guidelines and Informal Merger Review Process Guidelines outline its policy for the administration and enforcement of the CCA's provisions dealing with mergers and acquisitions, the factors it takes into account when considering mergers and acquisitions, its authorisation process, its use of enforceable undertakings and the process it follows.

Useful references

Australian Competition and Consumer Commission www.accc.gov.au

National Competition Council www.ncc.gov.au

Australian Securities and Investments Commission www.asic.gov.au

Australian Securities Exchange www.asx.com.au

Takeovers Panel www.takeovers.gov.au

DISPUTE RESOLUTION

OVERVIEW

Australia enjoys a strong global reputation for its respect for the rule of law, its progressive anti-bribery and corruption environment and its separation of powers between government, the executive and the courts.

This reputation encourages business and investment to be conducted on a level playing field, which is underpinned by the ability of parties to resolve their disputes through the courts and other dispute resolution mechanisms that are impartial, advanced and efficient by comparison with many other jurisdictions.

In recent decades, Australian courts have recognised the need for the speedy resolution of commercial disputes and in most jurisdictions specialist commercial courts have been established.

Mediation of commercial disputes has become recognised as an effective, and in most cases mandatory, process aimed at achieving an acceptable resolution at an early stage and significantly reducing legal costs.

Arbitration has been a feature of Australia's dispute resolution environment for more than a century and is today a primary vehicle to resolve disputes within industries such as projects and construction. In recent years, Australia has produced some of the best commercial arbitrators in the world.

The following is a summary of the main dispute resolution models and processes used for disputes in Australia.

LITIGATION

Courts operate at both federal and state government levels in Australia. In most cases, the jurisdiction of a court is governed by the monetary amount in dispute and in some cases, the subject matter of the dispute.

The highest court in each state is a Supreme Court, and these are separate from the Federal Court, which deals with Commonwealth laws. All courts of first instance are overseen by Courts of Appeal (both state and federal), whose decisions are subject to review by Australia's highest court, the High Court of Australia.

In Australia, the court system operates on an adversarial basis. This means that the parties involved in the proceeding retain advocates who seek to persuade an impartial judge of the merit of their position. They do this by examining witnesses and representatives of the parties and applying strict rules of evidence. This is in contrast with the inquisitorial system used in civil law systems in much of Europe.

Each court has rules applicable to the commencement, management and trial of a proceeding. These rules encourage the just, quick and cost effective resolution of disputes. The claim and all documents issued to articulate or rebut that claim (called pleadings) must be in a particular and specified form.

In many jurisdictions, specific specialty sub-courts or 'lists' have been established by the courts to manage specific disputes such as building, technology or insurance disputes. These lists are managed by a judge with experience in hearing such disputes and are intended to enable prompt hearing of interlocutory or preliminary arguments, assist with the quick identification of the issues and enable a hearing date to be obtained at the earliest possible time.

Proceedings are listed regularly at directions hearings, which the parties are obliged to attend. At this time, the court will make inquiries on the progress of the proceeding and make any necessary orders for the management of the matter including its trial. Such preparatory steps include provision of particulars, cross-claims, discovery of documents and the preparation of statements of evidence.

The purpose of these steps is to avoid surprise at trial and to ensure that each party knows the case against it and all the evidence upon which the other party will rely.

Courts are empowered to make various orders to enable the prompt and timely settlement of disputes, such as referral to mediation (discussed in more detail below) or determination by the court of a preliminary issue in order to dispose of the dispute or limit the issues in dispute.

While some courts will grant a trial date at the first directions hearing, in complex matters it might take two years to reach a trial. The timing for a trial can depend upon the court's resources, the nature of the dispute and how long the trial is likely to run.

Australian courts are increasingly requiring parties to conduct litigation on an electronic (mostly paperless) basis to reduce legal costs and time, particularly at the discovery and trial stages. Technology more generally is providing other advantages, including through the use of online Court registries and e-filing.

Legal costs in litigation are said to "follow the event". This means that the party that successfully brings or defends a claim is likely to obtain a judgment that the other party pays its costs. The costs that are usually payable under such a judgment are usually "party/party" or "standard" costs and amount to about 60 per cent of the actual costs incurred by the successful party.

Other cost orders may also be made where the circumstances require. For example, if the successful party had earlier made an offer to settle the dispute on terms that were more favourable to the unsuccessful party than the judgment ultimately obtained, the successful party may obtain an order that part or all of its costs be paid on a "solicitor/client" or "indemnity" basis. Such an order might enable the successful party to recover up to 80 or 90 per cent of its actual legal costs.

There is also an international perspective to the courts in Australia as they have powers to assist parties to foreign litigation. The *Foreign Judgments Act 1991* (Cth) enables Australian registration of a foreign judgment from certain courts in certain countries. This is useful if judgment is obtained in a foreign country against a judgment debtor who only has monies or assets in Australia. Also, using the court powers under the *Foreign Evidence Act 1994* (Cth) and similar state legislation, parties to foreign litigation can commence proceedings and obtain orders for the taking of evidence in Australia. This is useful if a case turns upon the evidence of a witness or documents that reside in Australia.

TIME FOR ISSUE OF PROCEEDINGS – LIMITATION PERIODS

In each state of Australia, specific legislation imposes a time period before the end of which proceedings must be commenced for a claim or dispute. These time periods vary from state to state and depend upon the type of claim. A failure to issue proceedings before the relevant time period expires is likely to result in that claim becoming "time barred".

In most Australian states, actions in simple contract or tort must be brought within six years of either the date of breach (contract) or the date on which loss was incurred (tort).

DOMESTIC COMMERCIAL ARBITRATION

Australia has a well-established arbitration practice of both domestic and international disputes. Growing familiarity with arbitration amongst industry and the legal profession, as well as pro-arbitration legislative reforms, have made arbitration a popular and reliable method for the resolution of disputes.

Domestic arbitration in Australia is regulated by the Uniform Commercial Arbitration Acts enacted in each State.[1] Only the Australian Capital Territory (ACT) is yet to adopt this uniform legislation. These Acts apply the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration, which aligns Australian domestic arbitration practice with international arbitration practice and allows parties to benefit from a wealth of precedent on the matter. The Uniform Commercial Arbitration Acts by default make arbitrations confidential and since the awards handed down by an arbitrator are not published, arbitration is an attractive form of dispute resolution to parties such as government agencies or those involved in sensitive disputes.

Because a court would otherwise have inherent jurisdiction over a dispute, parties must expressly agree (in their commercial contract) to use arbitration as the means of resolving their dispute in order for the Uniform Commercial Arbitration Acts to apply. This agreement usually takes the form of a clause in the contract setting out an agreement to arbitrate any dispute which arises under the contract. The Uniform Commercial Arbitration Acts provide a limited right of appeal to the courts.

Australian Courts are increasingly supportive of the domestic arbitration process, respectful of parties intention to arbitrate their disputes and favour construction of arbitration clauses which render them enforceable.[2]

The Uniform Commercial Arbitration Acts set out the procedural framework of a commercial arbitration as follows:

- Appointment of an arbitrator or composition of an arbitration tribunal, if it is not otherwise dealt with in the contract between the parties
- The basis upon which an arbitrator may reach its decision
- Enforcement of arbitral awards
- Power of a party to stay legal proceedings if there is an arbitration agreement in place (anti-suit proceedings)
- Power of the parties to challenge an award (usually limited).

Domestic commercial arbitration is usually conducted on a very similar basis to litigation, with similar procedures, legal representation and costs. There is, however, significant scope for the parties to tailor an arbitration proceeding to their respective needs so as to inexpensively resolve their dispute in a manner that is fast and final.

The Uniform Commercial Arbitration Acts allow parties to an arbitration access through injunctive relief (or interim measures) and court-issued subpoenas. The arbitrators selected are often solicitors, barristers or retired judges.

[1] *Commercial Arbitration Act 2010* (NSW); *Commercial Arbitration Act 2013* (Qld); *Commercial Arbitration (National Uniform Legislation) Act 2011* (NT); *Commercial Arbitration Act 2011* (SA); *Commercial Arbitration Act 2011* (Tas); *Commercial Arbitration Act 2011* (Vic); *Commercial Arbitration Act 2010* (WA); *Commercial Arbitration Act 1986* (ACT).

[2] See Supreme Court of Western Australia decision in *Australian Maritime Systems Ltd v McConnell Dowell Constructors (Aust) Pty Ltd* [2016] WASC 52. The Court heard a number of arguments as to why an arbitration clause included in a contractual agreement between the parties should not prevent the dispute being litigated in court. The Court held, however, that by executing the arbitration agreement 'the parties have committed themselves to resolving their disputes in a certain manner', and referred the dispute to arbitration.

In the construction industry, experienced engineers, architects and other building professionals with arbitration expertise are also often used. They charge a fee to hear the claim and prepare the award.

INTERNATIONAL ARBITRATION

International commercial arbitration is governed by the *International Arbitration Act 1974* (Cth) (IAA), which was modified in 2010 to adopt the 2006 amendments to the UNCITRAL Model Law. The UNCITRAL Model Law now covers the field in respect of international commercial arbitrations.

The IAA also gives effect to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, the Geneva Convention on the Execution of Foreign Arbitral Awards and the Convention on Settlement of Investment Disputes between States and Nationals of Other States ICSID Convention. The adoption of these Conventions give parties certainty that any award obtained in Australia can be enforced in any of the Convention countries in which the target party has assets. The alignment of the IAA with the Uniform Commercial Arbitration Acts puts Australian practitioners in an ideal place to assist with international commercial arbitrations.

Parties to arbitration under the IAA are free to stipulate the procedure of arbitration, including the procedure for the appointment of arbitrators. In the absence of specifically agreed procedures, the default rules for appointment of the arbitral tribunal in articles 10 to 12 of the UNCITRAL Model Rules applies, and the arbitral tribunal is granted extensive powers to determine the rules of procedure.

Australia is also a party to a multitude of bilateral and multilateral investment treaties and free trade agreements, and concluded negotiations for the Trans-Pacific Partnership in October 2015. Many of these treaties contain provisions for the arbitration of investment disputes, including investor-state disputes.

The types of commercial disputes that tend to use international commercial arbitration involve mining supply contracts, shipping contracts and technology contracts. The continued growth of the energy sector in Australia has coincided with an increase in reliance on international commercial arbitration by the sector.

The Australian Centre for International Commercial Arbitration (ACICA) is the most prominent international arbitration institution in Australia. ACICA publishes procedural arbitration rules and administers arbitrations and mediations governed by those rules. ACICA is the default appointing authority under the IAA.

Other providers used by Australian parties are the International Court of Arbitration, the London Court of International Arbitration and the Singapore International Arbitration Centre.

International commercial arbitrations can be run using a similar procedure to domestic commercial arbitrations, using the following features:

- "Stop clock" procedures where the parties must make their submissions and lead evidence from witnesses within a specific time frame, for example two days
- Quicker and less complicated exchange of pleadings and document disclosure stages
- The incorporation of terms of reference, which are agreed following the appointment of the arbitrator or arbitrators.

These and other procedures make international commercial arbitration a fast and efficient method of resolving cross-border disputes and can provide an attractive alternative to litigation.

MEDIATION

Mediation is a form of alternative dispute resolution. It requires the participation of a third party (a mediator), whose role is to assist the parties to a dispute reach agreement on the resolution of that dispute.

A mediator does this by seeking to align the parties' interests where possible, identifying the possible outcomes of the litigation or arbitration, and examining what options might be available to the parties to settle the dispute.

A mediator does not make a binding determination on the dispute, although he or she may make observations on the strength or weakness of the parties' respective positions.

Mediation is usually conducted on a confidential basis. In Australia, mediators tend to be senior barristers, solicitors or retired judges.

A mediation:

- Allows each party to test the strength of its case on a neutral third party
- Gives the parties a forum to articulate their claim in an informal environment
- Gives an opportunity for discussions to occur between a level of management higher than the "coal face"
- Permits the parties to explore means of resolution that are not simply reliant on payment of money or performance of work
- Can help to preserve a commercial relationship before the parties' positions become entrenched at trial or arbitration
- Is consensual in nature. If both parties sincerely want to mediate their dispute, then the prospects of settlement are probably higher.

In Australia, there has been a marked trend towards court-ordered mediation over the last decade. This trend has developed in response to pressure on court resources and is particularly acute in the context of major, multi-party disputes. Statistics produced by the courts show that a high proportion of disputes settle at mediation

Mediation has been so successful that, as discussed above, many commercial contracts now contain a clause requiring the parties to mediate their dispute prior to taking any formal steps in litigation or arbitration.

PROPORTIONATE LIABILITY

Since 2004, all states and territories have enacted proportionate liability legislation relating to economic loss or property damage claims arising from a failure to take reasonable care, whether founded in tort, contract, or under statute.

Proportionate liability replaces the common law doctrine of joint and several liability. The proportionate liability legislation applies where there are concurrent wrongdoers, that is, where there are two or more defendants who have caused the same loss or damage.

The previous doctrine of several liability had the effect that a claimant could recover all its loss and damage from one respondent party, even if that party was not responsible for all the relevant loss and damage. Proportionate liability now allows liability to be apportioned between "concurrent wrongdoers" according to their respective responsibility for the loss or damage.

A claimant needs to understand the effect of the legislation on its prospects for full recovery of its loss and damage, particularly if there are varying levels of liquidity or insurance arrangements between all the defendants.

The legislation impacts on many aspects of the negotiation of contractual agreements from the indemnity and warranty clauses through to the dispute resolution clause, to how and if a decision to join other parties into a proceeding is made if a dispute arises.

There are significant differences in the way proportionate liability applies in each jurisdiction. Specifically, the ability of parties to "contract out" of proportionate liability varies across jurisdictions.

The relevant legislation in New South Wales (NSW), Western Australia and Tasmania expressly allow parties to contract out of proportionate liability. Contracting out is expressly disallowed under Queensland legislation. In Victoria, South Australia, the ACT and the Northern Territory, the legislation is silent on the issue. Whilst there has been academic debate as to the efficacy of contracting out provisions in the states which have adopted them, the NSW Court of Appeal has recognised that a contractual provision affording one party an indemnity for any costs or expenses in relation to the breach of another party to the agreement will have the effect of contracting out of proportionate liability.[3]

A decision to "contract out" of the legislation can have a significant impact on a party's insurance arrangements. Contracting out may mean that the cover for a claim is limited or non-existent.

Whilst concerns as to inconsistencies between proportionate liability legislation between jurisdictions have galvanised discussion for uniform legislation, including the drafting of model legislation by the Standing Council on Law and Justice, no such uniform enactments have come to pass.

The Standing Council's model legislation proposes changes to broaden the scope of the regime to include multiple defendants who cause relevant loss or damage and exclude persons who have no legal liability to a claimant and to exclude the regime from arbitrations. The model legislation also prohibits contracting out of proportionate liability legislation, but allows for one concurrent wrongdoer to indemnify another.

Each state and territory will need to introduce the model legislation into their own jurisdiction for it to take effect. If enacted, the draft legislation will help clarify the areas of uncertainty under the current proportionate liability laws and achieve greater consistency between jurisdictions.

Useful references

Australian Centre for International Commercial Arbitration www.acica.org.au

Association of Dispute Resolvers www.leadr.com.au

Australasian Institute of Judicial Administration www.aija.org.au

Chartered Institute of Arbitrators Australia www.ciarb.net.au

London Court of International Arbitration www.lcia.org

The Institute of Arbitrators and Mediators Australia www.iama.org.au

[3] *Perpetual Trustee Company Ltd v CTC Group Pty Ltd (No 2)* [2013] NSWCA 58 at [11] – [15] per Macfarlan JA (Meagher and Barrett JJA agreeing on this issue).

REGULATION OF LABOUR

The *Fair Work Act 2009* (Cth) (Fair Work Act) is a federal law which governs employer obligations in Australia.

The Fair Work Act creates a federal workplace relations system applying to most corporations and businesses, but excludes some state public sector bodies. This chapter focusses on the federal system.

The major features of the federal workplace relations system under the Fair Work Act include:

- A safety net of minimum terms and conditions of employment that took effect on 1 January 2010, the main components of which are the 10 National Employment Standards (NES) and modern awards
- The creation of the Fair Work Commission (FWC), with broad powers giving it a central role in the bargaining process
- The introduction of good faith bargaining requirements that apply to all who participate in the bargaining process
- A streamlined general protections regime that protects employees against discriminatory, unfair or unlawful conduct
- Powers for the Fair Work Ombudsman (an independent Commonwealth agency responsible for enforcing compliance with federal workplace laws).

