DOING BUSINESS IN AUSTRALIA

DLA PIPER

CONTENTS

FOREWORD

With strong economic fundamentals, a positive outlook, proximity and strong trade links with some of the world's most dynamic economies, Australia offers a wealth of opportunities for global investors and multinational companies seeking a foothold in the Asia Pacific region.

This guide, Doing Business in Australia, provides sound, practical advice on the relevant laws and regulations for foreign companies looking to invest in Australia.

Australia's AU$1.6 trillion economy has entered its 23rd consecutive year of uninterrupted growth. Our economy continues to expand, with real Gross Domestic Product (GDP) growth outlook to 2018 set to exceed all other major advanced economies.

Australia is a global leader in future growth industries such as tourism, international education and wealth management. Australia is also a global food producer, with world-leading agricultural productivity and cutting-edge agribusiness technology and agricultural service providers. And while our strengths in mining and resources are well known, Australia's service industries are a major driver of growth, representing close to 80 percent of the economy.

Almost 40 percent of Australia's workforce holds a tertiary qualification, and the country is the most culturally diverse and multilingual in the Asia Pacific region. This highly-skilled labour force and culture of innovation lie at the heart of our success in research and development and global collaboration.

Australian innovation is built on the solid foundation of modern information and communications technology infrastructure, high level of investment, generous research and development tax incentives and strong intellectual property protection. The country's research and development investment has trebled in 10 years – twice the Organisation for Economic Co-operation and Development (OECD) average.

Australia's location, familiarity and long history of trade with Asia makes it an ideal gateway to opportunities in the region. Australia's unique time-zone is also a great advantage for global businesses operating 24/7.

With a stable political environment, strong governance and regulatory frameworks, efficient legal systems and sophisticated financial markets, Australia remains a top ranking destination for foreign direct investment globally. As a percentage of GDP, and despite the Global Financial Crisis, Australia's value of total foreign investment stock has remained at 140 percent since 2007.

Australia has a robust and dynamic economy, which is set for continued expansion, creating significant growth opportunities for investors in a low-risk environment.

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

Bruce Gosper
Chief Executive Officer
Australian Trade Commission

The Australian Trade Commission – Austrade – is the Australian Government's agency that promotes trade, investment and education, and develops tourism policy, programs and research. Through our global network, we help Australian companies attract productive foreign direct investment, and assist investors looking to expand into Australia.

Austrade is the first national point of contact for all investment enquiries. Working in partnership with Australian state and territory governments, Austrade can provide investors information and the right industry and government contacts needed to establish and expand a business in Australia.

OVERVIEW OF AUSTRALIA

SUMMARY

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.

The population of more than 23 million is principally of British, Irish and Scottish descent and has a median age 37.3 years at 30 June 2013[1]. Since the mid-20th century, Australia's immigrant intake has substantially come from eastern, central and southern Europe, the Middle East and Asia. Australia's native Aboriginals make up less than 2.5 percent[2].

While Australia's national language is English, in 2011, revealed that more than a quarter (26 percent) of Australia's population was born overseas and a further one fifth (20 percent) had at least one overseas-born parent. This multicultural nature commands newspapers, radio stations and television programs that cater for a variety of ethnicities.

The country is a federation divided into six states (New South Wales, Queensland, South Australia, Tasmania, Victoria and Western Australia) and two territories (the Australian Capital Territory and Northern Territory).

It is highly urbanised, with most people living in cities and towns. In addition, because of its low inland rainfall, the population is concentrated on the coast and particularly in Australia's southeastern corner. More than a third lives in its two major cities: Sydney and Melbourne.

Climate

Australia's climate ranges from tropical in the north to temperate in the south. In the southern states, winters are cool to cold. Snow falls only on the mountains. Average temperatures range from 4°C to 28°C[3] and, being in the southern hemisphere, Australia's seasons are the reverse of those in the northern hemisphere.

GOVERNMENT

The Australian Government participates in governing Australia along with the six state, two territory and a number of local governments. Members of the federal (national) and state parliaments and local government councils are elected through compulsory voting by everyone over the age of 18.

Australia continues to be a constitutional monarchy with an Australian Governor-General, representing HRM Queen Elizabeth II, appointed by the elected Prime Minister and sanctioned by the Monarch.

Australian Government

The Australian Parliament comprises two houses, the Senate and the House of Representatives.

Two main political groupings, comprising three political parties, exist – Labor and the Liberal/National Coalition – both of which are broadly pro-business.

Government is formed by the grouping that wins control of the House of Representatives, which consists of 150 members. Effectively, government is run by the Cabinet, an executive group chosen from ruling party members.

Elected on a state-by-state basis and voted on a proportional basis, the Senate contains representatives from both minor and major parties, and some independents.

Australia's current Prime Minister is Tony Abbott, federal leader of the Australian Liberal Party and is the Member for Warringah in Sydney since March 1994.

State governments

All states except Queensland have two houses of parliament. As at the federal level, Labor, Liberal and National parties dominate.

[1] http://www.abs.gov.au

[2] www.abs.gov.au/ausstats/abs@.nsf/PrimaryMainFeatures/4705.0

[3] www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/A0DFD1E32C0ADFA8CA25773700169C26

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

State or territory laws apply to people, businesses and events within the state or territory and to its residents. Some state powers, for example corporations law, have been ceded federally.

Local governments

Local governments have limited powers, derived from the states. They govern planning, local environment and other local issues. Elected by the residents of the municipality, local governments are generally less party political than others.

The law and governments

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

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

Only the Australian Government is empowered to impose customs and excise duties and levy income tax, sharing the proceeds of this tax with states in line with a formula negotiated by both.

SYSTEM OF LAW

Australia's legal system is a common law system, similar to that of Britain. The Australian Parliament may pass statutes and make regulations under statutes to deal with specific issues. This is subordinate legislation and must be tabled in parliament. A body of common law is developed and interpreted by a judiciary, which also has the role of interpreting statutes and regulations.

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.

CURRENCY

The Australian dollar (AU$) contains 100 cents (c). It comes in denominations of $100, $50, $20, $10 and $5. Coins exist for $2 and $1; and 50c, 20c, 10c and 5c. The currency floats freely and trades internationally.

INTERNATIONAL TIME ZONES

Three time zones exist in Australia.

The eastern zone covers the Australian Capital Territory, Queensland, New South Wales, Tasmania and Victoria and is 10 hours ahead of Greenwich Mean Time (GMT).

The central zone, covering South Australia and the Northern Territory, is nine-and-a-half hours ahead of GMT.

Western Australia is eight hours ahead of GMT.

Daylight saving time

From October to March the states of New South Wales, Victoria, Tasmania, South Australia and the Australian Capital Territory change to Daylight Savings Time, which is one hour further ahead of GMT. Daylight saving time in the Australian Capital Territory, New South Wales, South Australia, Tasmania and Victoria finishes on the first Sunday of April.

ECONOMY

Australia has a prosperous market economy and a Gross Domestic Product (GDP) comparable to industrialised western European countries. With stable economic and political climates, it offers a very low short-term trading risk.

Labour force

In March 2014 the number of employed Australians increased to 11.6 million, of whom a quarter were born overseas.

The labour force participation rate of people born overseas was 59.3 percent, compared with 68.4 percent for people born in Australia[4].

In 2010–11 of those who were employed, 27 percent were born overseas. The labour force participation rate of people born overseas was 62 percent compared with 69 percent for people born in Australia. This, in part, reflects the older age distribution of the overseas born population in Australia.

Industries and resources

Australia has a range of natural resources including iron ore, bauxite, coal, gold, uranium, nickel, zinc, oil, natural gas and liquefied petroleum gas. Major agricultural products include beef, wool, wheat, barley, sugar, fruit, cotton, dairy and wine. Major manufacturing industries include machinery and equipment manufacturing and food, beverage and tobacco manufacturing.

Japan, China, Republic of Korea, the United States and India are Australia's principal export markets, consuming 44.4 percent of Australia's exports in 2013[5]. Most of Australia's imports are sourced from the United States, China and Japan. Historically regarded primarily as a producer of agricultural commodities, minerals and energy, Australia's services sectors now contribute the most to GDP. However while services remain the backbone of Australia's economy, the Australian mining industry has been responsible for much economic growth during the past 10 years.

Role of the private sector

The private sector has become increasingly involved in providing and managing infrastructure, encouraged by federal and state governments. Privatised assets include gas and electricity utilities, telecommunications and road, rail and air transport.

The Australian Government still owns and operates the mail system and many states continue to own gas and electricity assets and health care providers. While many local authorities own and operate water utilities.

