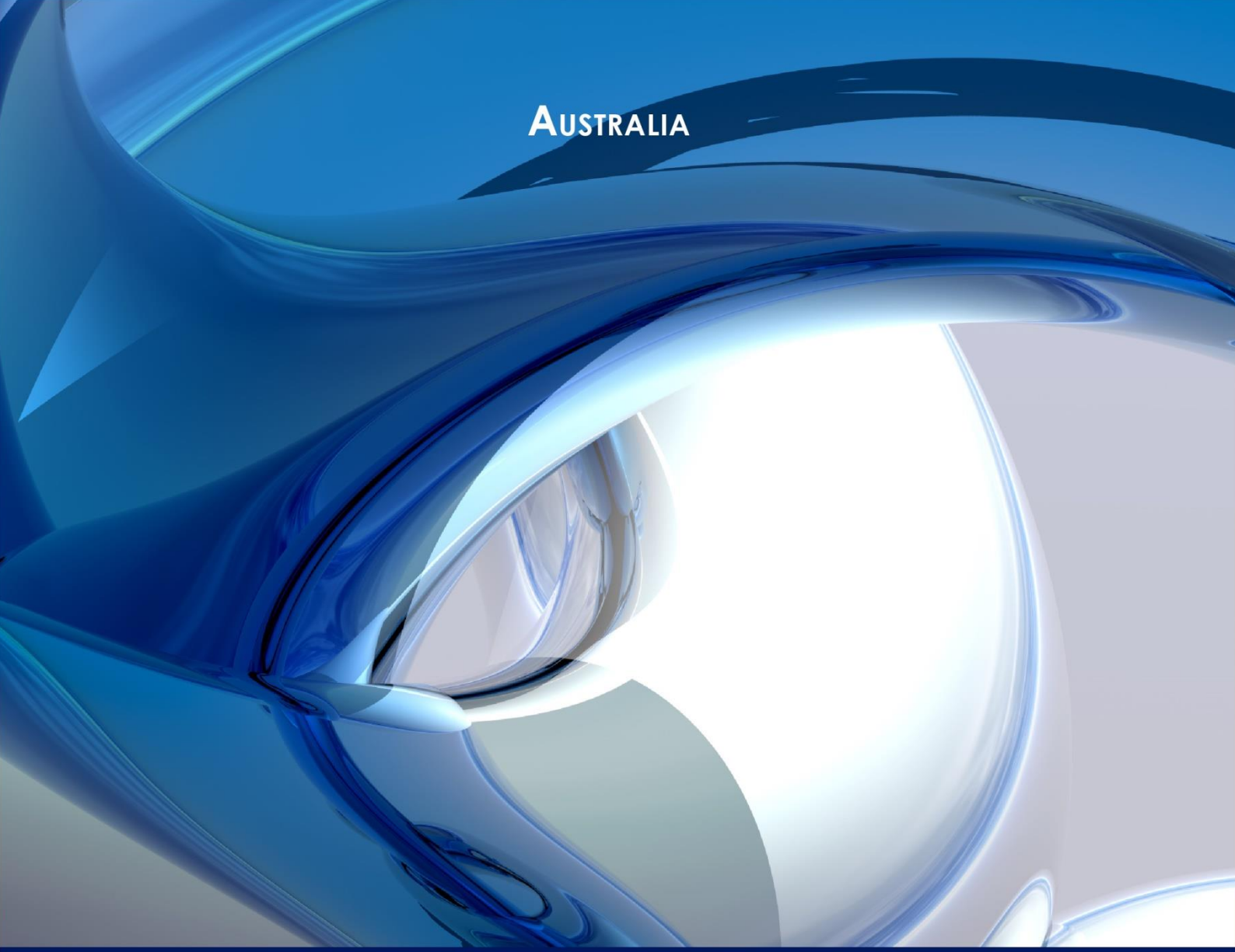
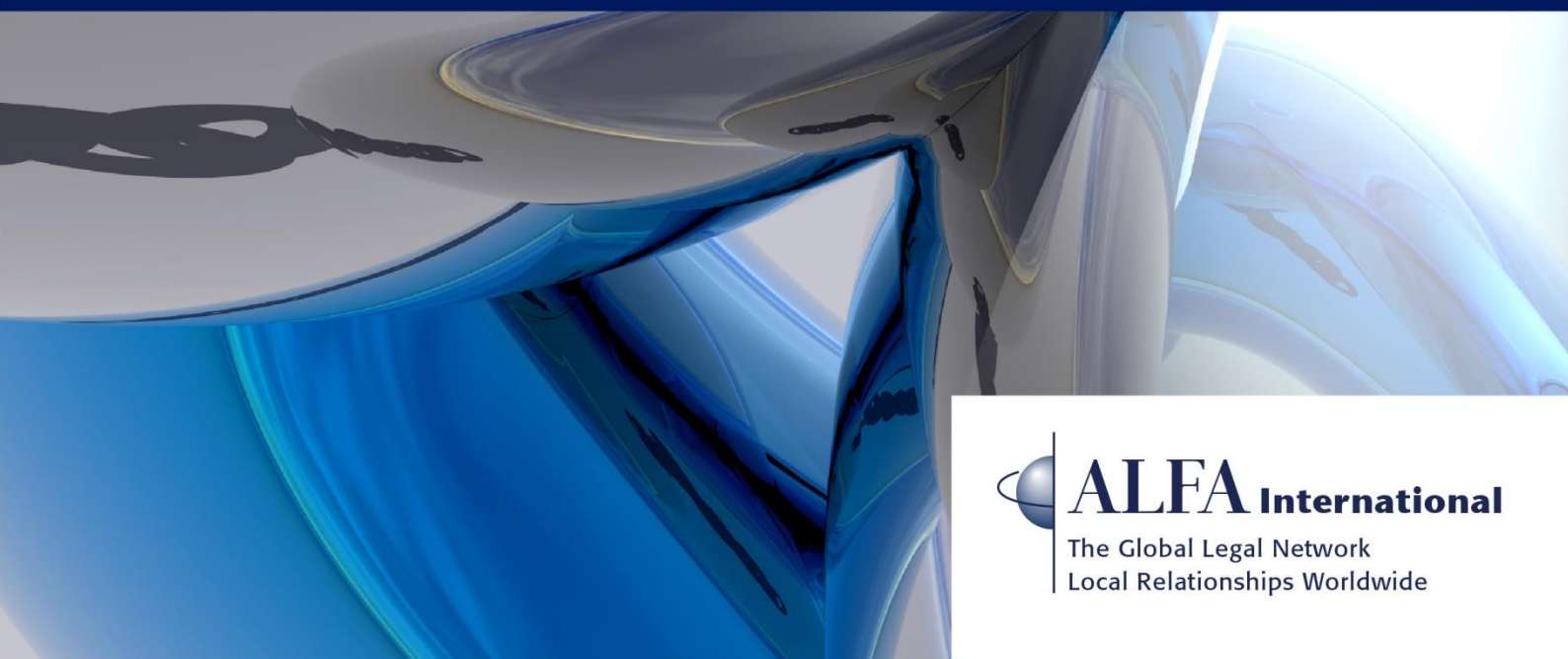


AUSTRALIA

DOING BUSINESS IN AUSTRALIA
FREQUENTLY ASKED QUESTIONS



ALFA International
The Global Legal Network
Local Relationships Worldwide

Contents

INTRODUCTION

Australia welcomes foreign investment. By international standards, most foreign citizens wishing to establish or invest in businesses in Australia can do so in a relatively straight forward manner. This document aims to provide a brief overview of some of the key legal considerations to be taken into account if you are considering investing in or establishing a business venture in Australia.

This document has been prepared jointly by Australian member firms of ALFA International, the Global Legal Network. The firms' contact details are below. Please contact either of them if you require further information or assistance with doing business in Australia.

This document is current at January 2018.