A large number of employees in the Australian labour market are award-free employees. This means that the terms and conditions of their employment may be negotiated privately between the employee and the employer and embodied in a common law contract of employment (either verbal or written). The contract of employment between the employer and the employee is subject to specific state or federal legislative provisions (including the NES) regarding:

- Annual leave
- Personal leave (sick leave, carer's leave and compassionate leave)
- Parental leave
- Long service leave
- Minimum rates of pay
- Termination of employment
- Workers' compensation
- Equal employment opportunity
- Unlawful discrimination and sexual harassment
- Occupational health and safety.

Another feature of the Australian labour market is collective bargaining between employers and their employees at a workplace. Labour unions may be involved to represent the employees. Collective bargaining takes place in industries where employment terms and conditions are generally covered by an award or there is a high union presence (although historically in Australia, bargaining has also taken place directly between employers and employees without the involvement of a union).

National Employment Standards

The ten key minimum entitlements under the NES relate to the following matters:

- Maximum weekly hours
- Requests for flexible working arrangements
- Parental leave and related entitlements
- Annual leave
- Personal/carer's leave and compassionate leave
- Community service leave
- Long service leave
- Public holidays
- Notice of termination and redundancy pay
- Fair Work Information Statement.

The NES cannot be excluded by an enterprise agreement or contract of employment. Further, an enterprise agreement or contract of employment must not provide for conditions of employment less favourable than those set out in the NES and, if they do, the more favourable terms and conditions of employment in the NES will prevail. The inclusion of less favourable conditions of employment may result in an employer breaching the NES, which could lead to a penalty being imposed by a court.

The NES applies to all employees covered by the federal workplace relations system, but only certain entitlements apply to casual employees.

Modern awards

As part of the Australian Government's workplace relations reforms, industrial awards (which set minimum employment conditions on an enterprise or industry basis) underwent a "modernisation" process and came into effect on 1 January 2010. As part of that, 3,000 former industrial awards were reduced to a smaller number of industry specific awards, known as modern awards.

Most modern awards provide for the following:

- Minimum wages
- Overtime payments for work in excess of normal hours
- Hours of work and rostering
- Penalty rates for shift work and weekend work
- Allowances for specific attributes of a job such as dirty or dangerous work.

It is illegal to contract out of awards – employers cannot make agreements with their employees that are designed to circumvent award provisions, irrespective of employee consent. Action may be taken by an employee, the Fair Work Ombudsman or unions seeking the enforcement of award provisions against an employer.

Enterprise agreements and good faith bargaining

The bargaining regime under the Fair Work Act encourages employers to negotiate terms and conditions of employment at the enterprise or workplace level. The intention is that the negotiated terms and conditions of employment are then embodied in an enterprise agreement.

One of the most significant reforms introduced by the Fair Work Act is the good faith bargaining requirements imposed on parties who are negotiating an enterprise agreement. The good faith bargaining requirements seek to regulate the behaviour of the negotiating parties (known as bargaining representatives), including the manner in which they deal with each other.

Under the good faith bargaining requirements, the bargaining representatives must:

- Attend and participate in meetings at reasonable times
- Disclose relevant (not confidential or commercially sensitive) information in a timely manner
- Respond to proposals in a timely manner
- Give genuine consideration to the other representatives' proposals and provide reasons for responses
- Refrain from capricious or unfair conduct that undermines collective bargaining and freedom of association
- Recognise and bargain with other bargaining representatives.

While bargaining representatives are required to comply with the good faith bargaining requirements, the Fair Work Act states that the requirements do not require any of the bargaining representatives to make concessions during bargaining or for the bargaining representatives to reach agreement on the terms that are to be included in the agreement.

The FWC can make orders to enforce compliance with the good faith bargaining requirements. The orders that may be made by the FWC include determining whether

a majority of employees want to bargain if the employer has not agreed to bargain, and the scope of the proposed agreement to ensure it covers the appropriate group or category of employees. The FWC may also issue bargaining orders if a party is not meeting the good faith bargaining requirements or issue a serious breach declaration if serious and sustained breaches of a bargaining order are occurring that significantly undermine the bargaining process.

A consequence of a serious breach declaration is that the FWC may, in certain (albeit rare) circumstances, arbitrate an outcome and make a workplace determination to finalise the terms and conditions of employment.

Before it can start to operate, the enterprise agreement must be approved by the FWC. One of the matters that must be satisfactorily addressed for the agreement to be approved is that it must pass what is known as the "better off overall" test. In essence, the test focuses on whether, on balance, the employee's overall terms and conditions of employment in the collective agreement are better when measured against any relevant modern award and the NES benchmark. If they are not, then the agreement does not pass the test and may not be approved by the FWC.

Holidays and leave entitlements

The NES provides for four weeks (20 business days) of paid annual leave per year, to be taken at times agreed between the employer and employee (although directions to take leave can be given in certain circumstances). Untaken annual leave accumulates from year to year and is payable on the ending of an employee's employment for any reason, at the employee's rate of pay immediately prior to cessation of employment. The NES also provides for 10 paid public holidays per year, with the ability for additional public holidays to be set or substituted.

Employees also have 10 days paid personal leave which they can take if they are ill or injured or to care for a member of their household or family. If untaken, it accumulates but untaken personal leave is not paid out on termination of employment,

Generally, all employees are entitled to three months' long service leave after 15 years' continuous service with one employer and paid *pro rata* long service leave after 10 years. In some states, the period of continuous service to qualify for the leave is less than 10 years.

Employers' obligations

Employer dealings with employees are covered by a number of award and legislative provisions. Unfair dismissal laws in the Fair Work Act only apply when an employee has completed a "minimum employment period", which is six months (12 months for employers with less than 15 employees). Under these laws, the employer may not dismiss an employee in circumstances that are "harsh, unjust or unreasonable", that is, unfair – although some senior employees will not be entitled to make such a claim (due to the level of their remuneration taking them beyond the jurisdictional coverage of the unfair dismissal laws). An employee can be reinstated (with back pay) or given compensation of up to the value of six months' remuneration if the termination is found to be unfair.

Employees whose jobs cease to exist, and who are made redundant, may be entitled to additional severance pay entitlements under the NES, in collective agreements or possibly in the employee's contract of employment or applicable policy.

Employers must retain records regarding their employees' wages, annual leave, time keeping and accidents. Specific advice should be sought regarding the period of time records must be retained by the employer.

General protections

The Fair Work Act contains a set of general protections against discriminatory, unfair or unlawful conduct. The general protections prohibit coercion, misrepresentation, unlawful termination, discrimination and certain other detrimental conduct, creating civil remedy provisions that can be enforced in a court.

The general protections protect "workplace rights" as defined broadly in the Fair Work Act. The general protections prohibit "adverse action" being taken against a person when that person decides to, or not to, exercise a "workplace right" or engage, or not engage, in "industrial activities". An employee is also protected from adverse action because of the employee's race, colour, sex, age and other such prohibited grounds.

Workers' compensation

Compensation to workers arising from workplace injuries comes under a number of state and federal statutes. In general, where any worker suffers personal injury in the course of their work, they are entitled to compensation. Most state workers' compensation schemes pay a percentage of the injured employee's pre accident ordinary time earnings.

Union membership

The general protections in the Fair Work Act also protect an employee from adverse action because of their decision to be, or not to be, a member or officer of a union or to, or not to, engage in industrial activities. No employee can be compelled to belong to a union. There is no power to make award or collective agreement provisions that demand a "closed shop", that is, a union-only workplace. While "closed shops" are prohibited at law, they can and do operate in certain industries in practice.

Under the Fair Work Act it is illegal for employers to dismiss, cause harm or otherwise prejudice employees because of union membership. It is also illegal to refuse employment on that basis.

Industrial action

Strikes and other industrial actions do occur in Australia, though Australia's industrial relations record has improved dramatically, with far fewer working hours lost through industrial action. Employers may restrain unlawful strikes by applying for an order under the Fair Work Act or by issuing common law injunctions. Legislation also prohibits certain types of boycotts. Lawful industrial action by employees and lawful lock-out by employers are available during the bargaining of an enterprise agreement, but in the case of industrial action by employees, only after a secret ballot of affected employees that approves the taking of industrial action.

Equal employment opportunity and reporting obligations

Federal and state legislation prohibits sexual harassment and discrimination on any grounds including sex, marital status, impairment or imputed impairment, religious or political beliefs, race, pregnancy and age. Employers need to consult the specific legislation as some states cover additional aspects such as criminal records.

The Workplace Gender Equality Act 2012 (Cth) also requires all non-public sector employers with 100 or more employees to comply with reporting obligations. Employers are required to report against standardised gender equality indicators (GEI). These indicators include:

- Gender composition of the workforce and of the governing bodies of employers
- Equal remuneration between women and men
- Availability and utility of employment terms, conditions and practices relating to flexible working arrangements.

Large employers (more than 500 employees) have additional compliance requirements. They must also meet the minimum standards set by legislative instrument. In order to meet the minimum standards, large employers must have a policy or strategy that

specifically supports gender equality in relation to one or more certain GEIs. Failure to comply with the Workplace Gender Equality Act may result in employers not being eligible to tender for contracts or receive federal grants or financial assistance.

Workplace health and safety

Around Australia, all employers owe a common law duty to their employees to take reasonable care to avoid reasonably foreseeable risks of injury. Statutory provisions in state legislation also impose general duties on employers to provide safe workplaces and obligations to provide protective measures, including for machinery. In most states, there are obligations on directors of corporations to exercise "due diligence" in respect to workplace health and safety matters for the corporation. Breaches can result in prosecution and substantial penalties. Most Australian workplaces are smokefree.

Employees and business sales

No legislation in Australia provides for employees to automatically transfer to a buyer. When a business is sold, sellers must terminate existing employment contracts and buyers must then make employment offers. In some cases, buyers may be bound by prior terms and conditions of employment set out in enterprise agreements.

MIGRATION AND TEMPORARY ENTRY VISAS FOR EMPLOYMENT

Australia's Department of Immigration and Border Protection administers migration to, and temporary entry into, Australia. A number of initiatives exist to assist businesses, including business centres in each state and territory.

The Australian Government considers that Australian businesses must have access to overseas skills, ideas, contacts and technology, and may need to recruit overseas personnel. Benefits are seen in attracting business people to establish or join businesses in Australia and in overseas companies gaining access to Australia's skilled labour force, industries, developed market and natural resources.

Temporary entry for employment

All visitors to Australia must hold a visa. Depending on the length of stay and the purpose for which a visa is sought, categories available to employees and business people include:

Electronic Travel Authority, eVisitor or Temporary Work (Short Stay Activity) visa

An Electronic Travel Authority or eVisitor may be applied for by citizens of certain countries, while a Temporary Work visa may be applied for by citizens of any country.

Their purpose is to allow genuine business visitors to undertake business-related activities such as attending meetings, conducting business negotiations and exploratory business visits. The Temporary Work (Short Stay Activity) Visa does allow the holder to participate in short-term, highly specialized, non-ongoing work. The other two visas do not allow the visa holders to work in Australia.

The Electronic Travel Authority allows holders to enter Australia multiple times within a year, staying for a maximum of three months a visit. While both the eVisitor and Temporary Work visa allow for up to three months stay. The Temporary Work visa may be extended to up to six months if supported by a strong business case.

Temporary Work (Skilled) visa (subclass 457)

For Australian and overseas businesses wanting to bring foreign workers to Australia for up to four years, this is the most commonly used visa subclass. Employers must sponsor the visa holder and will be subject to certain sponsorship obligations. There is no limit on the number of entries to and exits from Australia, as long as

they occur during the visa's life span. The visa holder's dependent family members, for example spouse and children, can be included in the application.

Local or foreign business employers wanting to use this program must be approved as business sponsors. In addition, both the position to be filled and the intended employee must meet certain requirements.

In overview, the employer must:

- Obtain approval to sponsor overseas workers
- Nominate the positions for which it intends to recruit those workers (from a list of eligible occupations)
- Cooperate with the Department in its monitoring requirements
- Pay the employee a market-level salary (which must exceed a certain threshold value)
- Meet a number of obligations, and certain costs, as part of the program.

The employee:

- Must apply for and satisfy all criteria for their visa, including English language ability
- May not work in Australia for any employer other than their sponsor.

Service sellers

Of use to employers supplying services into Australia, this program allows representatives to be sent to Australia to negotiate or enter into service supply agreements with Australian businesses. They cannot provide the services directly; they can only engage Australian providers to do so. Relating only to services and not the sale of goods and other products, the visa puts no limit on the number of times a successful applicant can enter and leave Australia during its life span, which is normally six months.

As there are no sponsorship or nomination requirements, this option may be more attractive to overseas employees, depending on the circumstances. Importantly, service sellers must not be employed by a company in Australia.

Labour agreements

This option requires a sponsoring organisation (for example an employer, industry association or group of employers), the Australian Government (through the Department of Immigration and Border Protection and the Department of Employment) and employees to collaborate together. These parties can negotiate a labour agreement in special circumstances not covered by standard sponsorship provisions. For example, a labour agreement might be used where a proven labour shortage exists in a particular sector. Either temporary or permanent visas may be granted.

Business owners, investors and senior executives

A range of visas are available for business owners and investors. The criteria for these vary but applicants will generally need to hold significant assets and have invested, or be willing to invest, some of these in Australian businesses or investments. Some of these visas require nomination from federal or state agencies.

While temporary and permanent visas are available, in most cases it isn't possible to apply initially for a permanent business visa.

PERMANENT EMPLOYMENT OR BUSINESS MIGRATION

Employer nomination scheme

Australian businesses wishing to engage overseas employees on a permanent basis may access this scheme, which involves the grant of permanent residence. Two stages are involved: first, the employer nominates the position and the employee for the position; then second, the employee applies for their visa within six months of the nomination.

Proposed employees must be highly skilled, suitable for the position and, unless exceptional circumstances apply, less than 50-years-old. There are three streams for obtaining this permanent residence visa.

Temporary Residence Transition stream

This stream is for subclass 457 visa holders who have worked for two years in the same occupation with their nominating employer.

Direct Entry stream

This stream is for employees who have never, or only briefly, worked in Australia, or who do not otherwise qualify for the Temporary Residence Transition stream. If the employee hasn't been both working in Australia in the nominated occupation and working for the nominating employer for two years, they must undergo a skills assessment or receive a minimum annual salary of at least AU$180,000 (excluding superannuation and allowances) – this figure may be adjusted over time.

Agreement stream

This is stream is for subclass 457 visa holders sponsored by an employer through a labour agreement.

State and territory support

Some Australian states and territories also actively encourage migrants and temporary visa holders to settle in their regions. They can assist visa applicants by nominating them and offering them assistance and some dispensations.

Regional support

The Regional Sponsored Migration Scheme (RSMS) is for employers in regional Australia, to fill skilled positions they are unable to fill from the local labour market. Under the RSMS, employers are able to nominate staff from overseas or temporary residents currently in Australia to fill full-time, permanent vacancies. The employees applying for a visa can be either skilled workers from overseas or skilled temporary residents.

Useful references

Department of Employment www.employment.gov.au

Department of Immigration and Border Control www.immi.gov.au

Fair Work Commission www.fwc.gov.au

ENERGY INDUSTRY

In Australia, the Commonwealth, states and territories cooperate in the regulation of the interconnected electricity and gas markets by adopting harmonized laws and regulatory oversight.

On climate change, under Commonwealth laws there are measures in place for reporting and reducing greenhouse gas emissions. As a result, there is a fast growing renewables industry in Australia, with wind energy and solar energy both rapidly growing sectors.

ELECTRICITY

Wholesale

The National Electricity Market (NEM) is Australia's wholesale electricity market for the interconnected States and Territories – being Queensland, New South Wales (NSW), the Australian Capital Territory (ACT), Victoria, South Australia and Tasmania. The Australian Energy Market Operator (AEMO) operates the NEM.

Western Australia and the Northern Territory do not participate in the NEM. Western Australia has its own major networks, and the WA wholesale market (WEM) is operated by AEMO. The Northern Territory has a single network administered solely by the government-owned Power and Water Corporation.

Retail

Currently, retailers operate under State-based licences and maintain the relationship with electricity consumers. Full retail competition, where all consumers have the option of choosing their energy (electricity and gas) retailers and negotiating individual supply contracts, has been introduced successfully in most states and territories in Australia, except for Western Australia and the Northern Territory.

In Western Australia, the retail market is dominated by the government-owned retailer, Synergy. In the Northern Territory, the Power and Water Corporation dominates the retail market.

The National Energy Retail Laws and National Energy Retail Rules, establish a national energy customer framework for the regulation of the retail supply of energy (electricity and gas) to customers where the NEM applies. Western Australia and the Northern Territory do not propose to operate under these laws.

GAS

Domestic wholesale and retail

AEMO operates the wholesale and retail gas markets of eastern and southern Australia and oversees the Victorian gas transmission network.