A number of federal and state-owned enterprises operate as if subject to income tax under a regime known as the National Tax Equivalents Regime, a system designed to create a more level playing field.

Structural reform and technology

Non-tariff trade barriers have been removed and tariffs reduced, increasing competition. The 1995 National Competition Policy has also contributed to this.

Reforms have been implemented in many industries, including electricity generation and rail freight, and there has been structural reform on the waterfront to improve efficiency and reduce costs.

Australia's regulatory environment is business-friendly. Of the top 30 Organisation for Economic Cooperation and Development countries, it has the fewest restrictions on product markets, least public ownership of business and least restrictive impact of regulation on economic behaviour[6]. Australia also ranks highly in terms of facilitating competitive business and for e-readiness, internet use, IT infrastructure and skills.

Useful references

Australian Government: www.australia.gov.au

Australian Bureau of Statistics: www.abs.gov.au

Austrade: www.austrade.gov.au

Department of Foreign Affairs and Trade: www.dfat.gov.au/geo/australia/index.html

Points to note

- Australia is a multicultural nation of more than 23 million people and 25 percent of its residents were born overseas.
- The governing of Australia is the responsibility of the Australian Government, six states, two territories and local governments.
- The Australian legal system comprises of common law developed by the judiciary and statutes and regulations made by parliament.
- Australia has a range of natural resources and produces major agricultural products, which are exported largely to Japan, China, Republic of Korea, the United States and India.

[4] www.abs.gov.au/AUSSTATS/abs@.nsf/mf/6202.0

[5] http://dfat.gov.au/publications/tgs/index.html

[6] www.austrade.gov.au/Invest/Why-Australia/Business-Friendly-Regulatory-Environment/default.aspx

INVESTMENT IN AUSTRALIA

FOREIGN INVESTMENT POLICY

Australia recognises that foreign investment can contribute substantially to developing its industries and resources and has framed a 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 Federal 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 Federal 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 examines foreign investment proposals and advises the Treasurer whether or not they comply with Australia's foreign investment policy. It also generally advises the Federal Government on foreign investment matters and can assist foreign investors to ensure their proposals conform with government policy.

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 15 percent or more or several foreign persons (and any associates) have 40 percent or more of the share capital or voting power in the corporation.

The prescribed limits are:

- United States and New Zealand investors
- prescribed sensitive sectors – AU$248 million;
- other sectors – AU$1,078 million;
- Other investors – AU$248 million.

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 as follows:

- Residential real estate, vacant land and Australian urban land corporations and trusts: all proposed acquisitions generally require approval (some limited exceptions apply) regardless of value;
- Developed commercial real estate (non-heritage listed):
- United States and New Zealand investors – AU$1,078 million;
- Other investors – AU$54 million;
- Heritage listed developed commercial real estate – AU$5 million.

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 percent or more in the media sector regardless of the value of the investment.

Note: 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 15 percent or more (or such entities from more than one foreign country having an aggregate interest of 40 percent 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 15 percent of the actual or potential voting power in the corporation, or by holding 15 percent of the issued shares of the company.

Foreign persons will jointly hold an aggregate substantial interest upon controlling (including together with their associates) 40 percent of the actual or potential voting power in the corporation, or by holding 40 percent 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$244 million or where the proposal values the business at over AU$244 million. For US investors, the AUSFTA provides a notification threshold of AU$1,062 million, except for investments in prescribed sensitive sectors, which are subject to the AU$244 million threshold
- All investments in the media of five percent or more, irrespective of value
- Takeovers of offshore companies whose Australian subsidiaries or gross Australian assets are valued at AU$244 million or more, or the US investor threshold of either AU$1,062 million or AU$244 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 percent of the value of its total assets that involve the:
  - Acquisition by a non-US investor of developed non-residential commercial real estate valued at AU$53 million or more, or if the property is subject to heritage listing valued at AU$5 million or more
  - Acquisition by a US investor of developed non-residential commercial real estate, where the property is valued at AU$1,062 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 of prospecting, exploration, mining or production tenements where they provide the right to occupy Australian urban land for periods likely to exceed five years and arrangements for the sharing of profits or income from Australian urban land
- 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. relating to agreements affecting a corporation's affairs.

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.

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 the sustainability of Australia's national agricultural resources.

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 Federal Treasurer has 30 days to make a decision and a further 10 days to notify the parties concerned of the outcome.

If these time frames are not met, the 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.

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.

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 (eg 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 (eg 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

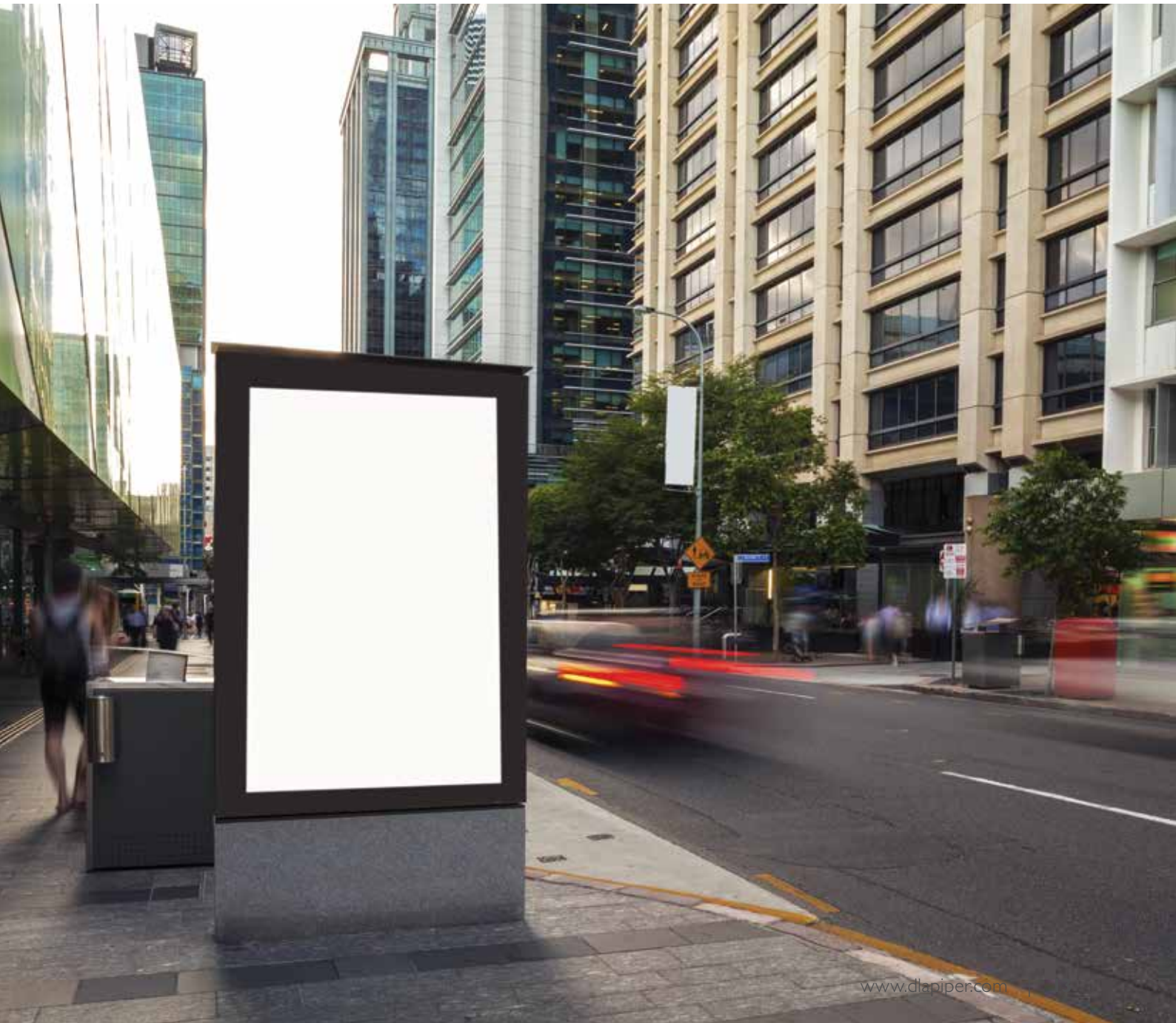
A company's liability to its creditors is limited to the value of its assets. Should a company be unable to pay its debts in full as and when they fall due (ie become insolvent), its creditors may not be repaid all of the debt they are owed. Similarly, a company's shareholders' liability is generally limited to the extent of their initial investment (ie 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 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 on a 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 (ie 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 (eg a Managed Investment Scheme (MIS) – 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

MISs 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 MISs 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. MISs 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, MISs may cover a wide variety of investments.

