



GUIDE TO GOING GLOBAL

IPT

Australia



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INTRODUCTION

Welcome to the 2023 edition of DLA Piper's *Guide to Going Global – Intellectual Property and Technology*.

GUIDE TO GOING GLOBAL SERIES

Many companies today aim to scale their businesses globally and into multiple countries simultaneously. In order to help clients meet this challenge, we have created a handy set of global guides that cover the basics companies need to know. The *Guide to Going Global* series reviews business-relevant corporate, employment, equity compensation, intellectual property and technology, and tax laws in key jurisdictions around the world.

INTELLECTUAL PROPERTY AND TECHNOLOGY

Inside this guide, we outline crucial aspects of IPT laws in over 40 jurisdictions that are particularly relevant to businesses seeking to expand their operations globally. We also summarize some fundamental commercial terms that customarily appear in IPT-related agreements.

You will find answers to such common questions as:

- Which jurisdictions recognize moral rights?
- What does my business need to do to have an enforceable assignment of intellectual property from an employee, from a consultant?
- What kind of liability can be excluded from a commercial contract?

With this edition, we've also included a section for each country that discusses the enforceability of electronic signatures.

Our goal is to make the guide as readable and informative as possible, providing you just the background you need to get an overview of the IPT laws in the selected jurisdictions. This is not a substitute for professional legal advice. If you have questions regarding specific matters, we encourage you to contact one of our contributors listed in the contributors section of this guide. With nearly 500 dedicated IPT lawyers around the globe, DLA Piper's IPT group is ready to handle your legal needs wherever you do business.

Also, please note that the guide's use of the term "trademarks" also refers to service marks, unless specifically addressed separately. The summary of intellectual property covers only the most commonly used categories worldwide (for example, we have not addressed plant patents). We have also referred to international treaties and conventions with their most commonly used names and not their formal titles (such as the TRIPS Agreement, the Berne Convention, the Paris Convention and the Patent Cooperation Treaty).

We hope that you find this guide valuable and we welcome your feedback.

This publication is provided to you as a courtesy, and it does not establish a client relationship between DLA Piper and you, or any other person or entity that receives it.

This is a general reference document and should not be relied upon as legal advice. The application and effect of any law or regulation upon a particular situation can vary depending upon the specific facts and circumstances, and so you should consult with a lawyer regarding the impact of any of these regimes in any particular instance.

DLA Piper and any contributing law firms accept no liability for errors or omissions appearing in this publication and, in addition, DLA Piper accepts no liability at all for the content provided by the other contributing law firms. Please note that intellectual property and technology law is dynamic, and the legal regime in the countries surveyed could change.

AUSTRALIA



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INTELLECTUAL PROPERTY FRAMEWORK

Overview

Intellectual property rights – other than trade secrets and common law trademark rights – are governed by the laws of the Commonwealth (ie, at a federal level) and are interpreted by court judgments (ie, common law). IP Australia is the Australian Government agency that administers intellectual property rights and legislation. There are no state or territory-based intellectual property laws.

COMMERCIAL CONTRACT FRAMEWORK

Overview

Australia's commercial contract framework is governed by the common law and supplemented by equitable doctrines, statutes (Commonwealth, state and territory) and international law instruments. There is no codification of the law governing contracts.

For consumer goods and services contracts (a consumer may include a business in certain circumstances), the Australian Consumer Law (ACL) – which is a schedule of the Competition and Consumer Act 2010 (Cth) (CCA) – applies. This legislation covers purchases of goods or services worth less than AUD100,000, or when the goods or services are of a kind that is generally intended for personal, domestic or household use or consumption. There are also state and territory consumer laws.

The ACL additionally includes an unfair contract terms regime that applies to:

1. Standard form contracts for a supply of goods or services or a sale or grant of an interest in land to an individual whose acquisition of the goods, services or interest is wholly or predominantly for personal, domestic or household use or consumption; and
2. Standard form contracts where at least one of the parties is a small business (i.e., a business that employs fewer than 20 people), and the price payable up front is AUD300,000 or less, or AUD1 million or less for contracts with a term longer than 12 months.