In addition, AEMO is responsible for national transmission planning and the operation of the Short Term Trading Market (STTM) for gas. The STTM is a market-based wholesale gas balancing mechanism that has been established at defined gas hubs in NSW, Queensland and South Australia. The STTM facilitates the short-term trading of gas between pipeline owners/operators, shippers and gas producers. Victoria does not participate in the STTM, and has established its own wholesale gas market which producers, transporters, retailers and end users all engage in.

AEMO also operates the Natural Gas Services Bulletin Board (NGSBB) covering all major gas production fields, major demand centres and transmission pipeline systems of South Australia, Victoria, Tasmania, NSW, the ACT and Queensland. AEMO is also responsible for the Gas Services Information (GSI) functions in Western Australia, and operates the Gas Bulletin Board for Western Australia.

The National Gas Rules govern access to gas pipeline services and elements of broader gas markets. These Rules have the force of law, and are made under the National Gas Law.

LNG EXPORT MARKETS

Australia currently has seven operating LNG developments and three more under construction. Other projects are also being considered. Australia's major LNG markets are Japan, China and South Korea. Taiwan is also a customer and India is an important emerging market.

COAL

Coal in Australia is mined primarily in Queensland, NSW and Victoria. It is used to generate electricity domestically and is in the main exported to eastern Asian markets.

GAS AND COAL SUBSIDIES

The Australian Government's energy policies continue to support the coal mining and natural gas industries through subsidies for fossil fuel use and production principally because the exports by those industries contribute significantly to the earnings of foreign exchange and government revenues.

RENEWABLES

While Australia is now a signatory to the Kyoto Protocol and the federal, state and territory governments have set targets to reduce greenhouse gas emissions, government policies still strongly support coal and gas fuelled energy production.

Renewable energy commercialisation in Australia is an area of growing activity. Australia's renewable energy industries are diverse, covering numerous energy sources and scales of operation, and currently contribute about 13–15 per cent of Australia's total energy supply.

The major area where renewable energy is growing is in electricity generation. Australia's renewable energy target (RET) is government policy which supports electricity generation from renewable energy. Recently, there has been significant growth in both the wind and solar sectors.

Australian Government incentives, such as the government funded Australian Renewable Energy Agency (ARENA), support research, development and commercialisation of renewable energy and related technologies.

Useful references

Australian Energy Market Operator (AEMO)
www.aemo.com.au

Australian Renewable Energy Agency (ARENA)
www.arena.gov.au

Department of Industry, Innovation and Science
www.indutry.gov.au/energy

ENVIRONMENT AND PLANNING LAWS

Environmental protection policy and legislation in Australia is primarily concerned with guarding the environment from the harm caused by pollution, ensuring the quality of the environment, and, to a lesser degree, responding to the impacts of changes to the climate system on the environment.

Organisations operating in Australia will need to be familiar with the various Commonwealth, state and territory, and local government policies and legislation governing management of the environment. Whereas broad principles of environmental management are common throughout the states and territories, they are managed differently across the various jurisdictions. Consequently, sound and up-to-date advice should be obtained before proceeding with any project that involves or relates to the built or natural environment. Failure to comply with environmental protection laws in Australia can result in project delays and the imposition harsh penalties.

ENVIRONMENTAL LAWS

There are several hundred environmental statutes in Australia. The purpose, in general, of these pieces of legislation is to manage, rather than prohibit, environmentally harmful activities. The Acts often set up administrative schemes for the issue of licences to carry out activities, subject to compliance with certain conditions.

While the Australian Government has no direct powers under the Australian Constitution to enact laws for the environment, it has taken on responsibility for environmental protection under principal powers relating to trade and commerce, such as, trading, financial and foreign corporations, and external affairs. Its purposive powers have seen the Australian Government giving effect to specific matters of international concerns (e.g. prohibiting activities in a world heritage area), while its non-purposive powers have seen it imposing environmental restrictions or prohibitions (e.g. prohibiting the export of mineral sands). The Australian Government has increasingly worked towards nationally agreed approaches to managing environmental issues, through 'cooperative federalism'. This has seen the production of a number of environmental national policies and strategies, often linked to federal funding.

Federal environmental legislation is generally intended to meet Australia's treaty obligations. As a member of the international community, Australia is bound to comply with the rules of international law. Australian Government environmental legislation relies on various international conventions, agreements and protocols that relate to marine activities (pollution, shipwrecks, etc.), the atmosphere (ozone, climate change, etc.), migratory species, water and clean energy. Environmental protection and management largely lies with the state and territory governments. The self – governing territories (the Australian Capital Territory, the Northern Territory and Norfolk Island) have powers to enact laws in respect of environmental protection and conservation. Similarly, the states can legislate on environmental matters such as management of pollution, water, and vegetation.

One of the primary pieces of environmental legislation in Australia is the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act). The EPBC Act reflects the responsibilities the Australian Government has in relation to matters of national environmental significance under international law. In effect, the EPBC Act requires an assessment of the impacts of land use activities and development proposals on matters of national environmental significance, followed by approval or refusal by the minister.

Bilateral agreements have been reached with the various states and territories to enable actions to proceed without approval under the EPBC Act if they are conducted in accordance with a bilateral agreement that accredits a state management arrangement or authorisation process. Many of these agreements are currently under review with an aim to reducing duplication of environmental assessment and approval processes.

Management of pollution (other than marine pollution which is a matter for the Commonwealth) is largely a state and territory, and local government responsibility. That is, administration and enforcement is carried out variously by the state or local government

depending on the type or decree of the risk of harm. National Environmental Protection Measures have been produced to formulate environmental standards, goals, guidelines and protocols that deal with air, noise and water quality, assessment of site contamination, environmental impacts of hazardous waste, reuse and recycling of materials, and motor vehicle emissions. Pollution is categorised in reference to the degree of environmental harm it will or may cause, the control of which is often integrated with land use planning and managed through the grant of licences. Some states and territories impose a general environmental duty on proponents not to carry out an activity that might pollute the environment unless all reasonable and practicable measures are taken to prevent or minimise the environmental harm. Failure to comply with the duty attracts a civil or criminal liability. Contaminated land is otherwise managed under a system that involves the reporting and registration of contaminated sites on a public register. Use of these contaminated sites may be restricted or require remediation.

Protection of the environment may be achieved directly by the prevention of harm from pollution, but it may also be achieved indirectly by a reduction in the pollution and causes of pollution. This latter approach is characteristic of climate change mitigation policy and legislation in Australia. The Australian Government and some state and territory governments have made policy responses to climate change. Some have enacted legislation that seeks to reduce greenhouse gas emissions – this includes setting greenhouse gas emissions targets, renewable energy targets and energy efficiency targets. The Australian Government has proposed the implementation of a plan under which companies will receive individual baseline emission reduction targets, with the Australian Government incentivising low cost carbon abatement activities using an emissions reduction fund.

LAND USE PLANNING LAWS

In Australia, environmental protection is inextricably linked with planning and development legislation. Planning and development legislation typically manages the relationship between the built and natural environmental.

Whereas the Australian Government plays an important role in the development of infrastructure and transport systems (i.e. planning for the management of the environment and its natural resources), except to the extent it affects Crown land, land use planning resides largely in the domain of the state and territory, and local governments. Consequently, the commencement of a new use will generally require approval of the state or territory government, or the local government.

State and territory, and regional planning is effected under various instruments including legislation, policies, strategies, and plans. Development is also managed at a local level under local government planning schemes. Local planning schemes typically protect existing uses while indicating the desirability of particular future uses. Approval for development is achieved through compliance with a development assessment process under which permits, consents or approvals are granted to allow development to be carried out subject to certain conditions imposed by the assessing authority.

Changes in climate mean that long term environmental impacts on development need be considered and taken into account. Climate change adaptation (i.e., adapting to the impacts of climate change on land use), is dealt with variously under land use planning legislation either through mandatory consideration of climate change in terms of addressing the natural hazard impacts or through the application of the principle of ecologically sustainable development, or ESD. A requirement to take into account ESD principles has been judicially interpreted to include consideration of the impacts of climate change. ESD pervades much of the environmental related legislation in Australia. Environmental and natural resource management agencies are commonly directed to take into account ESD in decision making. Recent legislative reforms however, indicate that despite ESD increasingly becoming a principle of international law, in Australia, the requirement to take into account ESD and the impacts of climate change is likely to be absent from future planning legislation in an attempt to encourage the fiscal aims of economic development.

FINANCIAL SERVICES REGULATION AND LICENSING

The provision of financial services and products is regulated in Australia by chapter seven of the Corporations Act 2001 (Cth) (Corporations Act). The regulatory framework creates a uniform licensing (Australian Financial Services (AFS) licensing) and disclosure regime for financial services and products. The Australian Securities and Investment Commission (ASIC) is responsible for AFS licensing and supervision of financial services providers, consumer protection in the financial services industry and for enforcement of the financial services laws in general.

Anyone considering the establishment of a business in Australia should carefully ascertain whether their intended business (including by the internet) might also be providing a financial service covered by the licensing or disclosure regime.

LICENSING REQUIREMENTS

The AFS licensing regime covers a broad range of financial services and products. Financial services include advice and dealing in respect of financial products. Financial products include most investment products, non-cash payment facilities and arrangements for the management of financial risk. This covers everything from derivatives and shares to managed investment schemes, superannuation, life and general insurance, miscellaneous risk products, sales support for electronic cash and smart cards, payment systems, spread betting, contracts for difference and some loyalty schemes. Margin lending is regulated as a financial product rather than as a credit product. Credit rating agencies also require an AFS Licence to operate in Australia.

Since 2012, providing advice in relation to or dealing in Australian carbon credit units and eligible international emissions units has been a financial service and providers of such services will require an AFS Licence. Certain financial product issuers such as general and life insurance entities, credit unions and responsible superannuation entities are also prudentially supervised by the Australian Prudential Regulation Authority (APRA) – see the Insurance chapter. Insurers that are authorised by APRA and whose clients are solely wholesale (within the meaning of the Corporations Act) may claim an AFS Licence exemption.

Licences carry a range of financial solvency and risk management requirements, including adequacy of resources – human, financial and technological (except for APRA-regulated bodies). Licensees must ensure that their representatives are trained and able to provide its authorised financial services, and must manage conflicts of interest in accordance with ASIC requirements. ASIC issues regulatory guides, which set out its interpretation of the requirements of the law and how it implements regulation. The guides are available on ASIC's website.

Ongoing licence conditions require AFS licensees to comply with industry codes of practice. The time and resources required for a new licence and to maintain ongoing compliance with an AFS Licence can be significant depending on the required AFS Licence authorisations.

Some of the more time-consuming requirements concern the preparation of licensing proofs on topics such as risk management, compliance, information technology processes and capabilities. Staff providing

financial product advice to retail customers must also satisfy stringent minimum educational and competency requirements. Disclosure requirements apply to retail product information and marketing material.

Advertising restrictions including restrictions on cold calling and making unsolicited offers are also in place in Australia.

Consumer credit activities are regulated on a national basis in accordance with the *National Consumer Credit Protection Act 2009* (Cth) and Code. This replaced the existing state and territory consumer credit laws. Credit providers and intermediaries require an Australian Credit Licence to provide credit or financial broking services. The credit licensing system is based on the AFS licensing concepts and requirements. ASIC is now the national regulator for consumer credit and finance broking.

EXTERNAL DISPUTE RESOLUTION

Australian financial services (AFS) licensees, unlicensed product issuers, unlicensed secondary sellers, Australian credit licensees (credit licensees) and credit representatives are required to have in place a dispute resolution system that consists of:

- internal dispute resolution (IDR) procedures that meet the standards or requirements made or approved by ASIC; and
- membership of one or more ASIC-approved external dispute resolution (EDR) schemes.

Unlicensed carried over instrument lenders (unlicensed COI lenders) must have IDR procedures that meet ASIC's standards or requirements and may choose to be members of an ASIC-approved EDR scheme.

The Financial Ombudsman Service (FOS) is responsible for the Codes of Practice and dispute resolution for banking and finance, general insurance and life insurance. The FOS is an external dispute resolution scheme established to provide free advice and assistance to consumers aiming to resolve complaints against insurance and financial services industry members, including those offering banking, credit, loans, general insurance, life insurance, financial planning, investments, stock broking, managed funds and pooled superannuation trusts. The FOS is headed by a chief ombudsman who is supported by three ombudsmen covering each of the sectors: Banking and Finance; General Insurance; and Investments and Advice. Codes of practice exist for the Banking and Finance and General Insurance sectors. A Life Insurance Code of Practice is currently being developed and is in the consultation period. It is expected to commence on 1 October 2016 (see the Insurance chapter).

CREDIT AND INVESTMENTS OMBUDSMAN

The Credit and Investments Ombudsman (CIO) offers consumers an accessible, independent and fair EDR service, approved by the Australian Securities and Investments Commission (ASIC).

CIO has over 20,000 participants who operate in a variety of financial service sectors. Participants include credit unions, building societies, non-bank lenders, mortgage and finance brokers, financial planners, investment managers, debt services and a wide range of other financial services and product providers.

CIO also accepts membership applications from those credit providers who are required to join an EDR scheme recognised by the Office of the Australian Information Commissioner (OAIC). The requirement applies to credit providers who wish to participate in the credit reporting system. EDR membership is required when credit providers disclose credit information to a credit reporting body (including identity information about an individual to obtain a consumer credit report about the individual), or access such information.

AUSTRAC

The *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (AML/CTF Act) imposes legal obligations on the providers of certain services such as financial services providers (reporting entities), including the obligation to register with the Australian Transaction Reports and Analysis Centre (AUSTRAC) if providing designated services set out in the AML/CTF Act.

The AML/CTF Act imposes obligations on certain reporting entities, including the requirement to adopt and maintain an AML/CTF compliance program that includes customer identification procedures and a process for reporting suspicious and threshold transactions involving amounts over a set monetary value.

INSURANCE

REGULATION OF INSURERS

Australia operates a dual regulatory system, with prudential regulation of insurers being the responsibility of the Australian Prudential Regulation Authority (APRA) and consumer protection being the responsibility of the Australian Securities and Investments Commission (ASIC). APRA is responsible for the authorisation and on-going prudential supervision of insurers. Any new insurer wishing to write business in Australia must receive authorisation from APRA to do so. APRA issues prudential standards that provide the principles which form the basis for authorisation and ongoing supervision of insurers.

These principles include requirements in relation to capital adequacy and solvency, corporate governance, risk management and reinsurance management. The prudential standards have the force of law. All APRA-authorised insurers are subject to annual prudential review, which requires the participation of their board. All APRA-regulated insurers have on-going data collection and reporting obligations.

ASIC is responsible for the licensing of insurers and insurance intermediaries, as well as the monitoring and supervision of consumer rights in relation to financial services, including insurance.

There are significant compliance obligations imposed on participants in the financial services sector in connection with APRA and ASIC supervision. The compliance obligations are frequently revised and updated.

With this goes an expectation that directors of an Australian insurance company will have a full understanding of compliance and regulatory issues relevant to the business carried on in Australia.

General insurance

Carrying on business as a general insurer or a reinsurer in Australia requires an authorisation from APRA in accordance with the *Insurance Act 1973* (Cth) (Insurance Act). Only bodies corporate (or Lloyd's underwriters) are eligible for authorisation.

Unauthorised foreign insurers carrying on insurance business in Australia, either directly or through the actions of another (for example, an insurance agent or broker) require authorisation, unless they are only insuring risks that are within limited exemptions. It is an offence to carry on insurance business in Australia or undertake business incidental to carrying on insurance business in Australia without authorisation from APRA.

Also, an insurance intermediary cannot place insurance business with an unauthorised insurer. Regulations provide for specific, but limited, exemptions from this prohibition.

An authorised insurer must hold capital that meets minimum capital requirements set out in APRA's prudential standards. APRA has a grading system for insurers where prudential requirements vary according to the size and risk profile of each insurer. If an insurer has reinsured with an offshore reinsurer that is not APRA – regulated, the APRA-authorised insurer is required to hold more capital to match unsecured recoverables unless the offshore reinsurer has lodged security in Australia.

The Insurance Act does not apply to all forms of insurance. Workers compensation and compulsory third-party motor insurance are regulated on a state and territory basis and typically a separate licence issued by the relevant state is required to participate in these classes. In some states and territories these risks are either provided for by state-controlled funds or state insurance entities – they are not available for private sector competition although the private sector may be appointed to provide administration and claims services.

Medical indemnity insurance

Medical indemnity insurance (also known as medical malpractice insurance) must be written by an APRA-authorised general insurer only and may not be provided on a discretionary unlimited basis. ASIC also has a regulatory role in respect of medical indemnity insurance, being responsible for the general administration of product standards and disclosure requirements that apply to medical indemnity insurance policies. These include the minimum cover limit that an insurer may offer or provide to a medical practitioner and the requirement that the contract provides an offer for retroactive and run-off cover for otherwise uncovered prior incidents.