Please note that many of the laws referred to below are complex and the following summaries are very general in nature. This document is not legal advice. Please do not act in reliance upon it but always seek specific legal and other appropriate professional advice before taking action.

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BUSINESS STRUCTURES

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Types of Organisation Structures

Foreign citizens doing business in Australia can establish, own and carry on business using a variety of business structures. Those structures include:

- Sole trader – an individual typically conducting a small business with a small amount of capital investment.
- Partnership – 2 or more individuals or entities carrying on business together with a view to sharing profits. Each partner is jointly and separately liable for the liabilities of the partnership business. Establishment of a limited partnership in some circumstances is possible but is not prevalent in Australia.
- Joint venture – similar to a partnership but usually established for a particular project. Joint ventures may be unincorporated or incorporated. The rights and liabilities of each joint venturer will depend upon the terms of the joint venture agreement.
- Trust – trading trusts are widely used in Australia and are commonly a form of unit trust where the equity interests are units, which are similar to but distinct from shares in a company. Most trading trusts will have a proprietary limited company as its trustee. The trustee will hold the assets and operate the business of the trust as trustee for the beneficiaries of the trust. The beneficiaries are the ultimate owners of the business and assets.
- Foreign company – a foreign company may apply to the Australian Securities & Investments Commission (**ASIC**), the body that regulates Australian corporations, to be registered in Australia as a foreign company. Foreign companies may apply for listing as publicly traded entities. Almost invariably such a listing would occur on the Australian Securities Exchange (**ASX**), which is the primary securities exchange in Australia. To be listed on ASX, a company must comply with the ASX Listing Rules and with other legislative requirements, particularly those under the Australian *Corporations Act 2001* (Corporations Act), which is the principal (but certainly not the only) piece of legislation governing Australian companies. A foreign company registered in Australia must have a registered office in Australia and must appoint a local agent who will be responsible for ensuring the company complies with its legal obligations in Australia. As with almost all public companies in Australia, the company will be required each year to lodge with ASIC a copy of its financial accounts and to notify ASIC from time to time regarding details of its structure including the provisions in its constitution and its office holders (see the Financial Reporting section below).
- Public company limited by shares – these companies have issued shares. A public company does not have a limit on its number of shareholders.

It must have a registered office in Australia and at least 3 directors and at least 1 company secretary. Two of the directors and the secretary must ordinarily reside in Australia. Public companies are permitted to raise funds from the public, subject to certain disclosure and compliance requirements being met. A public company may be listed on ASX. A public company is typically identified by the suffix "Limited" or the abbreviation "Ltd".

- A proprietary company limited by shares – this is the most common type of company in Australia. A proprietary limited company may, if it chooses, have just one corporate or individual shareholder holding 1 issued share. At the other end of the spectrum it can have no more than 50 non-employee shareholders plus additional employee shareholders.
- Proprietary limited companies are not able to engage in public fundraising activities. It must have a registered office in Australia and at least 1 director who ordinarily resides in Australia. The company need not have a company secretary but if it does, the secretary must ordinarily reside in Australia. A proprietary limited company is typically identified by the suffix "Pty Limited" or "Pty Ltd".

Subject to some foreign investment regulation (see the section below on foreign investment), there is little regulation in Australia preventing ownership of Australian business interests by foreign citizens, either directly or through interposed Australian companies or trading trusts.

Most foreign citizens will establish an Australian business presence by acquiring the equity interests in an Australian company or by acquiring the business assets which they will hold either directly or through an Australian company which they establish and own.

Financial Reporting Relief for Wholly Owned Australian Companies

An Australian company that is a subsidiary of a foreign company will have an obligation to file with ASIC annual audited financial accounts and directors' reports. Especially for small proprietary companies, this reporting obligation can be quite onerous. Failure to file reports gives rise to an offence under the Corporations Act. Subject to particular conditions, an Australian small proprietary company that is foreign owned may be entitled to receive the benefit of financial reporting relief from ASIC, relieving the Australian company from the requirement to prepare and lodge audited financial statements and a directors' report for a particular financial year.

A number of requirements must be satisfied in order for the relief to be available to a company and strict compliance with these requirements is necessary.

Competition and Consumer Law

Australian competition and consumer law (**ACL**) is found predominantly in the *Competition and Consumer Act 2010* (Cth) (**Competition and Consumer Act**) and a number of pieces of State legislation. The

regulatory body is the Australian Competition & Consumer Commission.

The Competition and Consumer Act seeks to protect consumers and to promote fair trading and competition in trade and commerce in Australia. Amongst other things, it prohibits:

- unfair contract terms in standard form consumer and small business contracts;
- most forms of restrictive pricing agreements;
- a party with substantial market power from engaging in conduct that has or is likely to have the effect of substantially lessening competition in the market or any other market in which the party is or is likely to operate;
- conduct that has the purpose, effect or likely effect, of substantially lessening competition;
- mergers and acquisitions without a merger clearance or authorisation from the ACC and that have the effect or likely effect of substantially lessening competition in the market;
- misleading or deceptive conduct (which includes false representations concerning goods or services), frequently in the area of advertising or promotion or misrepresentation about where products are made or their price, quality and performance. In determining whether conduct is misleading or deceptive, a court will consider the issue on an objective basis. An intention to mislead or deceive is not necessary for a breach to be committed. The courts have suggested that conduct that is misleading or deceptive, or likely to mislead or deceive, can include making a statement which is misleading or deceptive, or likely to mislead or deceive. The conduct must lead, or be capable of leading, a person into error and the error or misconception must result from conduct of the person and not from other circumstances for which the person is not responsible;
- unconscionable conduct in both consumer transactions and commercial dealings; and
- contraventions by a corporation of an applicable prescribed industry code of conduct. The Franchising Code of Conduct is a typical example.

The ACL applies in all States and Territories, and to all Australian businesses. The ACL is enforced by all Australian courts and tribunals.

If a business breaches the ACL, it may face a number of penalties including civil pecuniary penalties, infringement notices, disqualification orders, criminal sanctions for most serious breaches of the ACL, injunctions and/or payment of damages.

Australian Transaction Reports and Analysis Centre (AUSTRAC)

The *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) (AML/CTF Act) is a part of a legislative framework aimed at deterring, amongst other issues, money laundering and terrorism financing in Australia.

The AML/CTF Act imposes a number of obligations on reporting entities when those reporting entities are deemed to provide a

designated service. The obligations include, but are not limited to, a requirement to:

- enrol and/or register the business with AUSTRAC;
- undertake customer identification and verification of identity checks;
- record keeping; and
- establish and maintain an AML/CTF program.

AUSTRAC is the primary regulatory body and compliance enforcement agency for anti-money laundering and counter-terrorism financing.

Rather than conduct investigations itself, AUSTRAC collects data from businesses and other sources on financial transactions and suspicious matters. That data is then analysed by AUSTRAC and the intelligence is provided to agencies such as the Australian Federal Police.

The Australian Prudential Regulatory Authority (APRA)

APRA sets standards and oversees regulation for the prudent management of banks and other deposit taking institutions, insurance companies and friendly societies to maximise the likelihood that they will remain financially sound and able to meet their obligations to depositors and policy holders.

EMPLOYMENT RELATIONS

Cornwall Stodart

In Australia, the terms and conditions of an individual's employment are not limited to their employment contract. Common law principles, legislation, industrial instruments (such as Modern Awards or Enterprise Agreements) and decisions of industrial tribunals and Courts all regulate the employment relationship.

This paper covers some key employment issues faced by Australian employers in the daily operation of their business (due to space constraints this summary is necessarily limited to the major areas of concern to employers).

Overview of the Australian Industrial Relations System

Employment matters are governed by both state and federal legislation. Industrial tribunals are set up in each state (as well as federally) to regulate this legislation.

Since 1 January 2010, the predominant industrial relations system has been the federal one, with a system of Modern Awards and 10 National Employment Standards (**NES**) that regulate the minimum terms and conditions of virtually all private sector employees.