Some of the popular MISs that may be offered include:

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

Note: To encourage foreign investment into Australia, certain MISs 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 Investments Review Board: www.firb.gov.au

BUSINESS PRACTICES

As with a number of aspects of doing business in Australia, federal and state laws and regulations combine to influence how business practices are conducted. Fundamental to Australia's economic goals and achievements is a competitive and vibrant economy. The market economy is fostered by a key Australian Government law, the *Competition and Consumer Act 2010* (Cth) (CCA), administered by an independent statutory authority, the Australian Competition and Consumer Commission (ACCC).

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

The ACCC is the only national agency dealing generally with competition matters and the only agency with responsibility for enforcing the CCA and the state and territory application legislation.

In broad terms, the CCA covers anticompetitive and unfair market practices, mergers or acquisitions of companies, product safety and liability and third-party access to facilities of national significance.

Part VIIA of the CCA enables the ACCC to, in limited circumstances, hold price inquiries, examine proposed price rises and monitor the prices, costs and profits of an industry or business under the direction of the minister.

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 restraint practices – generally this type of conditional dealing 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, where a wholesaler specifies a minimum resale price to a retailer
- Contracts, arrangements or understandings between corporations that have the purpose, or likely effect, of substantially lessening competition in a relevant market
- A corporation with a substantial degree of market power taking advantage of that market power for an anticompetitive purpose
- Cartel behaviour, including price fixing, restricting outputs in the production and supply chain, market sharing and bid rigging.

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

ACCESS TO ESSENTIAL FACILITIES

Part IIIA of the CCA establishes a national framework for access to infrastructure services considered to be of national significance. Most significantly, this access regime establishes legal rights for third parties to share these services on reasonable terms and conditions 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 misleading or deceptive conduct and unconscionable conduct, are prohibited by the CCA and Fair Trading Acts, which are administered by state consumer and business affairs offices.

Unconscionable conduct is prohibited in consumer and commercial transactions. While "unconscionable" is not defined in the CCA, there are two kinds of such conduct in commercial transactions it prohibits. The first is where a weaker party is in a position of special disadvantage that the stronger party knew about, or should have known about, and takes unfair advantage of that special disadvantage. A special disadvantage may arise where a person's ability to understand and assess what is in their best interests may have been affected by circumstances

such as infirmity of mind or body, illiteracy or extreme financial need.

The second type of unconscionable conduct applies in transactions of up to AU$10 million. This simply allows the court to assess, against a list of non-exhaustive factors, whether the conduct was unconscionable in all circumstances.

To amount to unconscionable conduct, there must be more than unequal bargaining strengths between the parties and more than merely a hard bargain.

Also prohibited under the CCA are:

- False or misleading representations in trade or commerce
- Component pricing
- Pyramid selling
- Bait advertising
- Referral selling
- Payment without supply
- Harassment or coercion

PRODUCT LIABILITY

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

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

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

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.

For more information on proportionate liability, see the Dispute Resolution chapter.

PRIVACY LAW

Australia recently joined the growing ranks of countries that take 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).

From 12 March 2014, the Australian Privacy Principles (APPs) replaced the National Privacy Principles and Information Privacy Principles, which will apply to organisations, and Australian Government agencies. The Privacy Amendment (Enhancing Privacy Protection) Act 2012, amends the Privacy Act 1988 (Cth).

The amendments to the Privacy Act and the introduction of the APPs introduce a new higher standard for the way in which organisations operating in Australia collect, hold, use and disclose personal information. 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.

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 and viewing history 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 un-identified 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 via social media/websites (websites) operating in Australia (and the organisations behind them) 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 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 possibly 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, etc, as per the pertinent Monty Python parrot sketch).

- 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. Please see our update "Australian businesses must destroy or de-identify personal information no longer needed for the purpose(s) authorised" for more information on the obligation to destroy or de-identify personal information.

  It is hard to see how an organisation that holds on to 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.

- 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 (ie should not have been kept) in the first place.

- The APPs place a new 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 could not meet this obligation. Also, an individual who has de-activated their account is 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.

The Office of the Australian Information Commissioner (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 legislative instruments and that are therefore not legally binding. 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 business can be taken to a court or tribunal and enforceable orders, including compensation, can be made.

INSOLVENCY REGIMES IN AUSTRALIA

There are three principal regimes that apply to corporate insolvency in Australia – liquidation, voluntary administration and receivership. The law relating to corporate insolvency in Australia is set out in Chapter 5 (External Administration) of the *Corporations Act 2001* (Cth) (Corporations Act).

Liquidation

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

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

In principle, all creditors of a company in liquidation are to be treated equally. There is a moratorium preventing most unsecured creditors' actions, and the liquidator has statutory rights to avoid certain pre-appointment creditor transactions that are proved to the court to comprise unfair preferences or uncommercial transactions. The liquidator has powers to investigate the affairs of the company and persons who have dealt in those affairs to establish any wrongdoing.

In Australia, directors can be personally liable for the debts incurred by the company whilst it was insolvent in the lead up to the collapse of the company (subject to certain defences). The directors' powers are suspended following the appointment of a liquidator.

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

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

Voluntary administration

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

The directors' powers are suspended during the administration and, subject to certain exceptions, there is a moratorium on creditor action. Secured creditors may still enforce a charge and appoint a receiver without the consent of the administrator or the court, provided the charge extends over at least almost all of the assets of the company and the appointment is made within the

first 13 business days of the administration. The powers of lessors are limited.

The courts have only a limited supervisory role in relation to administrations, and the decision as to whether the company should be wound up, returned to its directors (uncommon) or made the subject of a DoCA is left to the creditors who vote after considering the report and recommendation of the administrator. If the creditors vote in favour of a DoCA, all unsecured creditors, and those secured creditors who voted in favour of the DoCA, will be bound by its terms. The administration process is required to be completed within the short period of approximately five weeks, although this period can be extended by the court.

Receivership

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

Although the receiver is the agent of the company and not of the appointor (unless the company is also in liquidation), a receiver will be concerned primarily with realising the value of the secured assets for the benefit of the appointor, and not the interests of the general body of creditors (compare the duty of an administrator and liquidator). The courts also have the power to appoint a receiver. If the receiver's appointment extends to most of the company's assets, the directors' powers will be effectively superseded by the powers of the receiver.

Unlike liquidation and administration, no moratorium applies where a receiver is appointed, although if the receiver controls all of the assets of the company, there may be little incentive for a creditor to proceed with action against the company.

RECOGNITION OF FOREIGN INSOLVENCY REGIMES IN AUSTRALIA

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

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

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

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

DEBT RECOVERY IN AUSTRALIA

Recovery of debts can be achieved through the various federal and state courts of Australia, subject to various jurisdictional limits. Creditors of debtor companies may issue a 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.

BANKING

BACKGROUND

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, Westpac Banking Corporation, Australia and New Zealand Banking Group, Commonwealth Bank of Australia and National Australia Bank. A number of the so called four majors operate a multi brand strategy, so for example Westpac also operates as St George Bank and BankSA while Commonwealth Bank operates under Bankwest as well.

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

Most of the global banks such as HSBC and Citibank are present in Australia as are many well-known investment banks, for example, 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).

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 (ADI's). 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.

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 Authorised Deposit taking Inistitutions (ADI's) 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 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 incorpotrated in Australia can apply for ADI status
- A non operating holding company or group of companies that includes one or more ADI's 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.

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

ASIC has responsibility for the supervision of operators of financial markets, clearing and settlement facilities, and market participants. It advises the 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.

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. 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 (UN) sanctions.

Countries and their nationals currently sanctioned include Zimbabwe and North Korea. Following the 9/11 terrorist attacks in 2001, the RBA exercised its powers to prohibit transactions identified by the UN and the US as being linked to terrorism. These sanctions have now been superseded by specific UN antiterrorism legislation, with input from Australia's Department of Foreign Affairs and Trade.

Anti–Money Laundering and Counter–Terrorism Finance (AML/CTF) 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 on 1 November 2011 new mandatory enrolment and registration requirements came into effect for reporting entities.

All reporting entities are required to register with AUSTRAC and have their name entered into the Reporting Entities Roll. This roll will be used to determine whether or not the business is subject to the annual AUSTRAC supervisory levy and the amount of the levy that will be applied.

Consumer credit legislation

The *National Consumer Credit Protection Act 2009*, 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 ' 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 in engaging in the provision of 'credit activities' must hold an Australian credit licence. Licensees must comply with a number of general conduct obligations and must also comply with responsible lending guidelines.

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.