The suite of specific legislation governing medical indemnity insurance contracts includes the *Medical Indemnity Act 2002* (Cth), the *Medical Indemnity (Prudential Supervision and Product Standards) Act 2003* (Cth) and the *Medical Indemnity (Run-Off Cover Support Payment) Act 2004* (Cth).

Life insurance

All companies wishing to carry on life insurance business in Australia must be authorised by APRA in accordance with the *Life Insurance Act 1995* (Cth) (Life Insurance Act). Life insurance business includes traditional whole – of-life insurance and endowment policies, continuous disability policies, contracts for the provision of annuities and investment-linked contracts.

The Life Insurance Act requires the life insurer to act in the interests of the prospective and existing policyholders of the relevant statutory funds.

With limited exceptions, a foreign life insurance company must establish a subsidiary in Australia and have it authorised by APRA. All life insurance business in Australia must be conducted through the subsidiary.

Health insurance

Private health insurance is provided through private health insurers registered under the *Private Health Insurance Act 2007* (Cth). This Act together with the related rules define health insurance and who can offer it, and establish the regulatory regime for private health insurance providers.

The financial performance of registered health funds was previously monitored by the Private Health Insurance Administration Council. However, its prudential supervisory functions were transferred to APRA with effect from July 2015. The previous standards have been rebranded however maintain the status quo. For example, Schedule 2 of *Private Health Insurance (Health Benefits Fund Administration Rules)* is now APRA rule HPS100 Solvency, and Schedule 3 of *Private Health Insurance (Health Benefits Fund Administration) Rules 2007* is now APRA rule HPS 110 Capital Adequacy.

The Private Health Insurance Ombudsman is an independent body established to resolve complaints about a private health fund, a hospital or medical practitioners. The Ombudsman's services are available to health fund members, hospitals, medical practitioners (including some dentists) as well as health funds.

Other relevant acts

Financial Sector (Shareholdings) Act 1998 (Cth)

Ownership in insurers (life and general) is governed by the *Financial Sector (Shareholdings) Act 1998* (Cth), which limits shareholdings of an individual shareholder or a group of associated shareholders in an insurer to 15 per cent of the insurer's voting shares. A higher percentage limit may be approved by the Treasurer on national interest grounds. APRA provides assistance to the Treasurer in this process.

Insurance Acquisitions and Takeovers Act 1991 (Cth)

This Act sets out rules for acquisitions of Australian companies authorised to carry on business of insurance under the Insurance Act or the Life Insurance Act. Notification requirements are triggered by the acquisition of assets and agreements with directors. The Act requires notification of certain proposals to be provided to the Minister.

Foreign Acquisitions and Takeovers Act 1975 (Cth)

This Act is administered by the Foreign Investment Review Board (FIRB) and requires the notification of and approval for certain increases in substantial shareholdings in an Australian company by a foreign interest. FIRB operates independently of the *Insurance Acquisitions and Takeovers Act 1991* (Cth). See also the Investment in Australian chapter.

The *Terrorism Insurance Act 2003* (Cth)

Provides terrorism cover where eligible general insurance policies have a terrorism exclusion. It also establishes the Australian Reinsurance Pool Corporation (ARPC). Private residential property is excluded from the ARPC scheme, which allows insurers to choose whether to reinsure or bear the terrorism risk themselves. Contracts eligible for the ARPC scheme include insurance for loss or damage to the insured's commercial property, business interruption and insurance for liability arising from ownership or occupation of eligible property.

It is not compulsory for insurers to reinsure the risk of eligible terrorism losses through ARPC. Local and foreign insurers have the option to:

- Purchase e-terrorism reinsurance from ARPC
- Purchase e-terrorism reinsurance from a commercial reinsurer
- Elect to hold the exposure themselves.

REGULATION OF INSURANCE CONTRACTS

The *Insurance Contracts Act 1984* (Cth) (Insurance Contracts Act) regulates the content of general, life and medical indemnity insurance contracts. The most important exclusions are contracts of reinsurance, insurance covered by the *Marine Insurance Act 1909* (Cth), workers' compensation, compulsory insurance (for example third-party motor vehicle insurance) and state and Northern Territory insurance.

The Insurance Contracts Act does not codify the law, but lays down extensive rules in a number of areas, for example:

- The statutory duty of disclosure on insureds (of which the insurer must inform the insured) and an insurer can only avoid the contract for non-disclosure or misrepresentation in limited circumstances
- Insureds must be clearly informed if cover is less than the minimum amount
- The insurer must clearly inform the insured of terms that are not usually included in similar policies or if it is not able to rely on them
- Insurers can only refuse to pay claims under instalment policies if an instalment of premium has remained unpaid for a period specified in the Insurance Contracts Act and the insurer has clearly informed the insured, before or at the time the contract was entered into, that it may refuse to pay claims for non – payment
- Persons who are not parties to the policy may in some circumstances be entitled to recover from the insurer
- Renewal notices must be given to insureds
- The requirement to give notice of cancellation and limitations on cancellation rights
- The insurer's right to refuse to pay claims is limited, for example it cannot refuse to pay if there is a breach of a term of the contract requiring an act by the insured in some instances. Claim payments can only be reduced to the extent of any prejudice.

INSURANCE

General Insurance Code of Practice

The General Insurance Code of Practice (Code) is self-regulatory. It requires insurers to adopt standards for the treatment of insurance claims and sets out minimum service standards to customers. This code also requires authorised representative and employee training, complaints handling and dispute resolution procedures.

The Code is monitored independently by the General Insurance Code Governance Committee. The Financial Ombudsman Service Code Compliance and Monitoring team provides code monitoring, secretariat and administrative services to the Committee. Some insurance products, such as workers' compensation, medical indemnity, motor vehicle injury insurance and marine, are not covered by this Code.

Life Insurance Code of Practice

The Financial Services Council has released a draft of the Life Insurance Code of Practice for public consultation. It was anticipated that Australia's first Life Insurance Code of Practice would take effect on 1 July 2016 however, the consultation period remains open until 9 September 2016. It is expected it will commence on 1 October 2016. This code will deal with the design, distribution and marketing of life insurance products, which should be easier to follow than the relatively opaque provisions that apply under the Corporations Act 2010 and Life Insurance Act. APRA also issues life insurance circulars regulating various matters, including disclosure requirements and policy illustration rates.

USEFUL REFERENCES

Australian Prudential Regulation Authority www.apra.gov.au

Australian Securities and Investments Commission www.asic.gov.au

Financial Ombudsman Service www.fos.org.au

General Insurance Code of Practice www.codeofpractice.com.au

Insurance Council of Australia www.insurancecouncil.com.au

Private Health Insurance Ombudsman www.phio.org.au

INTELLECTUAL PROPERTY

All intellectual property legislation in Australia is federal with national jurisdiction.

TRADE MARKS

Trade marks are registered in Australia under the *Trade Marks Act 1995* (Cth) (Trade Marks Act). Trade mark registration gives the proprietor the exclusive right to use the trade mark in relation to the goods or services in respect of which the trade mark is registered, while the trade mark is registered.

The Trade Marks Act specifies that a trade mark must distinguish a person's goods or services from other traders' goods and services, and must not be the same as or deceptively similar to a prior trade mark registration or prior pending trade mark application made in Australia by another person in respect of similar goods or services. A person wishing to register a trade mark must either be using the trade mark or have a definite intention to use it. Once registered, a trade mark can be removed for non-use if it has not been used or has not been used in good faith for a continuous period of three years. However, an application for removal for non-use cannot be made within the first five years of the trade mark application date. Trade marks can be licensed or assigned to third parties.

Passing off

Australia allows common law claims for passing off goods or services as being those of, or approved by, another person, even if that other person does not have a registered trade mark. A person who claims passing off must establish that there is goodwill attached to the goods or services he supplies, that there has been a misrepresentation of the type previously referred to, and that the alleged misrepresentation has harmed that goodwill.

Additionally, an action can be brought for misleading and deceptive conduct under the *Competition and Consumer Act 2010* (Cth) (CCA) (which replaced the *Trade Practices Act 1975* (Cth)) if a trade mark is used in a misleading or deceptive manner, or if a false representation of sponsorship or approval is made.

The recent case of *ACCC v Valve Corporate (No 3)* [2016] FCA has clarified when a foreign corporation supplying goods to Australian consumers will be subject to the CCA. If a foreign corporation carries on business in Australia, they will be subject to the CCA, regardless of whether the conduct took place in Australia.
In determining if a corporation carries on business in Australia, the following will be relevant:

- The number of Australian customers of the corporation and the revenue earned
- Whether the corporation maintains or stores any content, data, servers or other infrastructure in Australia (whether or not via a third party)
- Whether the corporation owns significant personal or property interests in Australia
- Whether the corporation engages in other business in Australia.

Foreign corporations will not be exempt from these obligations even where the proper law of their contracts with consumers is not Australian law.

The case also extended the definition of goods under the CCA to include computer software. This may potentially widen protection afforded under the CCA for goods, to software provided by way of license.

International registration

Australia is a signatory to the Paris Convention for the Protection of Industrial Property (Paris Convention). Under the Paris Convention, any person who has filed a trade mark application in Australia has a right to claim the filing date of that application for trade mark applications it files within six months in other signatory countries and any person who has filed a trade mark application in another signatory country has a right to claim the filing date of that application for trade mark applications it files within six months in any other signatory country, including Australia.

Australia's membership of the Madrid Protocol lets Australian trade mark owners file international trade mark applications in up to 70 jurisdictions, including the UK, the US, Germany, France, Italy, Japan and China. European Union trade marks can also be sought using the Madrid Protocol.

International registrations are processed by each country through its office responsible for trade mark applications. In Australia, this is IP Australia.

Brand coexistence agreements

Trade mark owners party to brand co-existence agreements with other trade mark owners should note the UK decision of *Merck KGaA v Merck Sharp & Dohme Corp and others* [2016] EWHC 49 (Pat). The ruling provides useful insight into how the English courts have approached international trade mark disputes and possible future developments of the common law in line with this ruling in Australia. The brand coexistence agreement in this case allowed use of the brand "Merck" within certain geographic areas by each party and did not contemplate the popularity of the internet.

The court (applying German law which governed the agreement) found that an exception in the agreement which allowed parties to use "Merck" outside their geographic area in advertisements in journals emanating from within their geographic area, did not apply by analogy to advertising on a website originating within a jurisdiction. This was due to the marked difference between the distribution of the material, party control over distribution, third-party material containing the name and the liberal use of the name on the website in question.

This decision provides guidance on how Australian courts may view the geographic reach of the use of trade marks online. Therefore, brand co-existence agreements should expressly consider online or electronic use.

COPYRIGHT

Creators and owners of original literary, artistic, musical and dramatic works as well as sound, film and television broadcasts and computer programs have an exclusive right to reproduce, publish, perform, communicate and do other acts, and to license other people to do those things, in relation to those works, under Australia's *Copyright Act 1968* (Cth) (Copyright Act). The Copyright Act doesn't prevent other people from creating and using a similar or identical work, provided it was independently created.

Copyright arises automatically under Australian law and there is no copyright register. The Copyright Act also deals with performers' rights and individual creators' moral rights.

Australian copyright law is becoming more aligned with international norms. The Copyright Act was amended in 2004 in response to the Australia–United States Free Trade Agreement, to enhance performers' rights and extend the term of copyright protection.

Further changes in 2006 addressed issues linked to the internet and digitisation technological developments, dealing with piracy, portable music players and digital television recording devices.

A broader exception now exists for educational institutions for instruction, library and archive purposes, and for time and format shifting (such as recording a television program on a DVD recorder for viewing at a later time, or converting music in CD format into MP3 format).

Copyright can be licensed or assigned to third parties.

Duration of copyright protection

Although there are some exceptions, copyright protection for original literary, artistic, musical and dramatic works is generally the life of the author plus 70 years, except where the literary (except for computer programs), dramatic and musical works were

not "made public" during the author's lifetime. In this case, the term of protection is 70 years after the year the work was made public.

The duration of copyright protection for films and sound recordings is the year of first publication plus 70 years, and for copyright in TV or sound broadcasts it is the year of the broadcast plus 50 years. Published editions of works enjoy copyright protection for 25 years after first publication. Specific rules also apply where the Australian Government is the copyright owner or wishes to use copyright works.

Moral rights

Australian copyright creators enjoy moral rights designed to protect their honour and reputation. These rights include the right of attribution of authorship, of integrity of authorship and the right not to be falsely attributed as author. Moral rights cannot be assigned. Use of material in a way that would be in breach of the creator's moral rights requires the creator's consent.

International protection

Australia's membership of the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention) means Australian creators of copyright works enjoy protection for their works in other signatory countries as if they were nationals of those other countries. Under the Berne Convention, copyright arises automatically when a work is created and does not rely on registration.

PATENTS

Australia's *Patent Act 1990* (Cth) (Patents Act) confers exclusive rights to exploit, to authorise others to exploit and to prevent others from exploiting patented inventions during the term of patent protection. IP Australia administers the Patents Act.

Two main types of patents are available in Australia – standard patents, which are equivalent to patents granted around the world, and innovation patents, which are unique to Australia. Innovation patents are a second-tier form of patent protection intended to provide protection for a shorter term to inventions that cannot satisfy the inventiveness requirement for a standard patent. The innovation patent replaced Australia's former second-tier patent, the petty patent.

Patents may be licensed or assigned to third parties.

Standard patents

For an invention to be protected by a standard patent in Australia, it must be a manner of manufacture within the meaning of s6 of the Statute of Monopolies 1623 (UK), novel, inventive, useful and not have been commercially exploited in secret by or with the authority of the patentee in Australia before the priority date of the patent. However, human beings and the biological processes for their generation are not patent-eligible inventions. In general, the term of a standard patent is 20 years, although the term of particular types of standard patents relating to pharmaceuticals may be extended by up to five years.

Innovation patents

Innovation patents were introduced to provide protection for incremental improvements that are not sufficiently inventive to warrant a standard patent. However, their use is not limited to such incremental improvements. For an invention to be protected by an innovation patent, it must satisfy each of the requirements for obtaining a standard patent, other than that it must be inventive.

Rather than needing to be inventive, an invention need only be innovative to be protected by an innovation patent. This requirement is satisfied if any variation between the invention and the prior art makes a substantial contribution to the working of the invention. In addition to the exclusion from patentability referred to above in relation to standard patents, plants, animals and the biological processes for their generation are not patent eligible inventions for the purposes of an innovation patent – unless an invention is a

microbiological process or a product of such a process. The term of an innovation patent is eight years and cannot be extended.

Unlike standard patents, innovation patents are granted without substantive examination. However, for innovation patent holders to enforce their monopoly rights, they must first have the patent examined and certified by IP Australia.

International protection

Australia is a member of the Patent Cooperation Treaty (PCT). This gives Australian patent applicants the ability to seek patent protection in each PCT member country by filing a PCT application with IP Australia, designating any PCT countries in which protection is sought. Similarly, patent protection can be sought in Australia on the basis of a PCT application filed in another PCT member country.

Additionally, as Australia is a signatory to the Paris Convention, patent applicants from member countries may use the filing date from their first application as the effective filing date in Australia provided they file an Australian complete application or a PCT application within 12 months of the date of filing the foreign original or basic application. Similarly, patent applicants from member states may file their patent application first in Australia and use that date as their effective filing date in other member countries provided they file a complete application or a PCT application in those other member countries within 12 months of the Australian filing date.

REGISTERED DESIGNS

Design registration protects the visual appearance of manufactured products, not how the product works. Registered designs can be valuable commercial assets and steps can be taken to enforce design rights.

Australia's *Designs Act 2003* (Cth) (Designs Act) covers the registration of "new and distinctive" designs for products. "New" means that no identical design or very similar design has been publicly used in Australia or published in a document (whether inside or outside Australia). "Distinctive" designs are those considered not substantially similar to other designs already in the public domain. Registration protects designs for five years initially and can be renewed for a further five years.

Once a design is registered, examined and certified, the owner of the registered design may sue for infringement if another person uses the registered design without permission.

The current Designs Act imposes more stringent tests for the distinctiveness of designs than originally outlined in the 1906 Act of the same name. However, a wider infringement test effectively increases the enforceability of registered design rights under the current legislation.

Useful references

Australian Copyright Council www.copyright.org.au

IP Australia www.ipaustralia.gov.au

INFORMATION TECHNOLOGY AND E-BUSINESS

Australians are early adopters of technology, the use of the internet is widespread and continues to increase. The proportion of ecommerce transactions also continues to increase rapidly.

Governments at all levels have recognised Australia's move towards an information-based economy and strongly support the development and use of information and communication technologies.