Minimum Conditions of Employment

The key features of the federal system are the NES and Awards. In the federal system, statutory terms and conditions are prescribed by:

- The NES – These comprise 10 minimum employment standards that *must be* complied with in all circumstances. They apply to all national system employers and are not negotiable.

  The NES cover hours of work, flexible working arrangements, paid and unpaid

leave (including parental leave, annual leave, personal/carer's leave, compassionate leave and community service leave), public holidays, notice of termination (generally and on redundancy) and information to be provided to an employee at the commencement of their employment.

- Modern Awards cover a broad spectrum of industries and occupations, but only apply to employees whose duties are covered by the work classifications in a particular Modern Award.

  Determining which Modern Award applies and the appropriate classification can be a complex process. Awards set minimum terms and conditions in addition to the NES and prescribe, among others, the minimum wages for each work classification, working hours and allowances. Like the NES, Modern Awards must be complied with and cannot be contracted out of. However, it is possible to vary the application of the terms of a Modern Award either through an Individual Flexibility Agreement (with one employee) or an Enterprise Agreement (with all employees or a particular group of employees), provided that the employees are '*Better Off Overall*'.

- Enterprise Agreements need to be negotiated with employees (and in some cases, unions) and approved by the Fair Work Commission (**FWC**). They must also comply with strict procedural requirements. Once approved, Enterprise Agreements generally override the application of any Modern Award.

  Making Enterprise Agreements can be a complex process and legal advice should be obtained.

- Under statute, employers are required to maintain time and wages records that are subject to inspection by employees, unions (in limited circumstances) and the Fair Work Ombudsman. Employers must also provide employees with payslips that give certain statutory information prior to the money being paid.

  The legislation contains a series of enforcement measures (including prosecutions for breach of the legislation, Modern Awards or enterprise agreements, fines and claims for underpayment of wages), which can be pursued by the Fair Work Ombudsman, individual employees and unions.

  While prosecutions are generally undertaken and fines imposed on the employer, often claims are made personally against its directors and managers, if they have aided and abetted a breach.

Contracts of Employment

In addition to the statutory regime, all employees are covered by a contract of employment.

A contract of employment can be oral or written (however for certainty, written contracts are strongly recommended) and are made up of a combination of express and implied terms. While a contract of employment cannot override the statutory conditions, additional provisions may be included in a contract of employment to protect the employer.

These may include a contractual notice period, the ability to suspend an employee, and provisions protecting confidential information, trade secrets, intellectual property and post employment conduct (including restrictions on solicitation of business, customers, suppliers and staff).

It is recommended that all employees have a written contractual provision for notice in order to avoid '*reasonable notice*' claims, which can result in pay in lieu of notice (12 months' pay in lieu of notice is not uncommon in the case of long standing senior employees).

For employees who are not covered by a Modern Award or Enterprise Agreement (normally senior/managerial employees), it is particularly important to have a written contract of employment, because apart from the NES, this will be the only document regulating the employee's terms of employment.

Anti-Discrimination

State and federal legislation prohibits a wide variety of discrimination, bullying and sexual harassment in employment. The legislation also covers a range of other contractual relationships including contractors, the provision of goods and services and education. This is a complex and highly litigated area of law.

Occupational Health and Safety Legislation

State and federal occupational health and safety legislation imposes a general (non delegable) duty upon employers to provide a safe work environment and to ensure the health and safety of employees, contractors, members of the public and volunteers.

A breach of the duty can result in, among other things, criminal prosecutions and substantial penalties. In some circumstances, not only can the employer be prosecuted, but a director and/or senior manager can also be held personally liable.

Most states and territories have adopted harmonised work health and safety legislation which imposes positive duties on directors and/or senior managers to exercise due diligence in ensuring the health and safety of their workplace and increased penalties.

A number of workplace bullying cases have received considerable publicity in recent years. Employees may make complaints of bullying to the FWC, and some states have made certain types of intentional bullying a criminal offence. All employers should have an anti-bullying policy and complaints procedure (incorporating a training regime) in order to minimise the potential of this type of claim and the adverse impact that bullying has in the workplace.

Workers' Compensation

Australia has enacted protective legislation with respect to persons injured at work. State and federal legislation requires employers to maintain workers' compensation insurance for employees and other workers (including some contractors) who are deemed employees for the purposes of the legislation. The insurance is intended to cover the cost of compensating an employee who is injured at work.

While the general principles of workers' compensation are the same, the actual legislative regime varies from state to state and specific advice should be obtained relative to the state in which the injured worker is located.

Superannuation

Employers must make compulsory superannuation (which is similar to a pension fund) contributions on behalf of their employees. If employers fail to pay superannuation they may have to pay a superannuation guarantee charge, made up of the original superannuation amount, interest and administration fees. The minimum superannuation contribution rate is currently 9.5%, however employers may negotiate higher rates with their employees or unions. The minimum superannuation contribution rate is scheduled to increase progressively until it reaches 12%.

Taxation

Employers are required to deduct tax from employees' wages and pay it to the Australian Tax Office. A similar requirement is also imposed on employers with respect to certain types of contractors who may be deemed employees for the purposes of the income tax legislation.

Termination of Employment

Termination of employment is regulated by legislation and any applicable employment contract, Modern Award, Enterprise Agreement or common law principles. These sources specify circumstances when an employee can be terminated and how termination should be carried out. A variety of claims can result from a termination of employment, depending on whether the basis of the claim is statutory or contractual.

This is a highly regulated and litigated area and specific legal advice should always be obtained prior to terminating employment.

Summary

Employment relationships and workplace relations generally, are highly regulated in Australia. In some industries, employees are very quick to litigate matters (particularly if the workforce is unionised).

It is important that foreign investors taking on employment obligations ascertain their rights and obligations as employers. To minimise risk (not only to a business but also to the directors and managers of a business), employers must ensure they are aware of, and meet, their obligations to employees.

TAXATION

Cowell Clarke

Income Tax including Capital Gains Tax (CGT)

Australia currently imposes income tax on the net income (i.e. gross income less allowable deductions for expenses) plus realised capital gains of all business entities and individuals. A capital gain or capital loss is broadly the difference between what it costs to acquire an asset and what is received on disposal of the asset.

In most circumstances the taxable amount of a capital gain for an asset held for more than 12 months is calculated on 50% of the gain, except if an asset is owned by a company in

which case no 50% discount is available. Capital gains in respect of assets acquired prior to 20 September 1985 are generally not subject to CGT.

A number of additional CGT concessions are also available in respect of CGT assets held or used by "small business entities" (see below) or entities whose CGT assets do not exceed AUD 6 million. These concessions include:

- a further 50% capital gains tax CGT reduction;
- lifetime reduction caps up to AUD500,000 per individual where the capital proceeds are used in connection with their retirement;
- a replacement asset rollover (where the CGT liability is deferred); and
- a potential outright exemption if the CGT asset is held for 15 years or more.

Small Business Concessions

A small business entity is broadly speaking an entity whose annual "aggregated turnover" is less than AUD2 million. Aggregated turnover takes into account the turnover of the entity in question and certain associated entities.

In addition to the CGT concessions noted above, a number of additional tax concessions for small business entities are available. Some of these concessions include:

- a reduced company tax rate of 28.5%;
- the ability to account for goods and services tax (see below) on a cash basis;
- small business restructure rollover provisions;
- in limited circumstances, deductions for professional and prepaid expenses, income tax offsets for individuals or fringe benefit concessions;
- simplified depreciation rules which allow for the immediate deduction of some expenses and accelerated depreciation rates.

Australian Tax Residency

A company will be considered an Australian resident for taxation purposes if it is:

- incorporated in Australia, or
- if not incorporated in Australia, carries on business in Australia and has either its central management or control in Australia, or it is controlled by Australian resident shareholders.

Broadly, an individual will be an Australian resident for tax purposes where:

- they ordinarily reside in Australia;
- are domiciled in Australia unless it is demonstrated their permanent home is outside Australia; or
- they are present in Australia for more than half of the income year.