Prior to 30 January 2012, security provided by a company or an Australian registered body was required to be registered under the *Corporations Act 2001* (Cth) (Corporations Act) and, depending upon the nature of the assets the subject of the security, may have required registration under certain state-based legislation.

Security provided by natural persons may, depending upon the nature of the assets the subject of the security, have required registration under various state-based legislation.

From 30 January 2012, new laws apply throughout Australia in relation to taking security over personal property. The *Personal Property Securities Act 2009* (Cth) introduces 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 US and New Zealand and provides Australia with a single register for recording security interests in personal property. The new laws apply 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.

The new system supersedes the charge registration provisions previously in operation under the Corporations Act as well as most state-based security registers. Security interests in land continue to be registered under the applicable state or territory land registration system.

SUPERANNUATION AND PENSIONS

The Australian Government places great importance on superannuation and retirement savings. The 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

The Treasury: www.treasury.gov.au

Reserve Bank of Australia: www.rba.gov.au

Personal Property Securities Register: www.ppsr.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 of a corporation in Australia unless a disclosure document, such as a prospectus or a product disclosure statement in the case of managed investments, is lodged with the Australian Securities and Investments Commission (ASIC), which is the primary regulator of the securities markets. The prospectus 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 authorising them to advise on securities
- Personal offers to investors where no more than AU$2 million is raised in any 12-month period.

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 five regional branches of the Australian Securities Exchange (ASX) in Australia are in Sydney, Melbourne, Brisbane, Adelaide 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 official list and from being quoted on the ASX. Listing rules have the force of law against listed entities and their associates.

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 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 percent of the voting shares of a company formed in Australia (which is listed on a financial market in Australia or has at least 50 shareholders), or for a current shareholder to acquire shares that would lift their interest to more than 20 percent or to increase their interest between 20 percent and 90 percent. The 20 percent 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 that threshold is reached, shares may only then be acquired as permitted by the Corporations *Act*. For example, a person may exceed the threshold by:

- Acquiring no more than three percent of the company every six months
- Making an off-market takeover offer to all shareholders
- Making an on-market bid by undertaking unconditionally to take all shares offered on the financial market on which the shares 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 percent 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 percent 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 (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 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

In Australia, as in many other countries, the economic uncertainty affecting the Euro-zone countries has kept the disputation of commercial, finance and supply contracts at levels similar to those seen during the Global Financial Crisis (GFC). There are a number of recent decisions[7] that stem from the GFC, such as misrepresentation claims in respect of financial products. The workload and waiting lists of all major commercial courts in Australia has remained steady over the past year.

Perhaps predictably, disputes arising out of commercial contracts have tended to involve many complex and interrelated issues, extensive documentation and the need for technical and expert involvement in any dispute resolution. This has meant that such disputes are costly and time consuming and, as a result, have placed greater demands upon the court system.

Also, disputes have arisen from the specific circumstances triggered by the economic downturn such as margin lending arrangements with stockbrokers or bankers on share portfolios when falling share prices triggered repayment obligations.

[7] See for example Wingecarribee Shire Council and Others v Lehman Brothers Australia Ltd (In Liq) (No 9) [2013] FCA 1350; (2013) 97 ACSR 227 and Bathurst Regional Council v Local Government Financial Services Pty Lts (No 6) [2013] FCA 114.

In Australia, the courts, lawyers, and commercial clients have for years sought to achieve cost-efficient and timely resolution of disputes. As a result Australia has often been at the cutting edge of developments in alternative dispute resolution. Some forms have been imposed by courts or government and others by agreement.

There is no one solution and any party to a dispute arising from a commercial contract in Australia may avail itself of a number of different options for resolution of that dispute.

Most commercial contracts now contain dispute resolution clauses permitting the parties to escalate their dispute by stages and which are structured so that a party may not pursue its claim in court (except for injunctive court relief) until it has fulfilled each step of the process. A typical contract may:

- Require parties to issue a notice of dispute in a timely fashion, setting out the nature and extent of the claim
- Require good faith negotiations between senior executives of the parties
- Require mediation or some other informal dispute resolution mechanism, for example, for the dispute to be heard by a dispute review board or hearing by a technical or legal expert (this step is often expressed as a precondition to litigation or arbitration)

- Permit a party only then to proceed to litigation or arbitration.

The government recently enacted the *Civil Dispute Resolution Act* 2011 (Cth), which requires parties to take genuine steps to resolve a dispute (and set out those steps in a document) by the time a claim is filed in a court of federal jurisdiction. This encourages parties to engage in alternative dispute resolution before costs are incurred and become a factor in settlement decisions.

There is no similar legislation that applies to claims in the state jurisdictions. In fact the Victorian and New South Wales governments have recently repealed their respective pre litigation protocols which required parties to take reasonable steps to resolve by agreement or narrow the issues in dispute[8]. Parties are expected to take these steps of their own accord.

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. The separation of powers means that courts are independent of and separate to parliament and the executive government.

In most cases, the jurisdiction of a court is governed by the amount in dispute or, in the case of the Australian Courts, the subject matter of the dispute. In Australia, the highest level court in each state (usually called the Supreme Court) has inherent jurisdiction to resolve a dispute.

In some jurisdictions, industry specific tribunals or courts have power to hear disputes (for example, the Land and Environment Court in New South Wales and the Domestic Building List in the Victorian Civil and Administrative Tribunal). On 1 January 2014, tribunals in NSW were amalgamated into the NSW Civil and Administrative Tribunal (NCAT). NCAT has consolidated the work of NSW tribunals into a single service gateway and is envisaged to improve access and efficacy of tribunal services in NSW.

Unless the parties specifically agree to refer a dispute to arbitration by means of a provision inserted in the commercial contract, a claim can only be pursued in a court. As a result, there is an increasing focus on parties to agree to arbitration or dispute resolution provisions at the time of contracting.

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 its own rules applicable to the commencement, management and trial of a proceeding. These rules encourage the just, quick and cheap 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. A fee is payable to commence a proceeding. Although judges do not charge to hear a proceeding, some courts now impose a court hearing fee.

In many jurisdictions, specific 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, sometimes each month 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 ambush at trial and to ensure that each party knows the case against it and all the evidence upon which the other party will rely prior to a trial so, if appropriate, settlement discussions may occur.

These specialist lists may incorporate a number of special features to enable prompt and timely settlement of disputes, such as:

- Referral to compulsory mediation (see below)
- If appropriate, determination by the court of a preliminary point in order to dispose of the dispute or limit the issues in dispute
- Referral to a special referee to consider key technical questions

[8] In Victoria, the *Civil Dispute and Legal Profession Amendment Act 2011* (Vic) came into effect on 30 March 2011. It repealed pre litigation requirements of the *Civil Procedure Act 2010* (Vic). In New South Wales, the pre litigation protocols in Part 2A of the *Civil Procedure Act 2005* (NSW) were repealed in February 2013.

- Dividing the proceeding into an assessment of liability and then quantum (if the claim is successful).

This last step is unusual but may occur where determining liability is straightforward and the issue of damages is complex or lengthy.

While some courts will grant a trial date at the first directions hearing, in other courts it might take two years until a trial commences. 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. In New South Wales especially, court delays can be lengthy.

In Australia, legal costs 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" costs and amount to about 60 percent of the actual costs incurred by the successful party. Other cost orders may be made. 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 percent or 90 percent 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 located in certain countries. This is useful if you obtain judgment in a foreign country but the judgment debtor only has the relevant 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 resident in Australia.

TIME FOR ISSUE OF PROCEEDINGS – LIMITATION PERIODS

In each state of Australia, legislation imposes a time period before the end of which proceedings must be issued 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

Domestic arbitration is regulated in most states by recently enacted uniform arbitration legislation (known as the Uniform Commercial Arbitration Acts). These 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 the relevant 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.

Recent case law demonstrates that 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.[9]

The Uniform Commercial Arbitration Acts address 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
- 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, however there is 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.

[9] See Supreme Court of Western Australian decision in *Pipeline Services WA Pty Ltd v ATCO Gas Australia Pty Ltd* [2014] WASC 10. The Court considered a range of arguments put forward by Pipeline Services WA Pty Ltd, which sought to prevent the dispute being arbitrated. The Court determined that the arbitration clause in the contract was not void by way of uncertainty and survived termination of the contract. Accordingly ,the proceedings were stayed and referred 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. Most States and Territories have passed legislation implementing the Uniform Acts.[10] Only the ACT has not yet proposed legislation to apply the Model Law to domestic arbitrations.