Completing transactions online and developing an online business presence raises legal issues including protection of intellectual property rights, trade practices and consumer protection issues, censorship regulations, privacy and spam obligations and contractual issues.

LEGISLATION

Electronic transactions

The *Electronic Transactions Act 1999* (Cth) (Electronic Transactions Act) provides for electronic signature recognition and confirms the validity of electronic communications in commercial and legal documents. Reflecting the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Electronic Commerce, the Act addresses the changed legal and business environment brought about by e-commerce, promoting and encouraging e-commerce due to the recognition of electronic signatures.

The Electronic Transactions Act primarily relates to dealings between a person and Australian Government agencies. State and territory legislation that substantially mirrors the federal legislation addresses concerns about electronic communications under state laws, both in the context of data transmitted and information provided to government authorities. The relevant state and territory legislation should be consulted in this situation when operating in a particular jurisdiction. The Electronic Transactions Act is now aligned with the UN Convention on the Use of Electronic Communications in International Contracts, with a view to acceding to the Convention once all Australian jurisdictions enact model amendment provisions.

Spam

The Spam Act 2003 (Cth) regulates commercial electronic messages, including emails. It prohibits the sending of commercial electronic messages, except with consent and where the messages contain an unsubscribe facility and contain information about the individual or organisation sending the message. See also the Business Practices chapter.

The Australian Communications and Media Authority (ACMA) is responsible for enforcing Australia's anti-spam law. Its role includes investigating complaints about online content and gambling services and monitoring compliance by Internet Service Providers (ISPs) and online service providers with industry developed codes of practice.

Separate legislation (the *Do Not Call Register Act 2006* (Cth)) and industry standards (the *Telemarketing and Research Industry Standard 2007*) regulate telemarketing and commercial communications to fax numbers.

Broadcasting

Internet content that is hosted in or provided from Australia is regulated by Schedule 7 of the *Broadcasting Services Act 1992* (Cth). Internet content hosted outside Australia is regulated by Schedule 5. The legislation provides that content that is prohibited under the Australian classification regime, or that is not classified but would be classed as prohibited if it was classified, must not be hosted or provided from Australia. ACMA has power to require that prohibited content be taken down. Australian legislation provides for ISP liability safe harbours, provided that ISPs comply with the safe harbour regime. See the Business Practices chapter for more information on privacy law.

STANDARD ONLINE TERMS

Where standard terms and conditions apply to the provision of information, data or services online, in order for a contract to be properly formed, each user or subscriber needs to accept the terms, and this needs to be able to be shown in the event of a dispute. For example, the technical implementation of a site should ensure that a user or subscriber cannot continue with his or her registration, or obtain access to the site or any of its content, until it has physically seen the entirety of the terms and clicked on an "I accept" button or similar. A record of such acceptances of the terms should also be retained.

Where standard terms are updated from time to time, it is generally stated that a user's continued use of the site after any such update will constitute acceptance of those amended terms. As a practical matter, it is advisable that a pop up box (or similar) appear to notify users of any change the next time they log in, and users be required to scroll through the notification in its entirety and agree to the amended terms before they are able to continue to access the site.

Consumer protection

From 12 November 2016, the unfair contract terms regime in the Australian Consumer Law will be extended to include standard form contracts where at least one of the parties is a small business (a business which employs less than 20 people) and the price payable upfront is AU$300,000 or less or AU$1 million or less for contracts with a term longer than 12 months. It will also apply to contracts which are varied after 12 November 2016.

Terms which may be considered "unfair" include terms which:

- Limit or avoid only one party's obligations under the contract
- Enable only one party to terminate the contract
- Penalize only one party for breach or termination
- Terms which allow one party to unilaterally vary the terms.

Importantly, terms that set the upfront price payable under the contract are not covered by the law.

If a court or tribunal (not the Australian Competition and Consumer Commission) find a term to be unfair, it will be void and therefore not binding on the parties. The rest of the contract will remain on foot to the extent it is able to continue to operate without that unfair term.

DOMAIN NAMES

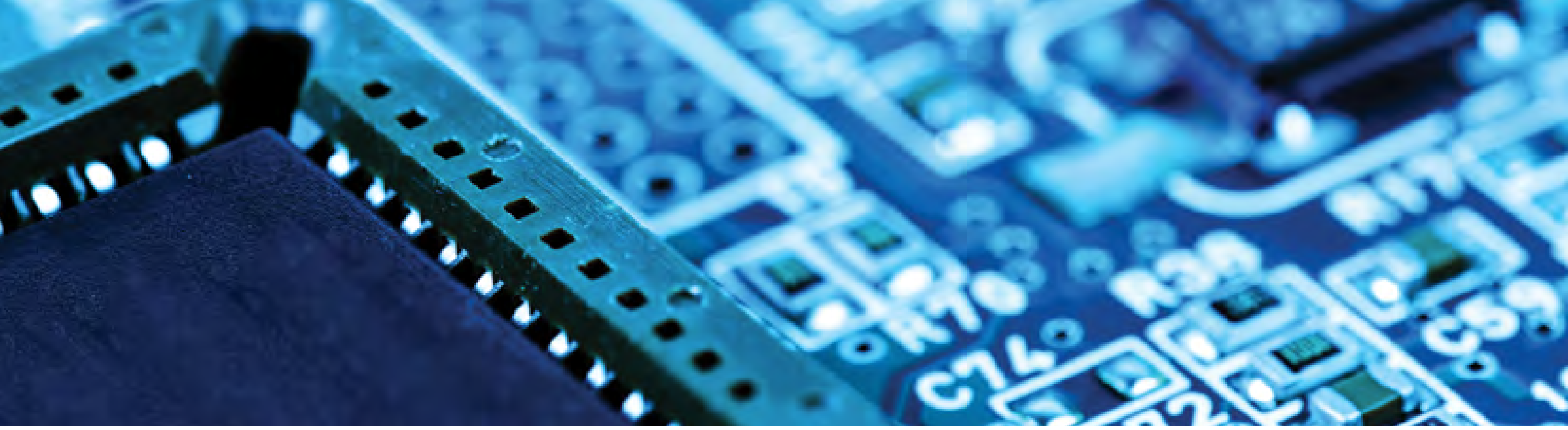
Addresses ending in .au

Businesses operating in Australia often have an online presence. In addition to generic domain names (such as .com, .net and .org), many Australian businesses choose to operate websites with domain names ending with the country code .au. A registration system for domain names exists, separate to those for company names, business names and trademarks. Registration costs vary depending on the type of domain chosen (e.g. .com.au or .net.au) and the term of the registration. Domain names are licensed to business operators, not sold. Once a licence has been granted, an exclusive right to use that domain name is given for the period of the licence, which is usually renewable.

The auDA

The auDA is an independent non-profit Australian company responsible for formulating and administering policy relating to the .au name space. Endorsed by the Australian Government, auDA is recognised by the Internet Corporation for Assigned Names and Numbers (ICANN) and has authorised 40 organisations to provide services for new domain name registration, domain name renewals and domain name record changes.

Domain names are licensed on a "first come, first-served" basis but must meet Australian eligibility requirements. Registration of a trade mark or a business name does not in itself secure the right to the domain name. Several people may each have legitimate rights



to the same domain name, or a person may register a domain name and use it in a manner that infringes another person's intellectual property rights.

There are several avenues available to resolve disputes about the registration and use of .au domain names, including recourse to the courts or auDA's Dispute Resolution Procedure (auDRP). An auDRP is a modified form of ICANN's Universal Dispute Resolution Procedure (UDRP). Like UDRP, auDRP applies to domain names registered in bad faith. All registrants of .au domain names must consent to the auDRP as a condition of the licence to use the domain name. auDRP has contractual, not legislative effect. auDRP's and UDRP's differences reflect the different prerequisites for registration that apply at the .au domain name level (in particular, the need to have a connection to Australia in order to register a .au domain name).

SOCIAL MEDIA

The number of social media users in Australia is increasing at a rapid rate and the majority of businesses now have accounts with social media outlets. However, only a small number of social media users claim to have read the terms and conditions for posting comments on social media websites.

Social media users are subject to privacy, defamation, competition, consumer protection and intellectual property laws. The courts treat advertisements on social media websites like other online advertising when considering claims of misleading and deceptive conduct.

Businesses that choose to establish and operate accounts on social media outlets need to ensure that they are aware of the terms and conditions of use for the sites and take steps to ensure that their use of social media (like their other operations) complies with privacy, defamation, competition, consumer protection, employment and intellectual property laws. This may include training staff on appropriate use and checking the terms of any licence to use materials posted on social media websites, and ensuring that advertisements on social media outlets are reviewed for legal compliance prior to posting.

Businesses with a social media presence also need to consider the potential impacts of social media use on their branding and reputation, such as the level of control over posts (including redistribution of posts), third-party comments and any potential impacts on confidentiality.

If businesses permit or expect their employees to establish and maintain social media accounts as part of or incidental to their employment, it is advisable to implement and enforce clear policies about whether the business or the individual owns and controls the account and its "followers" or "members".

The blurring of the line between personal and employment related use of social media by employees can also pose significant and diverse risks to an employer's operations and reputation, including disclosure of confidential and commercially sensitive information, work health and safety issues relating to cyber-bullying and sexual harassment, and the solicitation of key customers, suppliers and employees.

Social media policies should also include clear statements about what forms of social media use are permissible, whether (and how) employees can refer to themselves as employees of the business, and what content can be posted.

Useful references

Australian Communications and Media Authority www.acma.gov.au

auDA www.auda.org.au

LIFE SCIENCES

Australia is home to hundreds of companies in the life sciences industries, including pharmaceuticals, veterinary pharmaceuticals, medical devices and technology, biologicals, biotechnology, and agricultural biotechnology. It is also home to numerous world-class universities, major medical research institutes and teaching hospitals. Australia has a long established reputation for excellence in life sciences research, drug discovery, diagnostics, clinical trials and pharmaceutical manufacturing.

Australia's reputation as a centre of excellence for research in the life sciences is built on its wide availability of internationally recognised researchers and a full range of services and facilities to support active drug discovery and clinical trial programs.

The importance of reaping the commercial and social benefits of research is recognised by the Australian medical and business communities, and governments. The commercialisation of research in the medical, pharmaceutical, veterinary and biotechnology industries in Australia is increasing rapidly and is likely to play a key role in the country's future prosperity. Hundreds of life sciences companies, including many of the world's largest pharmaceutical companies, already operate in Australia to commercialise their research. This number continues to grow each year.

REGULATORY ENVIRONMENT

Australia has a strong but flexible regulatory environment. Therapeutic goods, which include pharmaceuticals, medical devices and technology and biologicals, are all regulated in Australia by the Therapeutic Goods Administration (TGA), a body administered by the Australian Government's Department of Health.

The *Therapeutic Goods Act 1989* (Cth) (Therapeutic Goods Act) provides sponsors, manufacturers and importers of therapeutic goods with a national framework of regulation, as well as a system to control the quality, safety, efficacy, and timely availability of therapeutic goods.

Clinical trials of unregistered pharmaceutical goods in Australia are conducted under either the Clinical Trial Notification or Clinical Trial Exemption Scheme, which are administered by the TGA.

Australian practice and standards frameworks are recognised by the US Food and Drug Administration and the European Medicines Agency. This ensures products successfully trialled in Australia have immediate transferability to European Union and US markets.

IMPORTING, MANUFACTURING, SUPPLYING AND EXPORTING THERAPEUTIC GOODS

Before a therapeutic good can be imported into, manufactured in, supplied in, or exported from Australia, it must be granted regulatory approval by the TGA under the Therapeutic Goods Act and entered on the Australian Register of Therapeutic Goods (ARTG).

Although therapeutic goods may be supplied in Australia once granted regulatory approval and entered on the ARTG, prescription medicines are generally not supplied in Australia until they are also listed on the Schedule of Pharmaceutical Benefits. Under the Pharmaceutical Benefits Scheme (PBS), listed medicines are available to Australian residents at prices subsidised by the Australian Government, resulting in a lower cost to consumers than would otherwise be the case. The PBS is governed by the *National Health Act 1953* (Cth).

KEY LEGAL ISSUES – REGULATORY COMPLIANCE AND PATENT PROTECTION AND ENFORCEMENT

Key legal issues that exist for life sciences companies in Australia include regulation and compliance, intellectual property protection and enforcement, corporations law requirements, consumer law compliance, privacy, taxation, and workplace and employment issues.

From a regulatory perspective, compliance with the Therapeutic Goods Act and regulations, as well as the Medicines Australia Code of Conduct and the Medical Technology Industry Code of Practice, are mandatory for applicable life sciences companies. The legislation and codes cover a number of issues, including advertising and promotion, interactions with health care professionals and the regulatory approval of therapeutic goods.

Life sciences companies commonly apply for patent protection in Australia for their inventions and regularly commence litigation in Australia to enforce those patents to protect their products from infringing competition in Australia. As part of that litigation, companies generally seek interlocutory (preliminary) injunctive relief to prevent the launch of competing products. Such litigation also generally involves a challenge to the validity of the asserted patent by the defendant, usually a generic pharmaceutical company.

Australian courts are very experienced in handling patent litigation, and are able to move very quickly to address the often urgent issues that arise in the context of that litigation. Moreover, in recent years, these courts have exhibited a trend of granting interlocutory injunctions in life sciences patent cases; doing so in a significant majority of such cases during this period.

Useful references

Department of Health
www.health.gov.au

Pharmaceutical Benefits Scheme
www.pbs.gov.au

Therapeutic Goods Administration
www.tga.gov.au

MINING

The mining industry continues to be a major driver of the Australian economy. Resource extraction and sale is a vital economic activity and mining contributes approximately 8 per cent to Australia's GDP and constitutes around 60 per cent of exports. Australia is the world's largest exporter of iron ore, second largest exporter of coal, and a major exporter of aluminium, copper, gold, uranium and zinc.

From 2003 to 2015, over AU$400 billion worth of mining projects were initiated in Australia. However, with more and more projects moving into the production phase and the end of the decade-long commodity price surge, investment in the sector has normalised since 2013.

Despite the challenging market conditions, Australia will continue to be an attractive target for foreign investors due to the low equity and asset prices in the sector and the Australian Government's open foreign investment policy. Industry and government are also working together to facilitate a new wave of investment in new mining projects. Further, the sharp rebound in commodity prices in the first quarter of 2016 and unprecedented demand for Lithium in the past year indicate that that there are new opportunities for companies and investors that can adapt to the changing market.

REGULATION AND OWNERSHIP

The general rule in Australia is that ownership of minerals is vested in the Crown. Federal and state governments will grant rights to extract and sell minerals in exchange for the payment of rent and royalties. The calculation of royalty payments will vary for different commodities. The grant of mining rights take the form of mining leases, or tenements, which are subject to strict conditions imposed by the relevant state or federal authority. Depending on the date of grant, certain rights to minerals on some land may have been passed to private land owners upon grant of freehold title.

Mining in Australia is administered by the various state and territory regulatory bodies. Each state and territory has its own, broadly similar, legislative regime which governs all procedures relating to the grant of mining tenements. To a greater or less extent, all jurisdictions apply a "use it or lose it" policy to resolving tenement disputes. Additionally, legislation in each state and territory provides prescribed forms of tenure which are standardised for all holders.

State Agreements

Some states, particularly Western Australia and Queensland, enter into 'State Agreements' when developing significant mining projects. These are essentially contracts between the state and private developers ratified by parliament. These agreements allow certain projects to derogate from the normal regulatory procedures, and provides proponents with more secure rights.

TENEMENTS

Generally speaking there are three types of mining tenements available in Australian jurisdictions: exploration, production and ancillary. Exploration tenements give rights of entry onto the land to explore for minerals. The grant of an exploration tenement also confers rights to conduct works associated with exploring like drilling and extracting samples for analysis. Typically if a proponent establishes a mineral resource to a JORC compliant standard, they will have a right to convert their exploration tenement to a production tenement.

Production tenements permit the exploitation of the mineral resource and the production of the commodity for sale. Mining leases are reserved for proponents who are ready and able to start production and as such the grant of mining leases is strictly regulated in all jurisdictions. Ancillary tenements are other types of mining tenure that are granted in connection with mining operations. These are typically granted for

purposes in connection with mining activities like treating and storing tailings, and constructing related facilities or infrastructure.

Subject to a few exceptions, land in Australia is open for mining and, as such, may be subject to competing tenement applications. In the event that multiple applicants are applying for the same land, priority will generally be given to the applicant who was first in time.

General tenement conditions

Mining tenements will be granted subject to a set of conditions that will vary depending on a range of factors such as jurisdiction, size of project, type of resource being exploited, anticipated expenditure and anticipated environmental impact. The most common conditions related to annual expenditure commitments, restrictions on dealing with a tenement, and environmental conditions relating to preventing environmental harm and remediating damage.