Non-resident companies, trusts and individuals are subject to Australian income tax on Australian sourced income. Non-residents will generally be subject to Australian income tax on the same basis as residents and will be exempt from Australian tax on foreign sourced income. Different taxation implications may arise in relation to dividend, interest and certain royalty income and where a double tax agreement (**DTA**) (if one exists) between Australia and the relevant foreign jurisdiction provides otherwise. Australia has DTAs with many countries in order to avoid double taxation

and evasion. Where the provisions of those treaties conflict with the Australian Income Tax Assessment Act, the provisions of the treaties generally prevail.

Financing operations

Certain rules operate when the ratio of debt versus equity used to finance the Australian operations exceeds specified limits (**Thin Capitalisation rules**).

The Thin Capitalisation Rules restrict the deductibility of finance expenses (e.g. interest) attributable to the Australian operations of foreign multinational investors.

These rules may apply to:

- Australian entities that are foreign controlled or foreign entities with operations or investments in Australia, where those foreign entities are claiming deductions ('inward investors').
- Australian controllers of Australian controlled foreign entities, entities that carry on business through overseas permanent establishments and their associates ('outward investors').

Thin capitalisation interests arise where an entity and its associates hold an interest in the shares, voting rights or dividend entitlement in a company. Australian controllers are holders of 10% or more in the controlled foreign company. An Australian company is 'foreign controlled' where fewer than five foreign entities control at least 50% of the thin capitalisation interest in the company.

These entities will be subject to the thin capitalisation rules provided that the entity and its associates claim total debt deductions of more than AUD2 million in the financial year and the debt exceeds a permitted ratio of debt to foreign equity. The permissible ratio of debt to equity is generally 1.5:1.

Taxation of Financial Arrangements

In recent years, legislation has been introduced reforming the taxation of financial arrangements (**TOFA rules**).

In effect, the TOFA rules will cause gains and losses from financial arrangements to be recognised over the life of the financial arrangements for tax purposes, irrespective of the traditional capital or revenue considerations (generally, gains and losses from financial arrangements are on revenue account).

The TOFA rules will apply to entities (excluding individuals) that have a turnover of over AUD100 million, assets of over AUD300 million or financial assets of over AUD100 million.

These requirements vary for financial and superannuation entities. Entities may also elect to have the TOFA rules apply. If applicable, the rules will apply to arrangements where the taxpayer has a right to receive, or an obligation to provide, a financial benefit of a monetary nature.

Transactions between a foreign entity and an Australian entity

The transfer pricing provisions provide a legislative framework for dealing with arrangements under which profits are shifted out of Australia, primarily through the mechanism of inter-company and intra-company transfer pricing. Examples of "internal profit-shifting" include profit-

shifting within the same enterprise, such as between a head office in one country and a permanent establishment (**PE**) or branch in another country, or between PEs of the enterprise in different countries. The effect of transfer pricing provisions is to ensure there is no manipulation of profits to be taxed in Australia by depressing Australian assessable income or increasing allowable deductions in Australia.

Withholding taxes

Withholding tax is imposed on certain payments from Australia to a foreign entity and is levied on the full amount of dividends, interest and certain royalties payable to non-residents at the following general rates:

- Dividends: 15% for most treaty countries and 30% for non-treaty countries, except for dividends that are fully franked (i.e. generally have borne tax) in Australia which are not subject to withholding tax.
- Interest: 10% on the *gross* amount of interest paid (i.e. without deducting expenses incurred in deriving that interest, etc.). With some exceptions, this rate is unaffected by Australia's DTAs.
- Royalties: 15% for most treaty countries and 30% for non-treaty countries.

Financial year end and tax rates

Australia's financial year runs from 1 July to 30 June. Individuals and most business entities operate on this financial year for accounting and taxation purposes.

The rates of income tax for various taxpayers are as follows**:**

- Companies (standard rate): resident and non-resident companies which are not small business entities or base rate entities (see below) are subject to a flat 30% tax rate.
- Companies ("small business entities"): from 1 July 2016, companies that were "small business entities" with an aggregated turnover (comprising the annual turnover of the company and certain associated entities) of less than AUD10 million became subject to a reduced corporate tax rate of 27.5%.
- Companies ("base rate entities"): from 1 July 2017, companies with an aggregated turnover (comprising the annual turnover of the company and certain associated entities) of less than AUD25 million also become subject to a reduced corporate tax rate of 27.5%. From 1 July 2018, the aggregated turnover to qualify as a base rate entity will be increased to AUD50 million.
- Resident Individuals: marginal tax rates apply to individuals depending on their taxable income and from the year commencing 1 July 2017 range from a low of 0% for taxable income of AUD18,200 or less to a high of 45% for taxable incomes above AUD180,000.
- The Medicare Levy of 2% may also apply to resident individuals in addition to the marginal tax rate, causing the effective top marginal tax rate for resident individuals in the year commencing 1 July 2017 to be 47%. Medicare refers to Australia's national health system.
- Non-Residents: higher rates are applied in the case of non-residents although the same top marginal rate of 45% is

applied to taxable incomes above AUD180,000.

- Investment income, such as trust distributions and interest received by children under 18 years of age, is effectively taxed at the top marginal rate of 45%.
- Fringe Benefits Tax (**FBT**): employers are also subject to a fringe benefits tax at the current rate of 47% for the FBT year commencing 1 April 2017 on non-cash benefits provided to employees such as private use of motor vehicles and interest free housing loans.

Capital Gains Tax (CGT) for Non-Residents

Foreign residents are subject to CGT in Australia, generally where a capital gain is made on certain specified assets. The specified assets are referred to as "taxable Australian property."

Broadly this means direct or indirect interests in land in Australia, and business assets of an Australian permanent establishment. For land acquisitions in Australia by non-residents, prior specific tax advice should be obtained about the appropriate structure.

An important development in this area has been the introduction of a CGT withholding regime for contracts entered into for the disposal of Australian real property by foreign tax residents with a market value of AUD750,000 or more. The broad effect of the regime is to require purchasers to withhold 12.5% of the purchase price and remit this amount to the ATO in the absence of receiving a clearance certificate from the ATO. The clearance certificate can only be obtained by Australian tax residents to whom the withholding obligation does not apply.

Other Taxes

Goods & Services Tax (**GST**): is a broad consumption tax imposed at the rate of 10% on most goods and services transactions in Australia. It is similar to a value added tax, rather than a sales tax, in that it is generally refunded to all parties in the chain of production other than the final consumer.

Payroll Tax**:** is imposed by the States and Territories on business payrolls at rates varying between jurisdictions from 2.5% to 6.85%, with potential concessions and exemptions for businesses with small payrolls.

Stamp Duty/Transfer Duty**:** is payable to State and Territory Governments on a variety of documents and transactions. Whilst duty treatment varies from one State/Territory jurisdiction to the next, dutiable transactions can include transfers of direct or indirect real estate interests, business assets (e.g. goodwill) and other personal property. The stamp duty regimes vary between each jurisdiction and duty rates may be up to 7% of the value of an asset. Queensland, Western Australia and the Northern Territory remain the only jurisdictions in Australia which continue to impose duty on non-real property transactions (such as the transfer of business goodwill). Foreign buyers are also now subject to an additional duty surcharge on acquisitions of residential land in New South Wales, Victoria and Queensland at rates of 4%, 7% and 3% respectively. From 1 January 2018, a 7% surcharge will also be

payable by foreign buyers of residential land in South Australia.

Land Tax: is charged annually by State and Territory Governments on the value of land owned, with exemptions in relation to land owned and used as one's principal residence. Certain foreign owners of residential property in New South Wales as well as residential and commercial property in Victoria also recently became subject to land tax surcharges of 0.75% and 1.5% respectively.

Death, Estate & Gift Duties: currently there are no such taxes in Australia. However, some caution needs to be exercised as CGT can apply to certain gifts.