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 (Australia is one of only 13 countries to do so) and the UNCITRAL Model Law now covers the field in respect of international commercial arbitrations – parties cannot contract out of it. The IAA also gives effect to the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) and the International Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention). The alignment of the IAA with the Uniform Commercial Arbitration Acts puts Australian practitioners in an ideal place to assist with international commercial arbitrations.

The types of commercial disputes that tend to use international commercial arbitration involve mining supply contracts, shipping contracts and technology contracts. There is also the ability for a party to commence international investor-state arbitrations under a bilateral investment treaty with Australia.

There are a number of important features under the international commercial arbitration framework in Australia, namely:

- The adoption of the New York Convention gives parties certainty in knowing that any foreign arbitral award they are granted will permit them to enforce that award in Australia, and stay judicial proceedings issued in Australia if they are brought in breach of an arbitration agreement. Awards can also be enforced in any of the 150-odd member countries where the target party has assets.
- The adoption of the UNCITRAL Model Law with 2006 amendments gives foreign parties a familiar procedural law for the arbitration and gives parties input to create their own arbitration process for the fast and/or efficient conduct of their arbitration. It also allows parties to draw upon the body of international precedent that deals with the UNCITRAL Model Law.
- The adoption of the ICSID Convention permits arbitration of an investment dispute between a country and a national of another country.

Sydney and Melbourne operate as centres for international arbitration, with Sydney recently opening the Australian International Disputes Centre, which is the specialist venue for international commercial arbitration. The Australian Centre for International Commercial Arbitration (ACICA) is a provider of international arbitration services and is the default appointing authority under the IAA.

ACICA also has its own set of arbitration rules (which parties may agree upon in the arbitration agreement), which are based on the 1976 UNCITRAL Arbitration Rules.

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 crossborder disputes and a real 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 in 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

[10] Commercial Arbitration Act 2010 (NSW); 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).

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.

While this trend flies in the face of a consensual approach and may result in the forced participation by parties in the mediation process, statistics produced by the courts show that a high proportion of disputes settle at mediation.

Mediation has been so successful that 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 loss claims arising from negligence or tort, and for damages arising out of misleading and deceptive conduct. Proportionate liability replaces the common law doctrine of joint and several liability. The 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. On the other hand, proportionate liability allows liability to be apportioned between "concurrent wrongdoers" according to their respective responsibility for the loss or damage.

The proportionate liability legislation is important because many major disputes involve more than two parties. 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 issues in a project, 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 Victoria, South Australia, the Australian Capital Territory and the Northern Territory does not expressly allow for contracting out. Contracting out is expressly disallowed under Queensland legislation. In contrast, Western Australian legislation expressly allows contracting out. New South Wales and Tasmanian legislation have similar provisions to the Western Australian legislation, and this has been generally understood to allow contracting out (although this issue remains contentious amongst lawyers and is yet to be fully tested by the courts). 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.

In response to concerns about inconsistencies between the different proportionate liability laws in each jurisdiction, the Standing Council on Law and Justice released draft model proportionate liability provisions in 2011. Following public consultation on the draft provisions, the Standing Council released revised draft model legislation in October 2013. These propose 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.

Each state and territory will need to introduce the model legislation into their own jurisdiction. 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

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

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

Association of Dispute Resolvers: www.leadr.com.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

EMPLOYMENT

REGULATION OF LABOUR

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

The FW Act creates a federal workplace relations system applying to all corporations, as a result, this guide will concentrate solely on the federal system.

The major features of the federal workplace relations system under the FW 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, employees and unions. In the main, 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 bargaining has also taken place directly between employers and employees without the involvement of a union.

National Employment Standards

The 10 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.

Modern awards

As part of the Federal 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. 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
- Special rates for 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 FW 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 FW 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) 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 FW 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 there is, on balance, a reduction in the employee's overall terms and conditions of employment measured against any relevant modern award and the NES benchmark. If there is such a reduction, 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.

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 FW 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", ie 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 awards 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 FW 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 conduct, creating civil remedy provisions that can be enforced in a court.

The general protections protect "workplace rights" as defined broadly in the FW 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 FW Act referred to earlier 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 industrial tribunal can compel someone to belong to a union. There is no power to make award provisions that demand a "closed shop", ie a union-only workplace. While "closed shops" are prohibited at law, they can and do operate in certain industries.

Under the FW 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

Australia's pluralist society sees strikes and other industrial actions occur, though its 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 FW Act or by issuing common law injunctions. Legislation also prohibits certain types of boycotts. Award breach actions can also be taken out by employers against unions. Lawful industrial action by employees and lawful lock-out by employers are available during the bargaining of an enterprise agreement, but only after a secret ballot of affected employees that approves the taking of industrial action.

Affirmative action and equal employment opportunity

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 *Equal Opportunity for Women in the Workplace Act 1999* (Cth) also requires employers with 100 or more employees to develop and implement an affirmative action program. This legislation does not seek to establish compulsory minimum quotas – it requires only that employers set objectives and forward estimates. Compulsory retirement age has been outlawed in most jurisdictions.

Workplace health and safety

Around Australia, all employers owe a common law duty to their employees to take reasonable care to avoid realistically 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 federal Department of Immigration and Border Protection administers migration to, and temporary entry into, Australia. A number of initiatives exist to assist businesses, including having department branches in Canberra and business centres in each state and territory.

Government considers that Australian business 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:

Business Electronic Travel Authority/eVisa or Short Stay Business Visa

A Business Electronic Travel Authority/eVisa may be applied for by citizens of certain countries, while a Short Stay Business 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 visas

do not allow the visa holders to work in Australia. Both visas are normally granted for multiple entries of up to three months each within a 12-month period.

Sponsored Temporary Business Long Stay (subclass 457) Visa

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 Federal 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 is 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.

While temporary and permanent visas are available, in most cases it isn't possible to apply initially for a permanent business visa. Instead, applicants need to hold a provisional visa for at least two years before applying for permanent residence. A temporary visa is available to senior executives of major businesses with turnover greater than AU$50 million.

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.

Proposed employees must be highly skilled, suitable for the position and, unless exceptional circumstances apply, less than 45-years-old. 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 be receiving a minimum annual salary of at least AU$165,000 (excluding superannuation and allowances) – this figure may be adjusted over time.

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

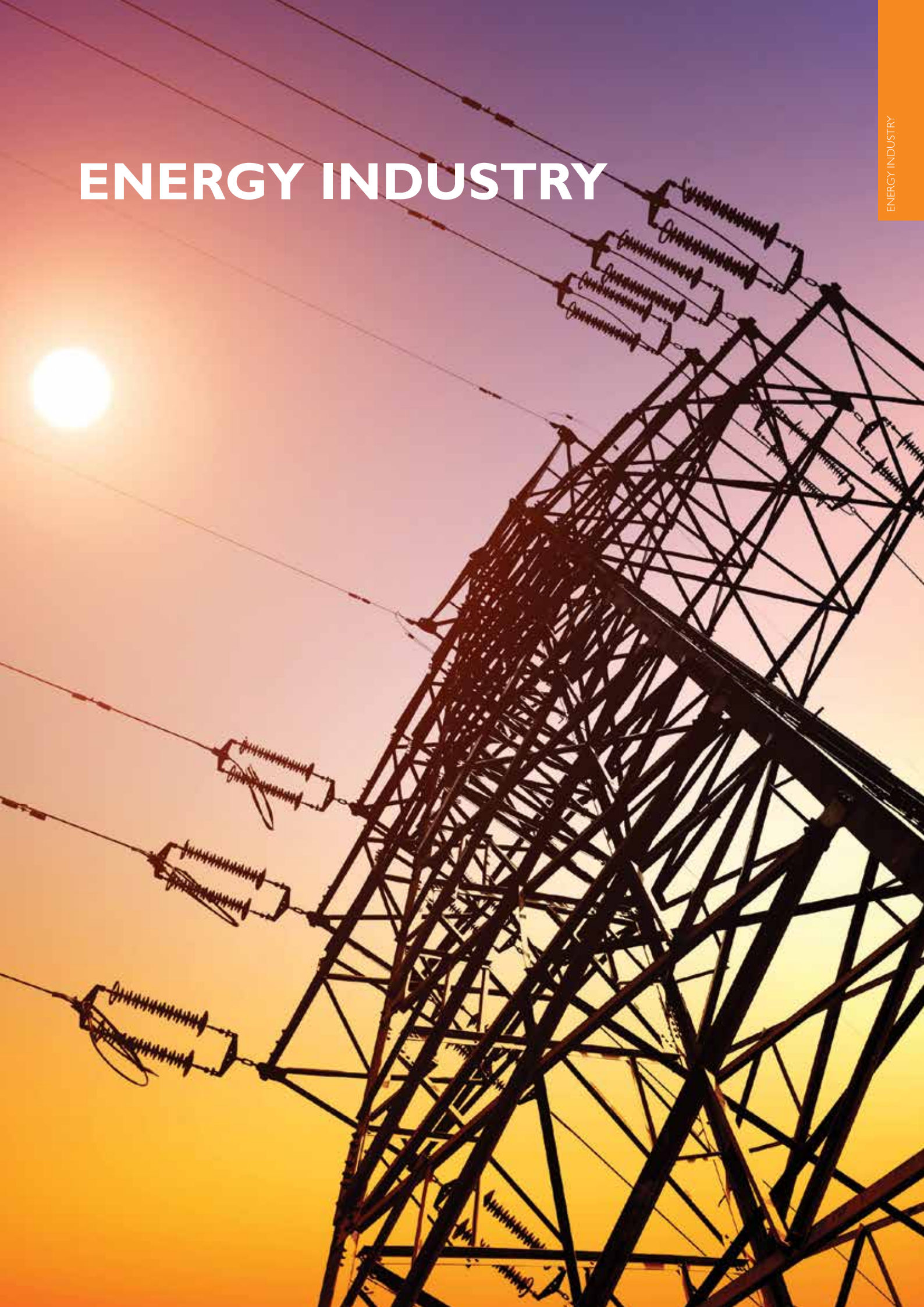
The Regional Sponsored Migration Scheme (RSMS) is for employers in regional Australia, to fill skilled positions they are unable to fill from the local labour market. Under the RSMS, employers are able to nominate staff from overseas or temporary residents currently in Australia to fill full-time, permanent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