COMPETING LAND USE

The State Minister, or delegate within the relevant government department, has a broad discretion in relation to the grant of mining tenements. As a matter of policy, significant consideration will be given to competing land uses and interests. There are administrative processes by which other interested parties may object to the grant of a mining tenement.

Competing land users may include owners of freehold title, pastoral lessees, native title groups, infrastructure owners and other tenement holders. Once granted, often the exercise of rights under a tenement will be curtailed by legislation governing the enjoyment of concurrent interests in land. Additionally, land users may enter into private land access agreements to deal with overlapping interests.

APPROVALS

The enjoyment of rights under a tenement, primarily those related to the exploitation of mineral resources, will be subject to obtaining certain government approvals. These may include approvals in relation to environmental obligations, preservation of cultural heritage, planning and development, and access to water.

Common environmental obligations include submitting to both state and federal environment impact assessment processes, obtaining emissions licences for things like dust and hypersaline water, and obtaining native vegetation clearing permits. Environmental approvals must be obtained before moving into exploration or production and as such the anticipated timeline for the assessment process can be critical to the viability of the project.

Additionally, proponents commonly have obligations relating to Aboriginal cultural heritage. It is typically an offence to disturb culturally significant or sensitive sites and it may be necessary to enter into land use agreements with Aboriginal groups before conducting certain mining activities.

INVESTING

Investors have several options when acquiring an interest in an existing mining tenement. An acquisition will either take the form of a purchase of mining assets (including tenements, approvals and plant and equipment), or a purchase of shares in the company that is operating the mine. There are a number of other transaction structures available which may enable investors to differ the purchase price of a project, reduce tax liability or gain an interest over time through a "farm-in" arrangement. The appropriateness of each option will depend on a variety of legal and commercial factors.

Due diligence

Depending on the nature and scale of the project, and in light of the above, it can be months or even years from the application for grant of tenement to the commencement of mining. It is therefore critical for investors to undertake comprehensive due diligence to identify the extent to which the necessary tenure and approvals have already been obtained, and the extent to which the proponent rights may be inhibited by other land users.

REAL ESTATE

LAND LAW

Australian land law was originally based on British land law, but has been significantly modified over time, principally by the adoption of the Torrens system for the registration of titles on a central registry and also through the passage of legislation dealing with specific land and general law issues.

Each Australian state and territory has its own version of the Torrens system and its own specific legislation so that practices vary between the different Australian jurisdictions.

All land titles originate from the Crown which, through the government, then grants or sells the land. "Fee simple" ownership, the most complete private title to land, gives the owner the right to always occupy and possess the land, and to sell, lease and mortgage it to any third party – generally without interference from the government.

The Crown may also grant leases or licences of land. Large areas of the more remote parts of Australia have been granted by way of "pastoral leases". Although described as leases, in many cases they are grazing licences, giving only the right to graze sheep and cattle and carry out ancillary or incidental works.

Title registration system

The Torrens system is a land title registration system with a central registry, which is searchable. A genuine purchaser of land from the registered owner of the land is guaranteed good title to the land by the government, even if the former owner became registered through fraud or mistake.

All easements, covenants and other restrictions on the land, as well as mortgages and (in most states) leases must generally be registered to be enforceable at law against a purchaser. The title registration system therefore provides purchasers of land with a high level of certainty, both as to ownership and as to any encumbrances or restrictions on the land.

There are still small remnants of land in some states that are not included in the title registration system (known as General Law Land), but they are gradually being brought under the operation of the registration system.

Strata title

It is common for multi-storey buildings in Australia to be held under strata title. The concept of strata title enables land to be subdivided into different horizontal layers, or "strata".

Since its inception in Australia in 1961, strata title has been adopted in a number of other countries and has become an exceedingly common form of land ownership within Australia.

Strata title schemes are comprised of strata units and common property, which are created when a strata plan is registered on the Torrens register.

The common property is owned and managed by an 'owners corporation' for the scheme, which is a body corporate composed of the owners of all the individual units within the strata plan.

Owners of land held under strata title have all the benefits and protections of the Torrens system.

Security of title

Once title has been granted by the Crown, whether it is fee simple, lease, pastoral or otherwise, the Crown cannot reacquire that land unless:

- it is for a "public purpose" or similar purpose
- just compensation is paid for the acquisition.

Leases and licences

Australian law recognises the British distinction between leases, granting exclusive possession of land; and licences, granting only a contractual right to occupy land in common with others. Commercial leases and licences are largely unregulated and their duration can vary widely, from as short as an hour to as long as 999 years.

Most Australian states and territories have standard form lease documents provided by the local law society or real estate institute that can be used in simple transactions, however the terms of leases otherwise vary widely and may fit onto a single page or require more than 100.

Specific types of leasing such as retail or shop leases and residential leases are heavily regulated with specific legislation in each Australian state and territory imposing similar laws, but with local variations.

Leases in most Australian states and territories of longer than three years must generally be registered on the certificate of title under the title registration system in order to be enforceable against the landlord. Registered leases can be searched and a copy obtained.

Retail leasing

Retail leasing is an area that has been heavily regulated in Australia to deal with the perceived inequality of bargaining power between retail tenants and major shopping centre operators.

However, in practice the legislation also covers small landowners leasing to large and small tenants, subject to some exceptions, and in some states covers retail services businesses, such as solicitors and accountants. As the legislation in this area is regularly reformed, DLA Piper produces a guide to retail leasing, which is available on request.

Planning laws

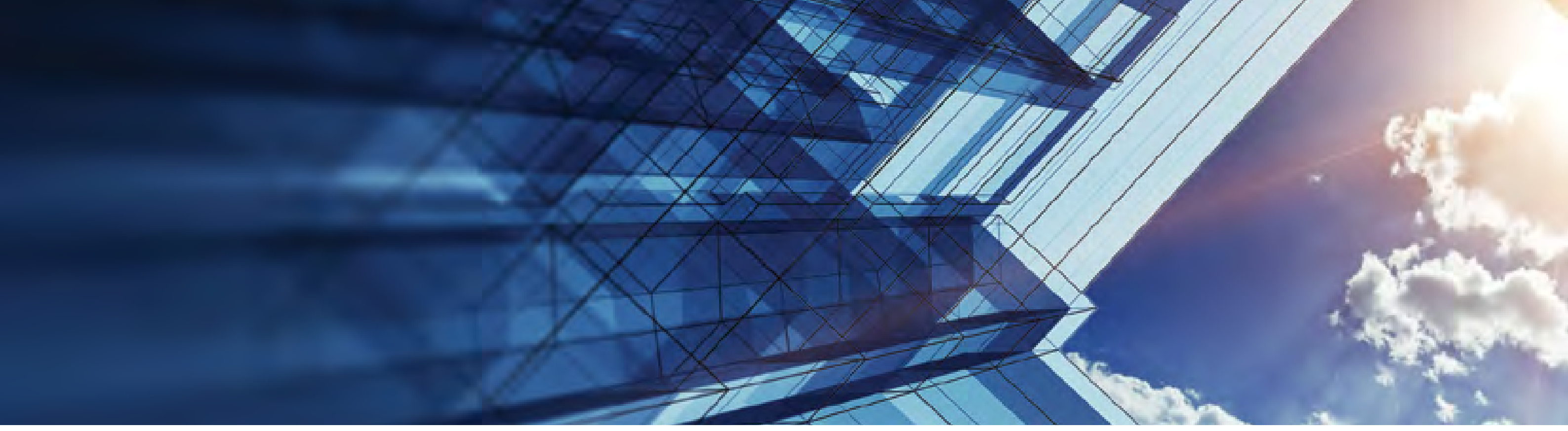
There are state and territory planning laws that restrict and control the use, development and subdivision of land. The planning law may provide for any use, development or subdivision to be "as of right" (no further permission required), subject to permission (which may be discretionary or subject to certain mandatory requirements, or both) or in some states, absolutely prohibited. There are generally appeal rights where the proposed use, development or subdivision is at the discretion of a planning authority. If a use, development or subdivision is prohibited under the planning law, it can only lawfully proceed if the planning law is changed.

Environmental regulation

Protection of the environment is a major priority in Australia, and environmental issues receive a great deal of media and public attention. Australia has had a strict system of federal and state environmental regulations prohibiting the discharge of pollution and waste to air, water or soil. Recently, an improved range of regulatory mechanisms involving more flexibility have allowed for a spirit of cooperation between business and government.

There are increased opportunities for industry to interact directly with government authorities to plan targets for waste control and disposal. Each state has its own environmental legislation and administration, and its own regime for town planning, control of pollution, clearing vegetation and the use and extraction of water.

In most states, the body with responsibility for environmental administration is known as the Environment Protection Authority. There are some environmental issues, for example water, where a coordinated national approach to ecologically sustainable development has been undertaken by all tiers of government.



Transaction and other taxes

The acquisition of properties in Australia is ordinarily subject to stamp duty based on the value of the property being acquired. This can be as high as 4.5 per cent or seven per cent depending on the type of property, its value and location, as each state and territory has its own rate of stamp duty.

Most land owners are assessed to land tax annually, generally assessed on the unencumbered value of the land, that is, without improvements. The rates of land tax also vary from state to state and reach 3.7 per cent.

Owners of land may also be subject to Capital Gains Tax (CGT) when the land is sold, if the owner has made a capital gain on the land, during the period of ownership. CGT is discussed further in the Taxation chapter.

Foreign investment in land

Australian land is very popular for investment by foreign nationals and foreign corporations. Under Australian law, land may be purchased and owned by foreign investors, however in the majority of cases the approval of the Foreign Investment Review Board (FIRB) will be required, unless the land falls under one of the exemptions. For further detail on foreign investment and FIRB, see the Investment in Australia chapter.

Native title

In 1992, in a decision of the High Court known as the Mabo decision, Aboriginal and Torres Strait Islander indigenous laws and customs in relation to land were legally recognised as forming part of the law of Australia. Those indigenous land laws are recognised if:

- there is maintenance of traditional rights and custom in respect of the land
- the traditional owners can demonstrate that they are the legitimate successors to the land
- there has been no clear and unambiguous act of government to extinguish or impair native title, for example by the grant of a fee simple title, pastoral lease or mining licence.

To avoid uncertainty in relation to title, the *Native Title Act 1993* (Cth) validated all freehold grants of title and most Crown leases in existence on 1 January 1994 to the extent they would otherwise be invalid because of the prior rights of native title holders. The legislation also extinguished native title where there had been grants of fee simple and in relation to most leasehold interests.

Native title is not an issue in respect of most urban land, but it is a factor to consider in relation to land that is sold or leased by the Crown after 1 January 1994.

Heritage

Federal, state and territory legislation can protect designated areas, buildings and objects from development, destruction or removal. The heritage controls are sometimes given effect in planning laws, or they may also run parallel with them.

Protection of Aboriginal culture

Specific legislation protects places and objects of cultural significance to Aboriginal and Torres Strait Islander people. It may be necessary to investigate whether legislation of this sort is applicable where developments concerning land are proposed, particularly in areas where there may be a strong Aboriginal or Torres Strait Islander community. The legislation provides for a variety of mechanisms ranging from complete protection from development by declaration (usually by a government minister), as well as lesser forms of protection (for example, consultation and management strategies).

LIQUOR LICENSING

Background

Liquor licensing in Australia is governed by various state and territory legislative enactments. Responsibility for the enactments is held by the various state liquor licensing courts, commissions or authorities. Many of the states have had liquor licensing legislation reviews and amendments in recent years.

The variety of licensed businesses is reflected by numerous types of liquor licences available in Australia. The requirements for transfer of licences vary from state to state, as do the hours of operation and standard conditions endorsed on a licence.

Applications

Generally, a licence is obtained by making a formal application to the state licensing authority, commission or court. In most states, a significant volume of supporting documentation must be lodged with the application, including planning approval, plans of the premises, registration by the local health department and evidence of the good character of the applicant or directors of the applicant company.

Further information for foreign parties looking to invest in Australian real estate is available on our DLA Piper RealWorld website www.dlapiperrealworld.com/countries/australia

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Taxation is spread between Australia's three levels of government.

At the federal level, the Australian Government collects almost 81 per cent of the tax paid in Australia and is the only level of government that levies income tax, its major form of revenue. In addition, it levies a Goods and Services Tax (GST) and also levies tariffs on a number of imported items.

State governments variously impose a large number of taxes. Principal among these are land tax, payroll tax, stamp duty and motor vehicle registration duty. Local governments also impose taxes – chiefly, rates payable by land owners – though these make up less than 5 per cent of taxes levied on the private sector.

There are a number of issue-specific reviews (for example, trust taxation and transfer pricing) of the tax system currently underway. As with all decisions, businesses need to consider any proposed changes, factoring them into business plans and activities. In particular, businesses should prepare before any tax change commences.

INCOME TAX

Australia's income tax system is administered by the Federal Commissioner of Taxation (the Commissioner), who is responsible for the operations of the Australian Taxation Office (ATO).

Income tax is governed by many enactments. The main legislation is the *Income Tax Assessment Act 1936* (Cth) and the *Income Tax Assessment Act 1997* (Cth). These and the common law form the basis for Australia's current income and capital gains taxation system. Administrative rulings and determinations are also involved.

Federal income tax returns must be lodged annually. The Australian tax year, or year of income, ends on 30 June. A Substituted Accounting Period (SAP) may be adopted as the income tax year with the written approval of the Commissioner. An application for a SAP may be lodged where special circumstances exist to justify one.

The system operates by way of self-assessment, together with random ATO audits to verify assessments. Taxpayers may seek a binding private ruling from the Commissioner in relation to a transaction or arrangement.

INCOME TAX LIABILITY

General rule

Australian residents are liable for tax on all their income and capital gains from sources anywhere in the world. Income from foreign service is assessable regardless of whether the employer is foreign or Australian.

An Australian resident's foreign earnings, however, will generally be tax exempt if the resident is employed for longer than 91 days. However, this exemption is restricted to employees who are engaged in foreign service attributable to certain Australian Government and official development assistance or certain developing country relief work.

Non-residents are generally taxed on all income and capital gains from Australian sources. A network of Double Taxation Agreements (DTAs) operates to modify these rules. Income or capital gains not earned from an Australian source by people who are not Australian residents is generally not liable for tax in Australia.

Tax on income not derived from an Australian source (foreign residents)

A number of situations exist in which foreign residents are taxed on non-Australian income. These include interest, royalties, unfranked dividends and other similar payments to a non-resident by an Australian resident.

The residence test

Residence is determined primarily by the ordinary meaning of "resides". People domiciled in Australia are generally deemed residents of Australia. One statutory test is whether a person is in Australia, continuously or intermittently, for more than six months of a financial year. In this case, he or she is considered a resident unless they can establish that their usual residence is outside Australia and that they do not intend to reside in Australia.

As residency is a question of fact, people who are in Australia for less than six months may also be able to establish that they are Australian residents. A number of factors determine a person's residency. Each DTA between Australia and a treaty country also contains rules to determine residency, including "tiebreaker" rules.

Companies

A company is resident in Australia if it:

- is incorporated in Australia, or
- carries on business in Australia and either:
- its central management control is in Australia, or
- its voting power is controlled by shareholders resident in Australia.

If company directors usually undertake business and make decisions in Australia then, as a general rule, the residence test will be satisfied. Again, residency is a question of fact decided in each case by reviewing the company's business and trading.

Trusts

Trusts will be resident trust estates during a financial year if their trustee is an Australian resident or its central management and control is in Australia.

TAX RATES

Company tax rate

Both Australian resident companies and foreign resident companies (with Australian-sourced income) are subject to income tax at the company tax rate of 30 per cent.

The Australian Government announced in the 2016-17 Federal Budget that the company tax rate will be progressively reduced for small businesses with an annual turnover of less than AU$10 million, initially to 27.5 per cent from 1 July 2016, and ultimately for all companies by 2023-24. A target has been set to reduce the company tax rate from 30 per cent to 25 per cent over 10 years.

Tax rates

Australian resident individual tax rates for 2016-17 are:

Taxable income (AU$)	Tax on this income (AU$)
$0–$18,200	NIL
$18,201–$37,000	19c for each $1 over $18,200
$37,001–$80,000	$3,572 plus 32.5c for each $1 over $37,000
$80,001–$180,000	$17,547 plus 37c for each $1 over $80,000
$180,001 and over	$54,547 plus 45c for each $1 over $180,000

Medicare Levy

A Medicare Levy of two per cent of taxable income is payable on top of these rates unless the person is a low income earner. Certain other exemptions apply, including for non-Australian residents for tax purposes. In other cases, a reduced levy may be available to certain non-residents. An additional surcharge of 1-1.5 per cent is payable by high income earners who do not have private patient hospital cover for themselves and their dependents for the relevant income year.