Start-up Company Investment

Qualifying investments in eligible startup companies (known as "early stage innovation companies") attract additional income tax incentives. The recently introduced incentives include:

- a 20% non-refundable carry forward tax offset of up to AUD200,000 per investor per year (the equivalent of qualifying investments of up to AUD1,000,000 per year); and
- a CGT exemption on gains realised on qualifying investments held for between one and ten years, with a market value cost base uplift for CGT purposes thereafter.

Whilst the above concessions are particularly effective, there are a number of eligibility criteria on the investor and investee side that need to be satisfied before these incentives are available.

Australia also offers a highly attractive taxation regime for venture capital investment. Venture capital funds in Australia are registered as limited partnerships, with a requirement that all general partners (who manage the fund and its investments) must be Australian tax residents. Importantly, capital gains and losses on eligible investments are disregarded under Australian income tax law. Partners of early stage venture capital funds may also be exempt from income tax on dividends and other investment returns.

Special income tax treatment also exists for employee shares schemes and share option plans, with concessions for eligible startup companies.

IMMIGRATION

Cornwall Stodart

General Business Visa Options for Non-Australian Employees

Australia's Federal Department of Immigration and Border Protection (**DIBP)** administers immigration to Australia.

There are various visa options available for business travel to Australia. The appropriate type of visa will depend on the intended purpose and length of stay Some visa options include:

- Short term business visas for visits to Australia for up to three months without the right to work in Australia;

- Temporary long stay visas for up to four years which allow the visa holder to work in Australia (subclass 457);
- Employer Nomination Scheme visas for migration to Australia on a permanent basis (subclasses 186).

The following is a summary of the main requirements of each of these types of visas. Please note that these requirements frequently change and are current as at January 2018. Professional advice from a registered migration agent should be sought before applying for a visa in individual cases.

Business Visitor Visa Options

Persons wishing to travel to Australia for not more than three months to undertake business activities may apply for an:

- Electronic Travel Authority (ETA) visa (subclass 601);
- an eVisitor visa (subclass 651); or
- a Visitor visa (subclass 600).

The ETA, eVisitor and Visitor visas (depending on the country of the applicant's passport) are electronic visas which are applied for via the internet by the visa applicant, travel agent or airline. To be eligible, the visa applicant must be outside Australia at the time the visa is applied for and hold a passport of an eligible country for the applicable visa subclass.

Holders of these types of visas are only permitted to participate in certain defined business visitor activity, such as attending a conference, training session or conducting business negotiations.

The holder of a business visitor visa must not engage in studies or training for more than three months, undertake work that can be done by an Australian citizen or permanent resident; or work in Australia.

Temporary Long Stay Visa Options

Persons wishing to work in Australia may apply for a temporary long stay visa (known as subclass 457).

The subclass 457 visa is designed to assist Australian employers in addressing labour shortages, where an appropriately skilled Australian is not available, by employing genuinely skilled workers from overseas. Also, overseas employers not carrying on business in Australia can deploy their employees to work in Australia for the purposes of establishing business or fulfilling contractual obligations. Once granted, the visa allows the employee (and any dependant of the employee included in the application) to remain and work in Australia for up to 12 months or 4 years, depending on how long the sponsor company has been conducting its business.

On 18 April 2017 the Prime Minister and the Minister of Immigration and Border Protection announced that the subclass 457 visa will be abolished and replaced with a Temporary Skill Shortage (**TSS**) visa. The final stages of these changes will take place in March 2018.

There will be two options available for non-citizens under the TSS program:

- short-term stream – under which employers may source genuine temporary overseas skilled workers in occupations included on the Short-term Skilled Occupation List (**STSOL**) for a maximum of two years (or up to four

years if an international trade obligation applies); or

- medium-term stream – under which employers may source highly skilled overseas workers to fill medium-term critical skills in occupations included on the Medium and Long-term Strategic Skills List (**MLTSSL**) for up to four years, with eligibility to apply for permanent residence after three years.

Eligibility requirements for the TSS visa program include:

- meeting prescribed English requirements;
- having at least three years relevant work experience; and
- being under the maximum age requirements at the time of application.

Employers must also meet the minimum market salary requirements and make a contribution to the Skilling Australians Fund of between $1,200-$1,800 per visa application per year of visa (based on the annual turnover of the sponsoring business).

Currently, the following requirements must be met when sponsoring an employee under a subclass 457 visa:

1. *Sponsorship*

The employer must:

- be lawfully operating a business either inside or outside of Australia;
- meet the prescribed training benchmark, if operating a business in Australia. (From March 2018, the training benchmarks will be replaced with a requirement for the sponsoring business to make a payment into a 'Skilling Australians Training Fund);
- attest that the employer has a strong commitment to employing local labour and non-discriminatory work practices if operating a business in Australia; and
- give certain undertakings to the Australian government.

Once approved, sponsorship is valid for a period of usually five years and it can be renewed provided that the sponsoring business meets certain criteria.

2. *Nomination*

The employer must nominate the position to be filled from the STSOL or the MLTSSL, which set out the occupations permitted for subclass 457 visas at the time of application.

The position must provide no less favourable terms and conditions of employment to the nominee than an equivalent Australian employee would have in the same location.

This includes the requirement that the salary of the position be at market rate based on sources such as salaries of Australian employees in the same business, industrial instruments/awards and salary surveys. Among other things, the employer must also demonstrate that the employee will be employed under a written contract of employment.

3. *Visa application*

The employee who is to fill the nominated position must demonstrate that s/he has the relevant qualifications and employment experience to meet the requirements of the position.

Further, the employee (and any dependant family members of the employee) must meet certain character and health requirements. Visa applicants must also make adequate arrangements for health insurance during the period of their intended stay and make a declaration about compliance with Australian values and laws.

Employer Nomination Scheme (subclass 186)

The Employer Nomination Scheme (**ENS**) enables an Australian employer to recruit, on a permanent basis, skilled staff from overseas or temporary residents currently in Australia.

The ENS process consists of two stages; nomination by the employer and the nominee's application for a visa.

The benchmark criteria to be met by the employer are generally similar to those for a sponsor under a subclass 457 visa. From March 2018, the criteria will be replaced with a requirement for the employer to make a payment into the Skilling Australians Training Fund of between $3,000-$5,000 per visa application, based on the annual turnover of the sponsoring business.

The employer must offer the nominated employee a full-time position for at least 2 years, which does not exclude the possibility of renewal.

The employer will also need to ensure that the salary of the position be at market rate.

There are 3 streams of ENS application:

1. *Temporary Residence Transition (**TRT**) stream*

This is for subclass 457 visa holders who have worked for their employer for at least 2 years in the nominated occupation.

2. *Direct entry stream*

This is for those who are applying from overseas or those who have worked in Australia for a short period without holding a subclass 457 visa for 2 years. Applicants in this stream must show at least 3 years of experience relevant to the nominated occupation and must produce a skills assessment by an approved assessing authority.

3. *Agreements stream*

This is for people being sponsored by an employer through a Labour Agreement, or Regional Migration Agreement, negotiated with and approved by DIBP.

Further, an applicant generally must be under 50 years of age, meet a specified level of ability in English and meet the mandatory health and character requirements.

Key changes to the ENS will also come into effect by March 2018, including:

- a decrease in the maximum age of applicants across all streams to less than 45 years;
- an increase in the level of English skills for the TRT stream;
- an extension of the minimum full time position offered under the TRT stream from 2 years to 3 years;

Once the ENS visa is approved, the employee has the right to live and work in

Australia on a permanent basis. The visa remains valid even if employment of the employee with the sponsor is later terminated.

FOREIGN INVESTMENT REVIEW BOARD AND GENERAL FOREIGN INVESTMENT ISSUES

Cornwall Stodart

Background to FIRB

Australia has a screening process for foreign investment administered by the Foreign Investment Review Board (**FIRB**), a non-statutory body established to advise the federal government on foreign investment policy and investment proposals.