Useful references

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

Department of Employment: www.employment.gov.au

ENERGY INDUSTRY



ELECTRICITY

Wholesale

Western Australia and the Northern Territory do not participate in the National Electricity Market (NEM). Western Australia has three major networks: the South West Interconnected System; the North West Interconnected System; and privately owned electricity transmission and distribution networks which primarily service mining operations in the Pilbara region in the state's north-west. Three state-owned corporations service these networks. The Northern Territory has a single network administered solely by the Power and Water Corporation.

Retail

Currently, retailers operate under state-based licences and maintain the relationship with electricity consumers. Full retail competition – all consumers have the option of choosing their power retailers and negotiating individual supply contracts – has been introduced successfully in all states around 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 government-owned Power and Water Corporation dominates the retail market. Retail and distribution businesses are primarily regulated by independent state-based bodies. State legislation and regulations establish a licensing system for all industry participants.

The National Energy Retail Laws and National Energy Retail Rules, which aim to establish a national energy customer framework for the regulation of the retail supply of energy to customers where the NEM applies, have commenced in the Australian Capital Territory, Tasmania, South Australia and New South Wales.

GAS

AEMO is the gas market operator for the wholesale and retail gas markets of eastern and southern Australia and oversees system security of the Victorian gas transmission network. In addition, AEMO is responsible for national transmission planning and the operation of a 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 Sydney, Adelaide and Brisbane. The STTM facilitates the short-term trading of gas between pipelines, participants and production centres.

Australia is the world's ninth largest energy producer, accounting for around 2.5 percent of world energy production and five percent of world energy exports according to the Australian Bureau of Statistics.

COAL

Australia is the world's ninth largest energy producer, accounting for around 2.5 percent of world energy production and five percent of world energy exports. Australia has abundant coal resources – particularly in the states of Queensland and New South Wales. Such diversity and quantity of natural resources has yielded a sophisticated and continually changing legal regulatory regime. Australia is the world's second largest exporter of coal, which represents more than AU$38 billion to Australia's economy and is Australia's second largest export. Australia's thermal and metallurgical coal exports are projected to increase at an average annual rate of six percent to 257 million tonnes and 847 million tonnes respectively in 2019.

Australian Government incentives such as the privately funded COAL21 Fund provide incentives for the Australian coal industry to continue developing advancements in coal production and technologies. Foreign Investment Review Board (FIRB) Threshold – The last paragraph of the Coal section notes that FIRB approval is required to acquire an interest in an operational mine equal or more than AU$50 million. However, current FIRB policy appears to have increased this threshold to AU$54 million (see http://www.firb.gov.au/content/policy.asp).

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 (eg, prohibiting activities in a world heritage area), while its non-purposive powers have seen it imposing environmental restrictions or prohibitions (eg, prohibiting the export of mineral sands). Nevertheless, 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. Nevertheless, 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. Nevertheless, 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 (ie, 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 territorial, 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 (ie, 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 July 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.

On-going licence conditions require AFS licensees to comply with industry codes of practice. The time and resources required for a new licence and to maintain on-going 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. Financial products and services provided to retail clients trigger the specific disclosure document requirements. This is an area of ongoing regulatory reform. 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, Life Insurance and Superannuation. A separate Code of Practice still exists for each sector.

CREDIT OMBUDSMAN SERVICE

The Credit Ombudsman Service Ltd (COSL) offers consumers an accessible, independent and fair external dispute resolution (EDR) service, approved by the Australian Securities and Investments Commission (ASIC).

COSL has over 16,500 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.

COSL is now accepting membership applications from those credit providers who are required to join an external dispute resolution (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.

Under the *Privacy Amendment (Enhancing Privacy Protection) Act 2012,* which commenced on 12 March 2014, the definition of 'credit provider' is very broad and includes an organisation or small business (a supplier) that carries on a business in the course of which the supplier defers payment for goods or services for at least seven days.

The Privacy Regulation 2013 which is effective on an interim basis for 12 months to 11 March 2015, removes the obligation to be a member of an EDR Scheme "*in relation to the disclosure of credit information by the credit provider if the disclosure is made in connection with the provision of commercial credit*". This exemption does not apply to certain commercial credit providers; namely, trade creditors that offer consumer credit to individuals by, for example, deferring for seven days or more. The OAIC is encouraging all commercial credit providers, during this transitional period, to become a member of a recognised EDR scheme where there is one available for them to join.

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 on-going 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. For instance revised governance and risk management standards will come into effect on 1 January 2015.

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. Life insurance, workers compensation and motor vehicle compulsory third-party personal injury insurance are regulated by separate legislation. 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

Since 2002, 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.

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. In early 2012, APRA reviewed and updated its capital standards for life insurers.

Health insurance

Private health insurance is provided through organisations 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 is monitored by the Private Health Insurance Administration Council (PHIAC), an independent Australian Government body, to ensure solvency and capital adequacy requirements are met. PHIAC also monitors compliance with the rules. There are presently ten rules in force:

- Private Health Insurance (Council) Rules 2007
- Private Health Insurance (Council Administration Levy) Rules 2007
- Private Health Insurance (Health Benefits Fund Administration) Rules 2007
- Private Health Insurance (Health Benefits Fund Administration) Amendment Rule 2013 (No.1)
- Private Health Insurance (Insurer Obligations) Rules 2009
- Private Health Insurance (Insurer Obligations) Amendment Rule 2013 (No.1)
- Private Health Insurance (Risk Equalisation Policy) Rules 2007
- Private Health Insurance (Risk Equalisation Administration) Rules 2007
- Private Health Insurance (Risk Equalisation Levy) Rules 2007
- Private Health Insurance (Levy Administration) Rules 2010

The Private Health Insurance Ombudsman is an independent body established to resolve complaints about a private health fund, a broker, a hospital, a medical practitioner, a dentist or other practitioners (as long as the complaint relates to private health insurance) and to be the umpire in dispute resolution at all levels within the private health insurance industry. 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 percent 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 Treasurer.

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).

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) (IC 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 IC 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 standard prescribed cover in certain classes (e.g. home contents, motor vehicle, property damage).
- 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 14 days 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 limits 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. Claim payments can only be reduced to the extent of any prejudice.

Medical indemnity insurance contracts

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).

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 agent and employee training, plain English and comprehensible documentation, and complaints handling and dispute resolution procedures. An estimated 90 percent of general insurers in Australia have signed up to the Code. The Code is monitored by the Financial Ombudsman Service to ensure participants meet the Code's required standards. Some insurance products, such as workers' compensation, medical indemnity and marine, are not covered by this Code.

Life Insurance Code of Practice

Dealing with the design, distribution and marketing of life insurance products, the *Financial Services Reform Act 2001* (Cth) and the *Life Insurance Act 1995* (Cth) regulate all conduct of life insurers as well as life brokers and life insurance advisers. 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

Private Health Insurance Ombudsman: www.phio.org.au

Insurance Council of Australia: www.insurancecouncil.com.au

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

Financial Ombudsman Service: www.fos.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) (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.

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.

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 (discussed below).