This surcharge is also payable by single people without dependent children and who have a taxable income of AU$90,001 or greater for the 2015-16 income tax year, and by family members if the combined taxable income of the person and their spouse is greater than AU$180,001 for the 2015-16 income tax year. On top of this, the threshold increases by AU$1,500 for each dependent child after the first. A person is considered a family member if they have a spouse, dependent children, or both.

Budget Repair Levy

A Budget Repair Levy applies to individuals with a taxable income in excess of AU$180,000. The levy applies at a rate of two per cent until the income year ending 30 June 2017.

The top rate of tax currently payable by individuals with taxable income above AU$180,000 is 47 per cent when combined with the two per cent Medicare Levy. Thus, the additional two percent Budget Repair Levy will effectively take the top marginal tax rate to 49 per cent until 30 June 2017.

A number of other tax rates, including trust tax rates, which are calculated by reference to the top personal tax rate have also temporarily increased until 30 June 2017, while the Budget Repair Levy is in place.

CAPITAL GAINS TAX

Capital Gains Tax (CGT) forms part of the income tax regime. Capital gain is calculated on the proceeds from the disposal of the asset less its cost and any incidental costs associated with its purchase and disposal. Capital losses may only be offset against current or future capital gains. The taxable part of the gain is treated as assessable income.

Some assets are exempt from CGT, for example an individual's principal residence and motor vehicles, but generally the types of assets subject to CGT are very broad. Various small business CGT concessions are also available, for example where the business is related to an entity's own net assets of AU$6 million or less and the assets are used in a business, though special rules about control may apply. At times, CGT may be deferred where one CGT asset is rolled over into another.

Non-residents are only subject to CGT where:

- They have a direct or indirect interest in Australian real property – an indirect interest includes an interest held through a non-portfolio interest, ie where an interest of 10 per cent or more is held through an interposed entity. Non-portfolio interests held by non-residents in both Australian and foreign entities will only be subject to Australian CGT where at least 50 per cent of the asset's value is attributable to underlying Australian real property; or
- The assets have been used to carry on a business through a permanent establishment.

New legislation has been introduced to impose a 10 per cent non-final withholding tax on payments made to foreign residents that dispose of certain taxable Australian property. The obligation is on the purchaser to withhold 10 per cent of the purchase price and pay that amount to the ATO. The new withholding regime applies to contracts entered into on or after 1 July 2016.

For assets held for at least one year, Australian resident individual taxpayers and trusts have the choice of including either half the realised nominal gain or the

whole of the difference between the disposal price and the frozen indexed cost base in their assessable income. Australian resident complying superannuation funds would include two-thirds of the net gain.

Companies must include in their assessable income the whole of the difference between the realised price of the asset and its cost base.

TAX LOSSES

Company tax losses can be carried forward indefinitely and can be offset against assessable income. However, this right may be lost if a company's ownership changes. The test for this is whether more than 50 per cent of all voting, dividend and capital rights are beneficially owned by the same people who held the rights when the loss was incurred.

A loss may remain deductible if the company carries on the same business after its ownership changes. Capital losses may also be carried forward indefinitely but may only be used to offset capital gains. Complex provisions apply to the carrying forward of tax losses.

CONSOLIDATION REGIME

For income tax purposes, a head company of a wholly owned group of entities can elect to consolidate with its wholly owned Australian subsidiaries. Under a "one in, all in" principle, the wholly owned subsidiaries become subsidiary members of the consolidated group.

Together with the head company, these constitute the members of the group and, while consolidated, will be considered a single entity for income tax purposes. Thus certain intra-group transactions are ignored for income tax purposes. All group members can in some circumstances be liable for the group's tax debts. Such groups often enter into internal arrangements concerning an allocation of tax responsibilities known as "tax sharing" and "tax funding" agreements.

TRUST WITHHOLDING REGIME

Certain distributions made by an Australian Managed Investment Trust (MIT) to foreign resident investors in the MIT are subject to a concessional rate of withholding tax (prior to 1 July 2008, the withholding tax rate was 30 per cent or higher). The rate of withholding differs depending on whether the investor's address is in a jurisdiction with which Australia has an effective Exchange of Information (EOI) agreement (which includes the UK, the US and New Zealand). The rate of withholding is 15 per cent.

Where the investor does not reside in an EOI jurisdiction, the rate of withholding tax continues to be 30 percent. The concessional tax rate only applies to distributions from a MIT of Australian source net income other than dividends, interest and royalties.

A new regime for Attribution Managed Investment Trusts (AMIT Regime) applies from 1 July 2016, however a Trustee can choose to apply the rules retrospectively from 1 July 2015. Broadly, under the AMIT regime, qualifying MITs will, amongst other things, be treated as a fixed trust for income tax purposes and will be able to "flow through" taxable income to their unitholders on an "attribution" basis, and for that taxable income to retain its character for tax purposes as it flows through the trusts. This new regime should significantly improve the operation of the taxation law for MITs by increasing certainty, allowing greater flexibility and reducing compliance costs.

COLLECTIVE INVESTMENT VEHICLES (CIVs)

As part of the 2016-17 Federal Budget, the Australian Government announced the introduction of two new types of CIVs – a Corporate CIV from 1 July 2017, and a Limited Partnership CIV from 1 July 2018. Generally, these CIVs will be treated as "flow-through" entities for tax purposes provided they are "widely held" and engage primarily in passive investment, like the existing MIT regime.

INNOVATION INCENTIVES

From 1 July 2016, tax incentives are available for eligible early stage investors and venture capital investors, in the form of tax offsets and CGT concessions.

TAXATION OF FINANCIAL ARRANGEMENTS

The Taxation of Financial Arrangements (TOFA) rules apply mandatorily to certain financial arrangements of certain taxpayers entered into from 1 July 2010.

The regime contains a set of rules that determines the tax timing and character treatment of gains and losses arising from such financial arrangements and more closely aligns the tax treatment with the accounting treatment.

Broadly, TOFA only applies mandatorily to certain financial sector entities with a turnover of AU$20 million or more, certain superannuation entities with assets of AU$100 million or more and to other entities with turnovers that meet certain turnover, asset or financial asset thresholds. However, any taxpayer can elect for the rules to apply to them. Some financial arrangements are specifically excluded from the operation of the TOFA rules. A taxpayer has to determine whether or not to make the following types of elections:

- Whether or not to enter into TOFA (if TOFA does not compulsorily apply)
- Timing of when to enter into TOFA.

DTAs AND PERMANENT ESTABLISHMENTS

Residents in countries that have a Double Taxation Agreements (DTA) with Australia are only subject to taxes on business profits in Australia if they conduct business in Australia through a permanent establishment. A foreign company is not considered a permanent establishment simply because it has an Australian subsidiary. Similarly, if the foreign resident operates only through an independent agent who cannot bind it, then it also is not a permanent establishment.

Countries with which Australia has DTAs

Argentina, Austria, Belgium, Canada, Chile, China, Czech Republic, Denmark, Fiji, Finland, France, Germany, Greece, Hungary, India, Indonesia, Ireland, Italy, Japan, Kiribati, Korea, Malaysia, Malta, Mexico, Netherlands, New Zealand, Norway, Papua New Guinea, Philippines, Poland, Romania, Russia, Singapore, Slovak Republic, Spain, South Africa, Sri Lanka, Sweden, Switzerland, Taiwan, Thailand, Turkey, the UK, the US and Vietnam. Additionally, in September 2015 the Australian Government commenced negotiations on a new DTA with Israel.

Withholding tax

Certain payments made by an Australian resident to a foreign resident may be subject to withholding tax in Australia; in particular, royalties (at 30 per cent), interest (at 10 per cent) and dividends (at 30 per cent). Certain exemptions from withholding tax are available under Australian domestic law. In addition, the withholding tax rates may be reduced under an applicable DTA.

THIN CAPITALISATION

Rules operate to prevent multinational entities allocating a disproportionate amount of debt to their Australian operations. Interest payable on debt may be deductible for tax purposes whereas dividends paid on equity are not.

Broadly, the thin capitalisation rules operate when the amount of debt used to finance the Australian operations of multinational corporations exceeds specified limits. These disallow a proportion of the deductible finance expenses, for example interest attributable to the Australian operations.

Once a group consolidates, thin capitalisation rules apply to the head company. An Australian branch of a foreign bank can be part of a group's head company or part of a single resident company for the purpose of determining their thin capitalisation position.

The rules may apply to:

- Australian entities that are foreign controlled and foreign entities that either invest directly into Australia or operate a business through an Australian permanent establishment
- Australian entities that control foreign entities or operate a business through overseas permanent establishments and associate entities.

There are two exemptions from thin capitalisation rules

- Taxpayers and their associates claiming annual debt deductions of AU$2 million or less
- Outward investing Australian entities, if at least 90 per cent of their assets (excluding those of a private or domestic nature) are Australian.

Application to Authorised Deposit–taking institutions

For Authorised Deposit-taking Institutions (ADIs) such as banks, debt deductions will be reduced where the equity capital that is funding Australian operations is less than the minimum equity requirement. For inward-investing ADIs (i.e. foreign ADIs with Australian permanent establishments) the minimum amount of equity capital is the lesser of the:

- Safe harbour capital amount of six percent risk-weighted assets of the Australian banking business
- Arm's length capital amount determined in a similar manner to the arm's length debt amount for non-ADIs, that is, a notional amount representing what would reasonably have been expected to be the entity's minimum arm's length capital funding of its Australian business throughout the year.

Outward-investing ADIs (i.e. Australian ADI entities with foreign investments) have the same requirement but also must have capital to match certain other Australian assets. The minimum amount of equity capital for outward investing ADIs is the least of the:

- Safe harbour capital amount of six per cent of the risk-weighted assets of the Australian banking business
- Arm's length capital amount, i.e. a notional amount representing what would reasonably have been expected to have been the bank's minimum arm's length capital funding of its Australian business throughout the year
- Worldwide capital amount allowing an Australian ADI with foreign investments to fund its Australian investments with a minimum capital ratio equal to 100 per cent of the Tier 1 capital ratio of its worldwide group.

Application to non-ADIs

For organisations that are not ADIs, debt deductions reduce where the amount of debt funding of Australian operations exceeds a specified maximum, which varies according to whether the entity is a financial institution and whether it is inward or outward-investing.

For non-ADI foreign entities with Australian investments, the maximum amount of debt will be the greater amount determined under either the safe harbour debt test or the arm's length debt test.

Under the safe harbour test, the amount of debt used will be considered excessive when it is greater than the gearing limit of 1.5:1. For financial entities, this gearing ratio only applies to their non-lending business.

Special rules delivering higher gearing ratios for financial entities with assets allowed to be fully debt-funded also apply. For the purposes of the safe harbour test, asset and liability take their accounting meaning.

The arm's length debt amount is determined by analysing an entity's activities and funding to deliver a notional amount that represents what would reasonably have been expected to be the entity's maximum arm's length debt funding during the period.

For non-ADI Australian entities with foreign investments, the maximum deductible debt amount will be the greatest determined under either the:

- safe harbour debt test
- arm's length debt test
- worldwide gearing debt test.

The safe harbour limit and the arm's length test are fundamentally the same as those described for non-ADI foreign entities with Australian investments. However, they take account of the amount and form of investment in the Australian non-ADI's controlled foreign investments.

The worldwide gearing debt test allows an entity to fund its Australian investments with gearing of up to 100 per cent of the gearing of the worldwide group it controls as at 1 July 2014.

TRANSFER PRICING (SHIFTING PROFITS OUT OF AUSTRALIA)

Australia's *Income Tax Assessment Act 1997* (Cth) deals with arrangements by which profits are shifted out of Australia.

Where an entity which engages in international related party dealings obtains a "transfer pricing benefit", the rules will apply to deem "arm's length conditions" to operate in lieu of the actual conditions that produced the benefit. The "arm's length conditions" are not limited to price but can include gross margin, net profit and other conditions.

Further, the rules are self-executing – that is, the Commissioner of Taxation does not need to make a determination before the rules are applicable.

ATO RULINGS AND ADVICE

The ATO and the different state revenue offices issue public rulings, determinations, interpretative decisions and practice statements, which set out their views on the operation of the relevant federal or state law. The various forms of ATO advice provide different levels of protection as to penalties, interest or primary liability.

In addition, a taxpayer can seek certainty in respect of how the ATO will treat the income tax, Fringe Benefits Tax (FBT) or GST laws as they apply to their tax affairs by applying for a private ruling.

A private ruling is legally binding on the Commissioner and protects the taxpayer from penalty, additional primary tax and interest when they rely on a ruling. Where a class of persons is involved, or the subject matter concerns the tax implications of a particular product, a class ruling or product ruling can be sought.

OTHER TAXES

Goods and Services Tax (GST)

GST is a value-added tax of 10 per cent, which is payable on supplies of any form whatsoever including goods, services, real property, rights and obligations and is generally applied at each stage of the production and distribution chain.

Individuals, companies, trusts, tax and legal partnerships and government entities that meet an annual turnover threshold of AU$75,000 are registrable for GST. Most registrable entities become liable for GST on the issue of an invoice or the receipt of a payment, whichever is the earlier.

There is no statutory right to increase prices on account of GST, so businesses generally seek reimbursement by way of a GST clause in their contracts or by charging a GST-inclusive price. Where the recipient is a business, it can generally claim back the GST charged to it as an input tax credit from the ATO in its GST return. However, input tax credits are not available for all businesses, for example where an expense relates to an input taxed supply made by the business, such as a financial supply. In this case, any GST borne by the recipient is a real cost.

Not all supplies are taxable. For example, financial supplies, which include granting loans and transfers of securities, are input-taxed where they involve Australian parties. Thus no GST liability arises for the supplier but it may not be entitled to claim a full input tax

credit on expenses related to the input taxed supply. For example, there is no GST on a share sale, but the vendor and the purchaser may not be entitled to claim input tax credits on their transaction costs, such as legal and accounting advice. There are a number of special rules in this area.

Other supplies, such as exports, certain food products, health and education are GST-free. In these cases, there is no GST liability for the supplier and the supplier can generally claim an input tax credit on expenses related to GST-free supplies. The sale of a business via an asset sale is generally sold as a GST-free going concern. The going concern test is a technical test and there are a number of requirements that need to be met. The benefits of using the going concern exemption include cash flow and stamp duty savings (the latter since stamp duty is calculated on the GST-inclusive purchase price). Expert advice should be obtained on any business purchase.

Cross-border transactions

Cross-border transactions are another area that give rise to complex GST issues. Australia has very broad GST cross border rules, such that many non-residents have a GST liability in Australia (even where they do not carry on business in Australia) and many Australian businesses need to charge GST to non-resident customers. All cross – border transactions require GST advice.

The Australian Government has recently amended the GST Act so that it applies to inbound intangible supplies, made by non-resident suppliers to "Australian consumers" from outside of Australia, with effect from 1 July 2017. In this context, intangible supplies refer to anything other than goods or real property, including: digital content, contractual rights, intellectual property, insurance and remotely performed services. Generally speaking, GST will not apply to inbound intangible supplies made from outside of Australia to GST registered business entities. This particularly reform is often cited in the media as the "Netflix Tax".

Presently, goods valued at less than A$1,000 (other than tobacco and alcohol) can be imported into Australia via parcel without GST applying. The Australian Government has also announced an intention to remove this threshold and to apply GST to all importations, again with effect from 1 July 2017. The Government's intention is for the tax to be paid by the non-resident supplier or, alternatively, the operator of the online market place through which the goods were sold. The Government does not intend to stop packages at the border to assess and impose GST. At the time of writing no draft legislation has been released in respect of this particular reform proposal.

Fringe Benefits Tax

Fringe Benefits Tax (FBT) is a federal tax of 49 per cent paid by employers on the taxable value of specific non-cash benefits provided to employees and their associates, whether provided by the employer or by a third party. It is calculated annually and paid quarterly or annually.

The taxable amount is determined by classifying fringe benefits into two types to account for the different treatment of certain people and benefits under FBT legislation. FBT paid by employers is tax deductible.

FBT applies to the private use of motor vehicles, the waiver of debts, the giving of interest-free or low interest loans and free or cheap housing, to name a few. Concessions are available for certain benefits paid to employees who relocate for their employment.

Payroll tax

States and territories levy payroll tax on an employer's total wages paid or their equivalent, for example, fringe benefits. Ranging between 4.75 per cent and 6.1 per cent of the payroll value, the tax rate differs between jurisdictions. Exemptions for total annual payrolls below certain thresholds are provided by individual states and territories. In some cases, if the total payroll of an employer is below this amount, no tax is payable. The thresholds vary and presently

range from AU$600,000 to AU$1.5 million, depending on the jurisdiction. Generally, wages include some amounts paid to independent contractors for payroll tax purposes.