The purpose of FIRB is to examine any proposal by foreign persons and governments to undertake direct investment in Australia (**Proposal**). FIRB then makes recommendations to the government on whether such Proposals are suitable for approval under the government's policy.

FIRB is advisory

FIRB provides only an advisory service to the federal government. It is the responsibility of the federal Treasurer to decide whether or not to block Proposals and the Treasurer is not obliged to accept FIRB's advice in making that decision. The Treasurer may block a Proposal if the Treasurer considers it to be contrary to the national interest. Such a decision is generally not subject to review, though the blocking power is very rarely exercised except in the case of land acquisitions, where FIRB has issued guidelines for the types of applications that will be approved.

Foreign acquisitions and investment in Australia

The legal framework for foreign investment matters considered by FIRB is contained in the *Foreign Acquisitions and Takeovers Act 1975* (**FATA** or **Act**) and regulations made under the Act, especially the *Foreign Acquisitions and Takeovers Regulation 2015* (**FATR**). FATA regulates foreign persons buying certain land interests, acquiring control of certain business enterprises, or acquiring mineral rights in Australia.

Foreign governments and foreign persons proposing to invest in Australia may need to obtain prior approval before making a direct investment in Australia. Higher monetary thresholds apply to investors which are entities of agreement countries, which include US, Japan, China and NZ.

Approvals of acquisitions or transactions required under the Act

The following Proposals require notification to the Treasurer (by giving notice to FIRB):

- acquisitions of substantial interests in Australian corporations with total assets of $252 million or more or if the Proposal values the corporation at $252 million or more; ;
- acquisitions of interests in Australian corporations or businesses that are an agribusiness if the price or value of the interest acquired (together with any pre-existing interest) is $55 million or more;

- direct investments of any nature by foreign governments or their agencies irrespective of size;
- acquisitions of interests in Australian land (including interests that arise via leases, financing and profit sharing arrangements and the acquisition of interests in Australian land corporations and trusts) that involve:
    - the acquisition of residential land or vacant commercial land irrespective of value;
    - the acquisition of developed commercial land valued at $252 million or more; and
    - the acquisition of agricultural land valued at more than $15 million. This is a cumulative test so that once a foreign person acquires agricultural land above the threshold all future acquisitions of agricultural land must be notified.

Application of the Act to sensitive industry sectors

Sensitive industry sectors have different regulatory and approval requirements for Proposals.

Those sectors include media, telecommunications, transport, military training manufacture or supply, and security technologies. Any Proposal in a particular industry sector should be examined on a case by case basis and compared against FIRB guidelines and the Treasurer's current policy. For US and NZ investors, acquisitions of interests in Australian businesses in defined sensitive sectors do not require notification unless the value of the interest to be acquired exceeds $252 million.

Free Trade Agreements (FTAs)

Australia has entered into a number of bilateral free trade agreements and they generally modify foreign investment policy as it applies to investors from those countries, making it easier for them to invest in Australia and generally easing restrictions on trade in those countries. Approval thresholds for FTA countries are set out in the FATR.

Approval process

The process for obtaining approval of a Proposal is to lodge a notification in the prescribed form with FIRB and pay the applicable fee. Fees are in the region of 1% for residential land applications and a lower percentage, also referable to value, for other applications. Fees are not recovered if the application is not approved.

The Treasurer has a statutory obligation to decide whether to block a Proposal within 30 days and a further 10 days to notify the applicant. In practice notice of approval or rejection is given by FIRB. FIRB may and often does extend the timeframe for notifying approval or rejection of a Proposal.

DEALING WITH THE AUSTRALIAN GOVERNMENT

Cowell Clarke

The Australian Federal Government is one of Australia's largest purchasers, contracting to

procure goods and services in the sum of over AUD47 billion annually.

In 2016-17, the value of procurement contracts the Australian Government entered into with overseas entities was over $6 billion.

Opportunities

For most products and services there is no single 'government market', as many agencies operate individually.

Suppliers, however, can access information about opportunities to supply to the Australian Government on "AusTender". See www.tenders.gov.au

AusTender provides centralised publication of the Australian Government business opportunities, annual procurement plans, open tenders and contracts awarded.

AusTender's subscription service allows anyone to register the area of their business interest and receive free automatic email notifications of the latest opportunities as they are advertised. It also allows suppliers to lodge tender responses online.

Procurement Rules

The *Commonwealth Procurement Rules* ("**Rules**") are the basic rule set for all Commonwealth procurements and govern the way in which various government entities undertake procurement of goods and services.

Achieving "value for money" is the key principle underpinning the Rules. This principle covers not only price but involves an assessment of all of the costs and benefits of a proposal.

The Rules try to achieve value for money through encouraging competition; promoting the efficient, effective, economical and ethical use of resources; and ensuring accountability and transparency.

The Rules set out three different types of procurement method:

1. An "open tender" where an agency invites all potential suppliers to participate in a procurement.
2. A "prequalified tender" where an agency generally selects from suppliers listed on a "multi use list" which has been established through an open approach to market (for example, a list of approved law firms to provide services).
3. A "limited tender" where an agency approaches one or more potential suppliers but without many of the procedural rules relevant to the first two methods.

The "limited tender" cannot be used if the contract is above certain thresholds set by the Australian Government. The threshold for all non-construction procurements is AUD80,000 for "non-corporate Commonwealth entities" and AUD400,000 for "prescribed corporate Commonwealth entities". The threshold for procurements of construction services is AUD7.5 million in all cases.

For all projects worth more than AUD4 million, the "economic value" of the procurement to the Australian economy must also be considered. This relatively new requirement might be indicative of a

preference to "buy Australian" where possible.

Where the value of goods or services sought is below the threshold, agencies have more flexibility to decide on a procurement process appropriate to the scale, scope and relative risk of the proposed procurement.

Probity

Australia has laws requiring ethics and probity in procurement. Officials are required to act ethically and cannot make improper use of their position. Officials are not able to accept hospitality, gifts of benefits from potential suppliers.

The management of probity issues is tailored to each individual process. External probity specialists are only appointed where justified by the nature of the procurement.

Challenging Decisions

A supplier who is unhappy with a tender process or decision, should first ask for a debrief.

The Rules require agencies to offer debriefings, on request, to unsuccessful tenderers outlining the reasons the submission was unsuccessful. The primary purpose of a debriefing is to enable potential suppliers to submit more competitive bids in the future. Debriefs can be a valuable source of information on the strengths and weaknesses of a supplier's tender.

Unsuccessful tenderers also have other avenues of complaint , such as the Commonwealth Ombudsman and the Australian National Audit Office.

Australia does not have an efficient and effective system of challenging tender processes judicially. Whilst breaches of legislation and policy concerning procurement, may attract a range of criminal, civil or administrative remedies, the process of challenging tender processes in court is quite difficult.

International Obligations

Australia is party to a range of bilateral free trade arrangements including with the United States, Thailand, Singapore, New Zealand, Chile, Malaysia, Korea, Japan and China.

Many of these agreements contain obligations as to procurement. The scope of government procurement open to partner countries (such as what entities and goods are covered and exempt) will generally be specified in the Free Trade Agreement.

The Australia-United States Free Trade Agreement, for example, resulted in Australian and US businesses being granted non-discriminatory rights to bid on contracts to supply Australian Government entities, including all major procuring entities and administrative and public bodies. It establishes a basic rule of "national treatment", meaning that each country's procurement rules must treat the other country's suppliers in a manner that is "no less favourable" than their domestic counterparts.

The Rules purport to incorporate all of Australia's international obligations. The requirement in the Rules to consider the "economic benefit" to the Australian economy for procurements above AUD4

million, for example, is expressed to "operate within the context of relevant national and international agreements" to which Australia is a signatory".

More information

For more information concerning Australia's procurement processes, see the Department of Finance and Deregulation website. www.finance.gov.au.