Australian copyright law is becoming more aligned with international norms. The Copyright Act was amended in 2004 in response to the Australia–US 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 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 Statue of Monopolies 1623, 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 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 patenteligible 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 all. 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 & 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 issues, censorship regulations, privacy and spam obligations and contractual issues.

LEGISLATION

Electronic transactions

The *Electronic Transactions Act 1999* (Cth) (the 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 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 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.

Separate legislation (the *Do Not Call Register Act* 2006 (Cth)) regulates telemarketing and commercial communications to fax numbers.

Broadcasting

Internet content that is hosted or provided from Australia is regulated by Schedule 7 of the *Broadcasting Services Act 1992* (Cth). 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.

The Australian Communications and Media Authority (ACMA) has power to require that prohibited content be taken down. Australian legislation provides for Internet Service Provider (ISP) liability safe harbours, provided that ISPs comply with the safe harbour regime. Please see the Business Practices chapter for more on privacy law matters.

DOMAIN NAMES

Address 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 (eg .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). 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 is increasing and many businesses now have accounts with social media outlets. DLA Piper's research report *Social Media – New Laws for New Attitudes* found that almost 70 percent of people used social media in 2011, and that number has increased since that time. 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". In addition to rules about who owns the account and followers, social media policies should also include details 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.

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. It 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 the federal, state and territory 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 Commonwealth 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 Association of Australia 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.

In addition to patent issues, companies should consider whether they have adequate protection for the brands that they intend to use in Australia. Australia has a first to use or file system. That is, trade mark rights can be obtained in Australia either through use of the trade mark, or through registration.

Trade mark registration has a number of benefits, including the deterrent effect of a registration on a publicly searchable register, as well as easier and more cost effective enforcement given that evidence of reputation is not required to succeed in court.

It is prudent to conduct trade mark clearance searches before committing to the use of a trade mark in Australia to determine the mark's availability for use and registration.

Life sciences companies regularly commence litigation in Australia to enforce their patents so as to protect their products from 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.

MINING AND RESOURCES

OVERVIEW

The continued focus on capital consolidation, improved productivity and cost competitiveness within Australia's mining and resource sector has been the backdrop to record export volumes in the north west of Australia, with two million tons of iron or being exported from Port Hedland in 24 hours in April 2014.

Although investment in the sector has been soft since the start of 2013, as operations moved into the production phase, the 'green shoots' appear to be returning as new players such as private equity funds take advantage of low equity and asset prices in the sector.

The Australian resources market is currently characterised by a high degree of takeover activity, with M&A activity expected to peak during late 2014 and 2015.

REGULATORY MATTERS

State governments approach resource projects very differently in Australia. Some states, for example Western Australia and Queensland, commonly use instruments known as State Agreements when developing significant mining, oil and gas projects. These are in addition to regulatory issues and are essentially contracts between the state and private developers where each commits to certain undertakings and obligations in relation to a project.

Under State Agreements, states will typically promise to grant certain rights, expedite processes and possibly also grant concessions in return for undertakings to develop a particular project within a certain time frame. Developers may also need to undertake to operate secondary processing, commit to community development plans and provide employment opportunities.

Developing mining, oil and gas projects in Australia requires a range of statutory approvals. Though not an exhaustive list, several key approvals are set out below.

Environmental approvals

Currently, environmental approvals may be required from both a state government and the Australian Government. Most states have an environmental assessment process for resources projects, which can take as little as a few weeks or as long as several years, depending on the project's size and potential environmental impact.

Recently, the Australian Government has committed to delivering a 'one stop shop' for environmental approvals that will accredit state planning systems under national environmental law, to create a single environmental assessment and approval process for nationally protected matters.

The one stop shop policy aims to simplify the approvals process for businesses, lead to swifter decisions and improve Australia's investment climate, while maintaining high environmental standards.

Native title

Australian law recognises the native title rights of traditional, indigenous inhabitants in areas where those rights have not been extinguished, for example by the grant of freehold title. Registered native title claimants and determined native title holders have certain important procedural rights, which must be accommodated in the development of most resources projects. See also the Real Estate chapter.

Land access

States and territories have their own legislation dealing with rights of access to land and how land can be owned, leased, licensed, transferred and otherwise dealt with. These regimes usually comprise several pieces of interlocking legislation, which affect the grant of land for access to projects, the development of infrastructure such as pipelines, railways and ports and for general purposes. See also the Real Estate Property chapter.

Mining legislation

Again, states and territories have their own legislation governing the granting of different types of rights to explore for and extract minerals from defined areas. Most states also have a network of specialist courts and tribunals overseeing and resolving disputes between parties as to their competing rights to minerals.

Petroleum legislation

State and territory legislation deals with the grant of rights to explore for and extract petroleum products. There is also federal legislation, which complements the state-based regimes.

Occupational health and safety

Specialist occupational health and safety legislation imposes significant obligations on companies and individuals. A notable feature is the imposition of personal liability on directors and senior officers of companies where there has been a failure to provide a safe system of work or other failure to comply with occupational health and safety legislation. Business systems and appropriate contractual arrangements must be in place to ensure compliance.

REAL ESTATE

LAND LAW

The basic principles

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.

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, we also produce a guide to retail leasing, which is available on request.

Planning laws

There are state – and territory-based 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. See also the Environment & Planning chapter.

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 percent or seven percent 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, ie without improvements. The rates of land tax also vary from state to state and reach 3.7 percent.

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.

Useful references

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

TAXATION

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

At the federal level, the Australian Government collects almost 80 percent 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 landowners – though these make up less than five percent 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.

TAX RATES

Australian resident individual tax rates for 2014 – 15 are set out in the table below.

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

From 1 July 2014, a Medicare Levy of two percent 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 percent 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 greater than AU$84,000 for the 2014-15 income tax year and by family members if the combined taxable income of the

person and their spouse is greater than AU$168,000 for the 2014-15 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

From 1 July 2014, a Temporary Budget Repair Levy will apply to individuals with taxable income in excess of AU$180,000. The levy will apply at a rate of two percent for the next three years, starting on 1 July 2014.

The top rate of tax currently payable by individuals with taxable income above AU$180,000 is 45 percent. From 1 July 2014, this increases to 47 percent when combined with the two percent Medicare Levy. Thus, the additional two percent Budget Repair Levy will effectively take the top marginal tax rate to 49 percent for the next three years, 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 will also temporarily increase from 1 July 2014 to 30 June 2017, while the budget repair levy is in place.

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.

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 percent), interest (at 10 percent) and dividends (at 30 percent). Certain exemptions from withholding tax are available under Australian domestic law. In addition, the withholding tax rates may be reduced under an applicable DTA.

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 percent 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 percent 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 percent.

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.

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
- Whether or not to apply TOFA to existing financial arrangements
- Elective tax timing methods – ie how gains and losses will be taxed under TOFA.

GOODS AND SERVICES TAX (GST)

GST is a value-added tax of 10 percent, 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 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.

CAPITAL GAINS TAX

Capital Gains Tax (CGT) forms part of the income tax regime. CGT applies to net capital gains relating to assets and notional assets acquired after 19 sale proceeds are less than the actual unindexed cost. However, these losses may only be offset against current or future capital gains.

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. 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.

In a recent alignment of Australia's CGT tax policy with Organisation for Economic Cooperation and Development practice, nonresidents 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 percent 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 percent 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.

Non-residents now have greater flexibility and efficiency in structuring their Australian investments. They are no longer subject to CGT on Australian share or unit trust investments where Australian real property is not held by the entity. Assets held through a partnership and options over taxable Australian assets are included in the tax base.

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.

ANTI-AVOIDANCE PRO VISIONS DIRECTED AT FOREIGN ENTITIES

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, 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.

From 1 July 2014 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 percent 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, ie 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, ie 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, ie 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 percent of the risk-weighted assets of the Australian banking business
- Arm's length capital amount, ie 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 percent 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 10 percent of the gearing of the worldwide group it controls from 1 July 2014.

TRANSFER PRICING (SHIFTING PROFITS OUT OF AUSTRALIA)

Australia's *Income Tax Assessment Act 1936* (Cth) deals with arrangements by which profits are shifted out of Australia. The Taxation Commissioner may impose arm's length prices in relation to:

- The supply or acquisition of property or services between related parties under an international agreement
- Internal dealings of an international organisation such as between international head office and an Australian branch.

Any management charges or supplies of services by foreign investors to related Australian companies must be commercially justifiable and at approximately arm's length prices. Several pricing methodologies exist that are acceptable to the ATO.