Related or associated business entities may be grouped together for payroll tax purposes. This is particularly relevant for entities seeking to rely on a threshold for an exemption or concession (the thresholds typically apply to a group as though it is a single entity).

Duty

Duty (also referred to as stamp duty), is imposed differently in each state and territory. Duty applies principally to transactions such as transfers of land, transfers of businesses, transfers of unlisted shares and the taking of security for financial accommodation, for example mortgages and charges.

Depending on the nature of the instrument and transaction, duty varies from 0.4 per cent to 7 per cent. Each state's and territory's stamp duty law is different, with some transactions being dutiable in some but not in others. For example, only New South Wales charges duty on the transfer of unlisted shares.

Trades in all securities listed on the Australian Securities Exchange (ASX) are not dutiable in all states or territories, except in certain circumstances where the listed company owns significant land assets in particular Australian states or territories and at least 90 per cent of the shares in the company are transferred.

A key area is the imposition of "land rich" or "landholder" duty on share or unit acquisitions where the vehicle owns significant land assets in Australia. Duty may then be up to seven percent of the land value, multiplied by the proportionate interest acquired in the vehicle.

Land tax

Each state and territory imposes land tax at varying levels and conditions. Generally, land tax is payable annually based upon the unimproved value of land owned and applying only above a certain threshold value.

Useful references

Australian Government Budget www.budget.gov.au

Australian Taxation Office www.ato.gov.au

The Treasury www.treasury.gov.au

TRANSPORT AND CUSTOMS LAW

CARRIAGE OF GOODS BY SEA

Australia's maritime law is headlined by its *Carriage of Goods by Sea Act 1991* (Cth), which governs the liability of carriers and the sea carriage of goods.

A modified version of the Hague-Visby Rules applies to all shipments out of Australia and includes the package limitation of a carrier liability of the greater of 666.67 Special Drawing Rights (SDRs) per package or unit, or two SDRs per kilogram of gross weight of the goods lost or damaged.

The rule applies to bills of lading and consignment notes, sea waybills and ships' delivery orders, as well as to electronic bills of lading. A carrier's responsibility for shipments out of Australia extends from the time the goods are delivered to it within the limits of the port or wharf until the goods are delivered from the limits of the discharge port.

In certain circumstances, a carrier may also be liable for a loss due to delay but liability is limited to two-and-a – half times the freight payable for the goods delayed. For shipments into Australia, jurisdiction clauses contained in bills of lading are ineffective if they preclude or limit the jurisdiction of Australian courts.

Ship arrest

Australia is a signatory to the 1952 Convention on the Arrest of Sea-Going Ships.

Under the *Admiralty Act 1988* (Cth), in rem jurisdiction is exercised by Australia's Federal Court and the Supreme Court of each state and territory. The right to commence proceedings against a ship extends to maritime liens, proprietary maritime claims (i.e. claims to title in respect of the mortgage of a ship) and general maritime claims, which include claims for damage to goods or property, claims for salvage and personal injury claims.

For general maritime claims, in rem proceedings can only be commenced if the person with personal liability for the claim (i.e. the "relevant person"), is the owner or demise charterer of the ship at the time proceedings are commenced. In rem proceedings can also be commenced against a surrogate or sister ship.

By commencing in rem proceedings, the plaintiff has an automatic right to obtain an arrest warrant from a court unless a caveat against arrest has been lodged.

Following arrest, it is common for security to be provided by a P&I Club (a mutual insurer of shipowners) for the amount of the claim plus interest and costs by way of a written undertaking, also known as a "Club letter".

Limitation of liability

Australia is a signatory to the 1996 Protocol to the 1976 Convention on Limitation of Liability for Maritime Claims.

Under the *Limitation of Liability for Maritime Claims Act 1989* (Cth), ship-owners, including owners, charterers, managers and operators of a sea-going ship, are entitled to limit liability for damage to property occurring on-board or in direct connection with the operation of the ship.

Registering a ship

A ship must be registered under the Australian flag if:

- More than half of the 64 possible shares in the ship are owned by Australian nationals or companies, where there are multiple or common owners, or it is operated by Australian nationals or an Australian company
- It is a commercial ship more than 12 metres in overall length
- It is a commercial ship more than 12 metres in overall length on demise (i.e. bare boat), chartered to an Australian-based operator.

A ship may be registered in Australia if:

- More than half of the 64 possible shares in the ship are owned by Australian nationals or companies

- It is less than 12 metres in length overall and wholly owned or operated by Australian residents, nationals or companies
- The ship is less than 12 metres in length overall and on demise, i.e. bare boat, chartered to an Australian-based operator.

CARRIAGE OF GOODS BY AIR

Since 24 January 2009, the Montreal Convention 1999 has formed part of Australian law and is incorporated into Australian law by way of amendments made to the *Civil Aviation (Carriers' Liability) Act 1959* (Cth).

Under the Montreal Convention, an air carrier is strictly liable for damage to goods occurring during international air carriage.

If the country from where the goods have been carried is a signatory to the Montreal Convention, the amount recoverable is limited to 19 SDRs per kilogram of cargo. When the country from where the goods have been flown is not a signatory to the Montreal Convention, the 250 gold franc limit provided for in the Warsaw Convention may apply.

In relation to death or injury claims, an air carrier is strictly liable for damages up to 113,100 SDRs and is exposed to unlimited damages unless it can establish that damage was not caused by its negligence or was caused by the negligence of a third party.

In relation to baggage claims, the limit of carrier liability is 1,131 SDRs.

In relation to domestic air carriage by a regular public transport operator, the current limit of passenger liability is AU$500,000 for death or personal injury.

CARRIAGE OF GOODS BY ROAD

In Australia, road carriers are able to limit or exclude their liability for loss or damage to goods by incorporating properly worded terms and conditions into their carriage contracts. This is different from many other countries and it is usual for Australian road carriers to claim to exclude all liability for loss or damage to goods.

However, in the case of carriage and storage of household goods and personal effects, implied guarantee to exercise due care and skill applies in line with certain contracts for the supply of services. In this case, *Australia's Competition and Consumer Act 2010* (Cth) and the Australian Consumer Law that forms part of that Act come into play.

CUSTOMS AND TRADE LAW

Imports and Exports

Importing and exporting goods is principally covered by the *Customs Act 1901* (Cth) (Customs Act) and associated Regulations.

Compliance with customs

The Australian Customs Service (Customs) expects that industry and the international trading community will comply with the customs legislation in all transactions involving the movement of ships and aircraft to and from Australia. There are a number of penalties for noncompliance, many of which are strict liability and do not require intent in order to be proven. These relate to providing false or misleading statements, unauthorised goods or interference with goods, and loading goods for export without authority to deal. Customs will consider whether a sanction is the best means for achieving future compliance.

Liability for payment of customs duty and Goods and Services Tax (GST) arises when the goods are entered for home consumption, that is, when they are cleared through customs. Such liability is imposed on the owner of the goods, where "owner" is broadly defined.

Goods must be entered for home consumption by the end of the day following their import into Australia, that is, the administrative process of clearing the goods

through Customs must be complete by that time. Even if a Customs agent is employed to clear the goods, the importer is responsible for the accuracy of the entry.

If goods are merely passing through Australia, no duty or GST is levied. However, Customs officers have powers of direction over transhipped goods.

Integrated Cargo System

The Integrated Cargo System (ICS) was introduced in 2005 and Customs requires all cargo to be reported electronically on the ICS prior to arriving in Australia. This includes in-transit and transhipment cargo.

Customs has a number of specific requirements for communicating electronically with it and these should be reviewed on their website (see details below).

Australian Quarantine Inspection Service requirements

The Australian Quarantine Inspection Service (AQIS) has strict quarantine requirements that must be complied with before goods can be imported to, or exported from, Australia. These include examination and inspection of all animal, plant and human products and should be reviewed on the AQIS website (see details below).

Import Permit System Regulations

The Customs Act prohibits the import of certain goods, either absolutely or conditionally. The nature of the goods determines whether or not a permit to import the goods is required under the Customs (Prohibited Imports) Regulations. The value of the goods has no bearing on the matter.

Goods requiring an import permit include such things as food and plant imports, protected wildlife, motor vehicles, intellectual property, drugs, firearms and other hazardous or dangerous goods. Permits must be obtained before goods arrive in Australia or they may be forfeited.

Export Permit System Regulations

Goods controlled by the Customs (Prohibited Exports) Regulations or other legislation require a permit to export. Such goods include fruit and vegetables and other primary products, cultural heritage items, protected wildlife and hazardous waste.

Goods may not be exported or loaded on to an aircraft or ship unless they have been entered for export and had an Export Clearance Number assigned. Certificates for departure are only issued once requirements for all cargo are met.

International obligations

Australia's membership of the World Trade Organisation and contracting party status to the General Agreement on Tariffs and Trade 1994 (GATT) and associated multilateral side agreements mean it is obliged to charge no more than its agreed maximum tariff rate on imports from other signatory countries. It must also accord no less favourable tariff treatment to imports from another signatory country.

Australia has given effect to the anti-dumping provisions of the GATT, and the Customs Act sets out the framework for complaints about dumping, which may be applied for where:

- A consignment of goods has been, or is likely to be, imported into Australia
- There is, or may be established, an Australian industry producing like goods
- A person believes that there are, or may be, reasonable grounds for the publication of a dumping duty notice or a countervailing duty notice in respect of the goods in the consignment.

Dumping and countervailing duties impost is governed by the *Customs Tariff (Anti-Dumping) Act 1975* (Cth).

Being a member of the World Customs Organisation, Australia has adopted the Harmonised Commodity Description and Coding System 1983. This is given effect through the *Customs Tariff Act 1995* (Cth) (Tariff Act),

which sets out the rules of interpretation and tariff classification. Where more than one classification item may apply, the Tariff Act provides a mechanism for solution.

Australia adopts GATT's Valuation Code Free On Board method to value goods subject to customs duties.

Australia is a signatory to the United Nations Educational, Scientific and Cultural Organisation Agreement on the Importation of Educational, Scientific and Cultural Materials, which excludes educational, scientific or cultural goods from customs duties and other charges.

Preferential rates of duty apply to goods from developing countries.

Free Trade Agreements

New Zealand

Most goods may be imported from New Zealand free of customs duties as a result of a longstanding bilateral trading agreement between the two countries. This is ratified by the *Customs Legislation Amendment (New Zealand Rules of Origin) Act 2006* (Cth), which introduced new rules of origin for goods traded under the Australia New Zealand Closer Economic Relations Trade Agreement.

These rules provide that New Zealand-originating goods will be eligible for a preferential rate of customs duty under the Tariff Act. Goods will be New Zealand – originating goods where they meet the change in tariff classification and/or regional value content requirement.

Other bilateral agreements

Australia has bilateral trading agreements with the United States, Thailand, China, Korea, Malaysia, Chile and Singapore, which allow goods from these countries to be either free of duty or subject to a concessional rate.

ASEAN-Australia-New Zealand Free Trade Agreement

Australia is also a party to the ASEAN-Australia-New Zealand Free Trade Agreement (AANZFTA). It is Australia's first multi-country free trade agreement.

Trans-Pacific Partnership Agreement

The Trans-Pacific Partnership Agreement (TPP) is a regional free trade agreement that has been negotiated across 12 countries, including: Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, Peru, New Zealand, Singapore, the United States and Vietnam. The agreement will eliminate 98 per cent of tariffs in the TPP region.

Marking requirements on goods

Australia's *Competition and Consumer Act 2010* (Cth) prohibits corporations engaging in misleading and deceptive conduct and provides specifically for country of origin representations and whether or not they are misleading and deceptive. Representations are not considered misleading or deceptive if 50 per cent or more of the cost of producing or manufacturing the goods occurred in that alleged country of origin.

The *Commerce (Trade Description) Act 1905* (Cth) and associated Regulations prescribe that certain imports, including shoes, electrical appliances, toys, agricultural seeds and jewellery, be labelled before entering Australia for consumption. False trade descriptions or those likely to mislead attract penalties, including forfeiting the goods.

Other customs duty exemptions

Enhanced Project By-Law Scheme (EPBS)

Australia previously operated a scheme which allowed goods for qualifying projects to be imported free of duty. The scheme was closed to new applications with effect from 3 May 2016.

Tariff Concession Orders

To ensure that Australian industry remains internationally competitive, goods that are not produced locally may potentially be imported free of duty. Qualifying goods are the subject of a "Tariff Concession Order" (TCO). Foodstuffs, clothing and passenger motor vehicles are ineligible and cannot be exempted from duty under the TCO system.

Useful references

Australian Quarantine Inspection Service www.daff.gov.au/aqis

Department of Immigration and Border Protection (Australian Customs Service) www.border.gov.au

Department of Agriculture and Water Resources www.agriculture.gov.au/biosecurity

GLOSSARY

AANZFTA	ASEAN-Australia-New Zealand Free Trade Agreement
ACCC	Australian Competition and Consumer Commission
ACICA	Australian Centre of International Commercial Arbitration
ACMA	Australian Communications and Media Authority
ACST	Australian Central Standard Time
ACT	Australian Capital Territory
ADI	Authorised Deposit Taking Institution
AEMC	Australian Energy Market Commission
AEMO	Australian Energy Market Operator
AER	Australian Energy Regulator
AEST	Australian Eastern Standard Time
AFS	Australian Financial Services
ALRC	Australian Law Reform Commission
AMIT	Attribution Managed Investment Trusts
AML/CTF	Anti-Money Laundering and Counter-Terrorism Financing
APEC	Asia-Pacific Economic Cooperation
APPs	Australian Privacy Principles
APRA	Australian Prudential Regulation Authority
AQIS	Australian Quarantine Inspection Service
ARPC	Australian Reinsurance Pool Corporation
ARTG	Australian Register of Therapeutic Goods
ASEAN	Association of Southeast Asian Nations
ASIC	Australian Securities and Investments Commission
ASX	Australian Securities Exchange
ATO	Australian Taxation Office
auDRP	auDA's Dispute Resolution Procedure
AUSFATA	Australia-United States Free Trade Agreement
AUSTRAC	Australian Transaction Reports and Analysis Centre
Austrade	Australian Trade and Investment Commission
AWST	Australian Western Standard Time
BRRD	Bank Resolution and Recovery Directive
CCA	Competition and Consumer Act 2010 (Cth)
CDI	CHESS Depositary Interests
CGT	Capital Gains Tax
CIVs	Collective Investment Vehicles
CIO	Credit and Investments Ombudsman
DOCA	Deed of Company Arrangement
DTA	Double Taxation Agreements
EAA	European Economic Area
EDR	External Dispute Resolution
EOI	Exchange of Information
EPBS	Enhanced Project By-Law Scheme
EPA	Environment Protection Authority
ESD	Ecologically Sustainable Development

FATA	Foreign Acquisitions and Takeovers Act 1975 (Cth)
FBT	Fringe Benefits Tax
FIRB	Foreign Investment Review Boards
FOS	Financial Ombudsman Service
FTA	Free Trade Agreement
FWA	Fair Work Australia
FWC	Fair Work Commission
GATT	General Agreements on Tariffs and Trade 1994
GDP	Gross Domestic Product
GEI	Gender Equality Indicators
GFC	Global Financial Crisis
GMT	Greenwich Mean Time
GSI	Gas Services Information
GST	Goods and Services Tax
IAA	International Arbitration Act 1974 (Cth)
ICANN	Internet Corporation for Assigned Names and Numbers
ICS	Integrated Cargo System
IDR	Internal Dispute Resolution
ISP	Internet Service Provider
MIS	Managed Investment Schemes
MIT	Managed Investment Trust
MP	Member of Parliament
NCCP	National Consumer Credit Protection Act 2009
NEL	National Electricity Law
NEM	National Electricity Market
NES	National Employment Standards
NSW	New South Wales
NT	Northern Territory
OAIC	Office of the Australian Information Commissioner
OECD	Organisation for Economic Cooperation and Development
PBS	Pharmaceutical Benefits Scheme
PCPIP	Paris Convention for the Protection of Industrial Property
PCT	Patent Cooperation Treaty
PPSA	Personal Property Securities Act 2009 (Cth)
RBA	Reserve Bank of Australia
RET	Renewable Energy Target
RSMS	Regional Sponsored Migration Scheme
SA	South Australia
SAP	Substituted Accounting Period
SDRs	Special Drawing Rights
STTM	Short Term Trading Market
TCO	Tariff Concession Order
TOFA	Taxation of Financial Arrangements
TPP	Trans-Pacific Partnership Agreement
UDRP	Universal Dispute Resolution Procedure
UNCITRAL	United Nations Commission on International Trade Law
WTO	World Trade Organization

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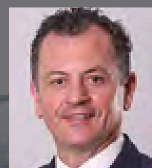

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