DISPUTE RESOLUTION AND COURT SYSTEMS

Cowell Clarke

Federal System

Australia has a sophisticated court system which reflects Australia's constitutional structure as a federation. Each of Australia's 6 States and 2 Territories has its own State or Territory Supreme Court and inferior courts. The Commonwealth of Australia also has courts including the High Court of Australia, the Federal Court of Australia and the Family Court of Australia. The High Court of Australia is the highest court of appeal for Australian cases and is the court of first instance for determination of disputes concerning the Commonwealth constitution.

Australia's legal system is a common law system, operating on principles derived originally from English law.

Most areas of business, however, are also regulated by Commonwealth, State and/or Territory statutes. State and Territory courts are able to exercise Commonwealth jurisdiction in some areas. For example, corporations and securities law is governed by Commonwealth legislation, but litigation concerning corporations and securities disputes can be commenced in either the Federal Court of Australia or in State or Territory Supreme courts. Other areas of importance to business, such as employment and occupational health and safety are dealt with under a combination of Commonwealth and State/Territory laws.

Since some State/Territory courts can exercise Commonwealth and State/Territory jurisdiction, the choice of the most suitable court in which to initiate litigation can be an important tactical decision.

The States and Territories also have civil administrative tribunals which exercise a range of jurisdictions covering matters such as administrative law, planning, building, consumer disputes, some employment related disputes and some debt claims.

The jurisdictions vary from state to state and in many instances, legislation dictates that disputes of a certain nature must be brought in a tribunal.

Procedures and Costs

The great majority of litigated business related disputes in Australia are heard by a judge alone without a jury.

It is only criminal and (in some states) defamation matters which are now typically tried before a jury and even then, parties can opt for trial by judge alone in those types of matters.

Representative class actions are permissible in Australia and are increasingly popular, especially, broadly speaking, in medical negligence cases and in shareholder claims

against corporations and their directors. However, to date, the track record for successful class action claims is relatively limited. The large majority of litigation cases are settled before trial and that is certainly the case with class actions.

Exemplary or punitive damages are not frequently awarded by Australian courts. It is generally only in cases of particularly egregious or contumacious breaches or acts of negligence that courts will award exemplary damages. Exemplary damages may be awarded in a range of intellectual property matters where an infringer has knowingly committed IP infringement.

While a number of plaintiff law firms offer "no win/no fee" costs arrangements, litigation on a contingency basis, in which the plaintiff's lawyer is remunerated by reference to a percentage of the damages awarded in favour of the plaintiff, is not permitted in Australia. In most jurisdictions, the "loser pays" principle applies in relation to recovery of legal costs. There are some exceptions where costs are not awarded in favour of the successful party. The tribunals referred to above typically do not make costs awards so that parties are left to bear their own costs.

Alternative Dispute Resolution

Alternative dispute resolution methods have been well utilised in Australia and are becoming increasingly the preferred approach rather than litigation at first instance.

It is common practice in Australia to include ADR provisions in business contracts so that before going to court, parties are required contractually to attempt to resolve a dispute, frequently by structured negotiation or mediation or by arbitration. In Australia, courts require that before a party commences litigation, it certifies that it has taken genuine steps to resolve the dispute before taking the matter to court.

All courts and tribunals in Australia offer alternative dispute resolution services and many require that parties take part in an alternative dispute resolution process before proceedings can be set down for trial.

Alternative dispute resolution processes are an attractive mechanism to resolve a cross-border or jurisdictional dispute, not only to reduce costs but more importantly, ADR agreements may address dispute resolution processes and enforcement issues more effectively. This is particularly important since Australian courts can only grant relief in accordance with the laws of Australia. Equally, any remedies ordered by an Australian court are only enforceable within Australian territories. Further, before a foreign court judgment can be enforced in Australia, that judgment would need to be registered through an appropriate Australian court. There are mechanisms to register and enforce foreign judgments in Australia and similarly, Australian court judgments may be registered and enforced in overseas jurisdictions. However, registration and enforcement processes vary from country to country, may not be straightforward and will involve time and cost.

Australia is a contracting State to the New York Arbitration Convention.

FOREIGN CORRUPT PRACTICES

Cowell Clarke

Australia's International Obligations

Australia is a signatory to the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (**the Convention**). The essence of the Convention is to encourage each signatory state to enact legislation necessary to criminalise the bribing of foreign public officials. Australia adopted the Convention in 1999. The relevant legislative provisions are in the *Criminal Code Amendment (Bribery of Foreign Public Officials) Act 1999* (Cth) (**the Code**), often referred to as the *Bribery Act*.

Bribery of Foreign Public Officials

Division 70.2 (**the Division**) of the Code provides that a person (which includes a body corporate) is guilty of an offence if that person:

- promises, provides or causes to provide or offer a benefit;
- which is not legitimately due;
- with the intention of influencing another person, which may be a foreign public official (**foreign official**);
- in order to obtain or retain business or a business advantage that is not legitimately due.

The person will be guilty of an offence even if the other person is not a foreign official. All that is needed to trigger the provision is an intention to influence a foreign official.

A foreign official is defined in the Code and includes an employee or official of a foreign government body; a member of the executive, legislature or judiciary of a foreign country; or an employee of a public international organisation in which 2 or more countries are members – such as a United Nations body or the Red Cross.

Defences

A person will not be guilty of an offence if the benefit conferred on or offered to the foreign official is required or permitted by the written law of the foreign official's country. A person seeking to rely upon this defence has the onus of proving that written law.

Further, a person will not be guilty of an offence if the benefit conferred on or offered to the foreign official is appropriately characterised as a facilitation payment. Pursuant to the Code, a benefit will be classified as 'facilitation' if the benefit offered or given to the official is of a minor nature and is given with the intention of expediting or securing the performance of a minor routine government action. Practically speaking, the action should be one which would have to be done in any case and the facilitation payment expedites its doing. If there is an official published government list of fees for the particular matter that specifically includes a fee for expediting a matter that will help.

Routine government action is defined in the Code and expressly excludes encouraging a decision: about whether to award or continue business with a particular person; or the terms of new or existing business arrangements. Thus any payment conferred

with the intention of obtaining or retaining business will not qualify for the defence.

Once the payment is made (assuming it falls within the ambit of 'routine government action'), the person who has offered or given the benefit must appropriately record all relevant details as prescribed by the Code. The record must be retained by the person: unless and until 7 years have passed since the alleged conduct; or through no fault of the person, the record has been lost or destroyed.

Contravention of the Division

A person who breaches the Division and cannot make out a statutory defence will be guilty of an offence. The extent of penalties imposed will depend on whether an individual or corporation has contravened the Division.

Contravention by an individual is punishable by imprisonment for not more than 10 years; a fine not more than 10,000 penalty units (AUD2,100,000 at the date of this article); or both.

A contravention by a corporation is punishable by not more than the greatest of the following:

- 100,000 penalty units (AUD21,000,000 at the date of this article);
- If the Court can determine the value of the benefit that the body corporate, and any related body, have obtained directly or indirectly and that is reasonably attributable to the conduct constituting the offence – 3 times the value of that benefit;
- If the Court cannot determine the value of the benefit – 10% of the annual turnover of the body corporate during the period of 12 months ending at the end of the month in which the conduct constituting the offence occurred.

International Reach of the Division

The Division applies to any person where the conduct constituting the alleged offence occurs wholly or partly in Australia.

The Division will also apply to conduct occurring wholly outside Australia where at the time of the alleged conduct: the person was an Australian citizen or resident or in the case of a body corporate; was incorporated by or under a law of the Commonwealth or of an Australian State or Territory. Foreign directors of an Australian company who condone or permit the company to contravene the Code will be at risk of prosecution.

Enforcement of Legislation

The Australian Federal Police is the enforcement authority of the Code. Since being enacted, there have been few convictions for a breach of the Code. Thus, the full judicial bite and scope of the Division is yet to be determined.