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, GST, 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

Fringe Benefits Tax

FBT is a federal tax of 46.5 percent (to be increased to 49 percent from 1 July 2015) 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 GST 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, eg fringe benefits. Standing at around 5.5 percent of the payroll value, the

tax differs between jurisdictions and exemptions for total annual payrolls of around AU$1 million or less 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. Generally, wages include some amounts paid to independent contractors.

Duty

Duty, sometimes 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, eg mortgages and charges.

Depending on the nature of the instrument and transaction, duty varies from 0.4 percent to 6.75 percent. 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 and South Australia charge 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 percent 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.

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 percent. This is proposed to be reduced to 28.5 percent from 1 July 2015, excluding large companies.

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 Federal 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.

TRANSPORT & 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 (ie 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, ie 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, ie 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, ie 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, ie 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, ie 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 now 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 at www.customs.gov.au.

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 at www.daff.gov.au/aqis.

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.

Bilateral trading 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 agreements

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

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 percent or more of the cost of producing or manufacturing the goods occurred in that alleged country of origin.

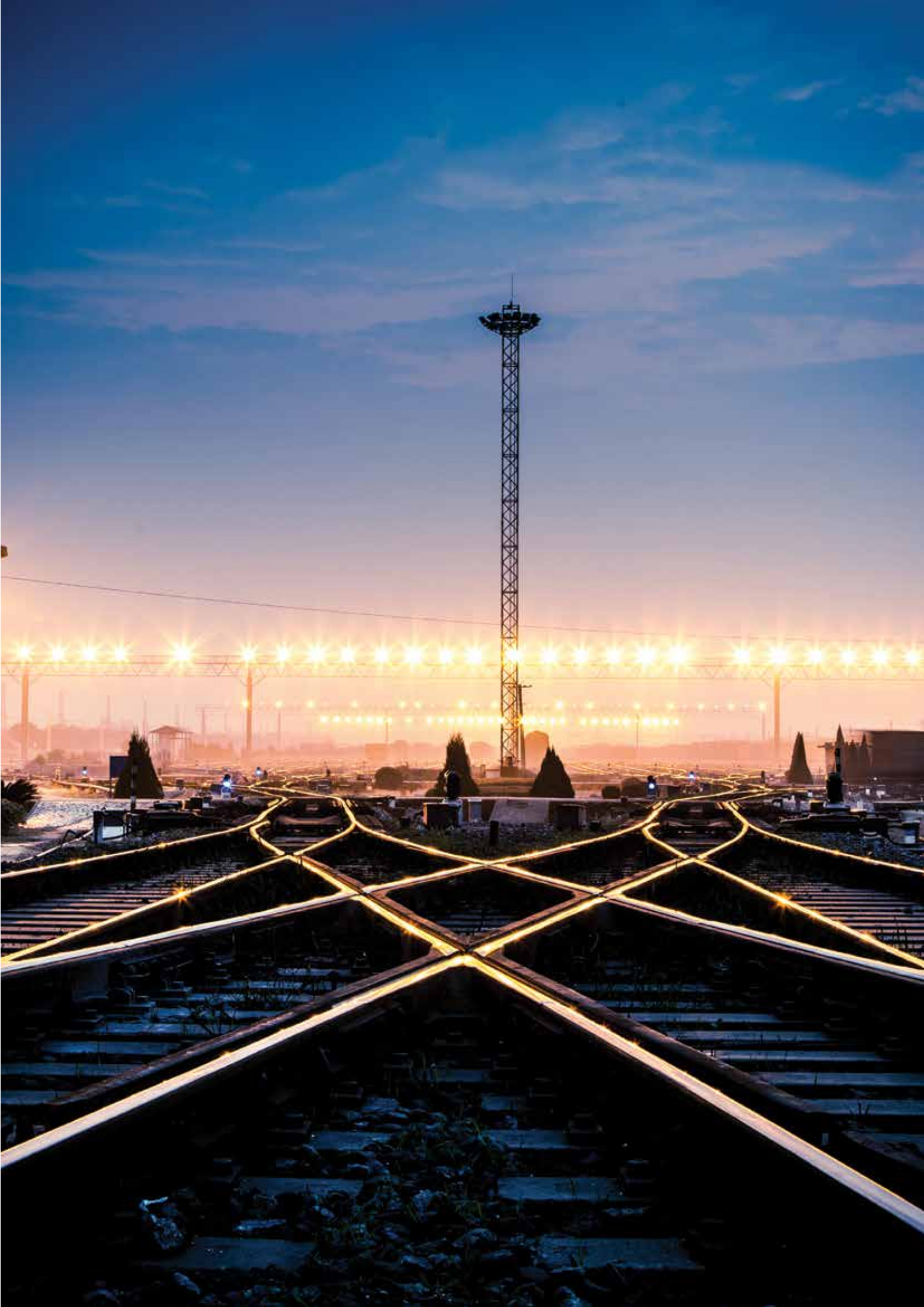
The *Commerce (Trade Description) Act 1905* (Cth) and associated Regulations prescribe that certain imports, including shoes, electrical appliances, toys, agricultural seeds and jewellery, be labelled before entering Australia for consumption. False trade descriptions or those likely to mislead attract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

Useful references

Australian Customs Service: www.customs.gov.au

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

Department of Agriculture, Fisheries and Forestry: www.daff.gov



GLOSSARY

ACCC	Australian Competition and Consumer Commission
ACICA	Australian Centre of International Commercial Arbitration
ADI	Authorised Deposit-taking Institution
AEMC	Australian Energy Market Commission
AEMO	Australian Energy Market Operator
AER	Australian Energy Regulator
AFS	Australian Financial Services (Licence/licensing)
ALRC	Australian Law Reform Commission
AML/CTF	Anti-Money Laundering and Counter-Terrorism Financing
APRA	Australian Prudential Regulation Authority
AQIS	Australian Quarantine Inspection Service
ARPC	Australian Reinsurance Pool Corporation
ARTG	Australian Register of Therapeutic Goods
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 Commission
CCA	*Competition and Consumer Act 2010* (Cth)
CDI	CHESS Depositary Interests
CEA	*Clean Energy Act 2011* (Cth)
CEC	Clean Energy Council
CFI	Carbon Farming Initiative
CGT	Capital Gains Tax
COMI	Centre of Main Interests
DIIRD	Department of Innovation, Industry and Regional Development (Victoria)
DoCA	Deed of Company Arrangement
DTA	Double Taxation Agreement
EEU	Eligible Emissions Unit
EPA	Environment Protection Authority
ERA	Economic Regulation Authority
FATA	*Foreign Acquisitions and Takeovers Act 1975* (Cth)
FBT	Fringe Benefits Tax
FIRB	Foreign Investment Review Boards
FOS	Financial Ombudsman Service
FW Act	*Fair Work Act 2009* (Cth)
FWA	Fair Work Australia
GATT	General Agreements on Tariffs and Trade
GDP	Gross Domestic Product
GFC	Global Financial Crisis
GMT	Greenwich Mean Time
GST	Goods and Services Tax
IAA	*International Arbitration Act 1974* (Cth)
ICANN	Internet Corporation for Assigned Names and Numbers
ICS	Integrated Cargo System
IPPs	Information Privacy Principles
ISP	Internet Service Provider

MIS	Managed Investment Scheme
MIT	Managed Investment Trust
NEL	National Electricity Law
NEM	National Electricity Market
NES	National Employment Standards
NGL	National Gas Law
NPPs	National Privacy Principles
OECD	Organisation for Economic Cooperation and Development
OPGGSA	*Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth)
PBS	Pharmaceutical Benefits Scheme
PCPIP	Paris Convention for the Protection of Industrial Property
PCT	Patent Cooperation Treaty
RBA	Reserve Bank of Australia
REEA	*Renewable Energy (Electricity) Act 2000* (Cth)
RSMS	Regional Sponsored Migration Scheme
SAP	Substituted Accounting Period
SDR	Special Drawing Right
STTM	Short Term Trading Market
TNSP	Transmission Network Service Provider
TOFA	Taxation of Financial Arrangements
UDRP	Universal Dispute Resolution Procedure
UNCITRAL	United Nations Commission on International Trade Law

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DLA Piper in Australia is a full service business law firm providing Australian clients with an extensive breadth and depth of service across five capital cities nationally.

We have approximately 600 legal staff based in Sydney, Melbourne, Brisbane, Perth and Canberra.

As trusted legal advisors to approximately a third of the ASX 100 companies or their subsidiaries and all levels of government, we take great pride in our reputation as a firm that is friendly, accessible and easy to do business with. It is our priority to spend time with our clients, getting to know them so that we can understand their businesses and provide strategic and innovative legal solutions that are practical and commercially focused.

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.

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