In 2017 three men were convicted of bribing an Iraqi official. The men each received a sentence of four years imprisonment. In addition, two of the men were each fined $250,000. The recent bribery convictions of Rio Tinto executives in China, the AWB - Iraq scandal and prosecutions relating to foreign business dealings by employees of a corporate subsidiary related to the Reserve Bank of Australia have increased awareness

in Australia of our foreign bribery law and the penalties resulting from breaches of it.

The enormous penalties imposed on companies and individuals under the United States *Foreign Corrupt Practices Act* in recent years have been well noted in Australian board rooms.

Proposed Amendments

New legislation introduced into Parliament by the Australian Government in December 2017, if passed by Parliament in its current form, will expand the range of foreign bribery offences and will make it significantly easier for Federal prosecutors to prove offences both by individuals and by companies. Some of the key provisions in the proposed new laws include:

- A new offence where a company is automatically guilty of a foreign bribery offence committed by an associate of the company. "Associate" is defined very broadly to include a corporate subsidiary or an employee, agent or contractor of the company or even anyone who performs services for or on behalf of the company. Absolute liability would apply so that the company will be taken to have committed the bribery offence even if it had no knowledge of or involvement in the associate's actions, those actions occurred entirely outside Australia and even if the associate has not been convicted of a bribery offence. The company's only defence will be if it can prove that the associate did not commit a bribery offence of that the company had in place adequate procedures designed to prevent the commission of a bribery offence by any associate within or outside Australia. The draft legislation gives no indication what will constitute "adequate procedures". The company would be presumed guilty of a criminal offence and would have the onus of establishing its defence. The Federal Government will be required to publish guidance on the steps that a company can take that are designed to prevent an associate from bribing foreign public officials.
- The definition of "foreign public official" would be expanded to include a person standing or nominated (whether formally or informally) as a candidate to be a foreign public official.
- The bribery offence will be expanded so that it captures a benefit given or offered to another person with the intention of improperly influencing a foreign public official in order to obtain or retain business or an advantage. "Advantage" is defined very broadly. An advantage could be anything, whether material or not. "Improper influence" is the test in lieu of the current term "not legitimately due".
- A new recklessness offence would be inserted so that a person could be guilty of a bribery offence if the person had no intention to bribe but if they are aware of a substantial risk that a foreign public official may be improperly influenced in relation to obtaining or retaining business or an advantage and it is unjustifiable to take the risk.
- The bribery offence will be expanded to cover situations where a person bribes a foreign public official in their private

capacity to obtain a personal advantage, rather than an advantage for say a particular business.

If these amendments become law, the anti-bribery provisions will be significantly expanded and it will be much easier for Federal prosecutors to prove offences. It will be critical that companies have in place "adequate procedures designed to prevent" offences. Companies with existing anti-bribery policies will need to review the wording of those policies. It is unlikely that merely having an anti-bribery policy will be "adequate". We expect that companies will also need to be able to demonstrate that they carry out substantial education of their personnel, agents and contractors and have instituted appropriate documentation and process management procedures.

A contravention of the proposed new provisions by an individual would be punishable by imprisonment for not more than 10 years, a fine of not more than 10,000 penalty units (AUD2,100,000 at date of this article), or both.

A contravention by a corporation would be punishable by a fine of not more than the greatest of the following:

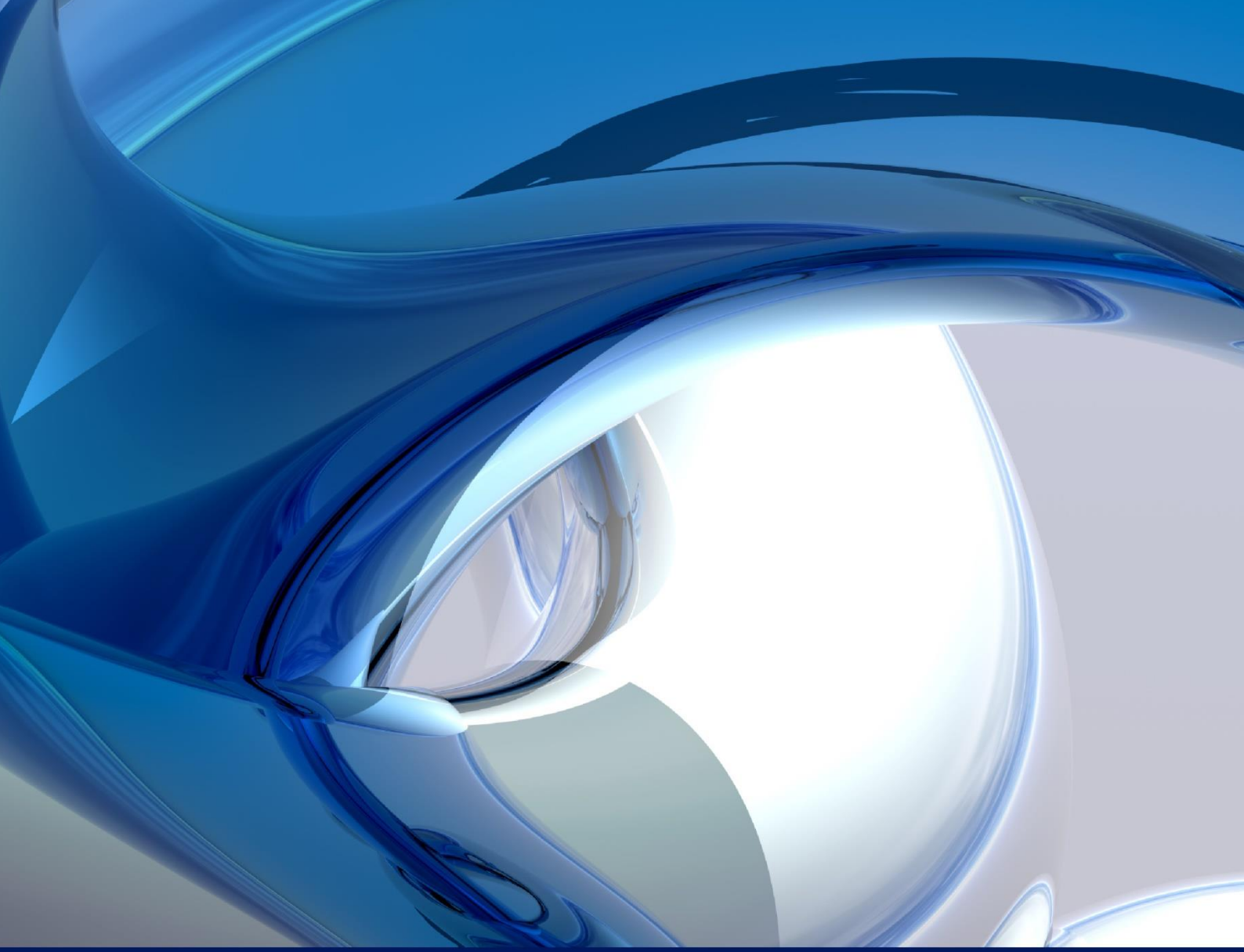
- 100,000 penalty units (AUD21,000,000 at date of this article);
- If a court can determine a value of the benefit reasonably attributed to the conduct constituting the offence - 3 times the value of the benefit;
- 10% of the annual turnover for a 12 month period ending at the end of the month in which the conduct constituting the offence occurred.

Conclusion

Individuals and corporations must ensure they comply with the Division when transacting business or proposing to deal with foreign officials. Companies will be liable for the actions of their overseas employees and also potentially their agents. Those breaching the Code risk incurring significant imprisonment, monetary penalties and reputational damage.

The Australian government and many international organisations, such as the World Bank and the major international funding agencies have strict anti-corruption policies. Breaches of those policies may lead to sanctions including black listing for future tenders or contracts.

Companies doing business in Australia should implement anti-corruption policies and implement ongoing training for their personnel.



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