Commercial contracts with Commonwealth and state government agencies may be subject to certain regulations.

COPYRIGHTS

Nature of right

Copyright may subsist in both works, which include original literary, dramatic, musical and artistic works, and subject-matter other than works, which includes sound recordings, cinematograph films, television and sound broadcasts and published editions of works.

There is no registration requirement or publication requirement for a valid copyright, except for television and sound broadcasts and published editions of works, which must be published.

The exclusive rights for original works are to reproduce, publish, perform, communicate to the public and make an adaptation of the work, and to enter into commercial rental arrangements for a work reproduced in a program or sound recording.

The exclusive rights for subject matter other than works are to make a copy of the work, communicate it to the public and to enter into a commercial agreement in respect of the work.

Legal framework

Copyright is governed by the Copyright Act 1968 (Cth) (Copyright Act). There is no state-based copyright law, and there is no common law of copyright, but there are court judgments that impact the interpretation of the Copyright Act. The Copyright Act provides for moral rights for original works and subject matter other than works except for sound recordings, sound and television broadcasts and published editions. It also provides performers' rights for performances.

On August 13, 2020, the Australian government proposed copyright reforms to better support the needs of Australians and public institutions to access material in an increasingly digital environment. The exposure draft of the Copyright Amendment (Access Reforms) Bill 2021 released in December 2021 details the proposed reforms. The proposed reforms include the introduction of a limited liability scheme for use of orphan works, a new fair dealing exception for non-commercial quotation, amendments to library and archives, education and research exceptions, and streamlining of the government statutory licensing scheme. Submissions from interested parties were received in early 2022 which remain with the government for consideration.

Australia is a party to the Berne Convention, Rome Convention, the TRIPS Agreement, the WIPO Copyright Treaty, the WIPO Performances and Phonograms Treaty, the WIPO Marrakesh Treaty, and a number of free trade agreements with individual countries and groups of countries.

Duration of right

For original works that are published during the author's lifetime, copyright protection lasts for 70 years after the death of the author. For original works that are not published during the lifetime of the author, the copyright protection lasts for 70 years from the date of first publication.

For subject matter other than works, the duration of the protection depends on the type of work.

For television and sound broadcasts, copyright lasts for 50 years after the expiration of the calendar year in which

the broadcast was made, and for published editions, 25 years after the expiration of the calendar year in which the edition was first published. For sound recordings and cinematograph film, copyright lasts 70 years after the end of the calendar year in which the recording or film is first published.

Ownership / licenses

Co-ownership of an original work is recognized where the work has been produced by the collaboration of 2 or more authors and in which the contribution of each author is not separate from the contribution of the other author(s). Subject to a written agreement to the contrary, all co-owners of copyright must consent to the licensing of the copyright by any other joint owner.

An owner of a copyright may grant a license over some or all of the owner's rights. Statutory licensing schemes operate to allow certain copyrights to be used without the permission of the copyright owner, but this is conditional on the payment of equitable remuneration for that use, or a fair dealing exception applies. An owner may also assign their copyright or future copyright to another person.

Remedies for infringement

The court may grant relief for an infringement of copyright by way of injunction, damages or – alternatively to damages – an account of profits. Criminal penalties are also available.

In cases of innocent infringement, where the defendant was unaware or had no grounds for suspecting that their act constituted infringement, damages are unavailable. However, in these circumstances, copyright holders may be entitled to an account of profits for revenue from the infringing works.

The court has discretion to award additional damages. In doing so, the court must consider, among other factors, the flagrancy of the infringement, the need to deter similar infringements, the conduct of the defendant, whether the infringement involved conversion of a work and the benefits that accrued to the defendant by virtue of the defendant's infringement.

MASK WORKS / TOPOGRAPHIES

Nature of right

Protection is given to the layout of integrated circuits (or semiconductor chips, commonly known as computer chips) under the Circuit Layouts Act 1989 (Cth) (CLA) if the following requirements are met:

- i. The circuit layout is a representation fixed in any material form of the 3-dimensional location of the active and passive elements and interconnections making up an integrated circuit;
- ii. The circuit layout is original; and
- iii. The circuit layout is either made by an eligible person or first commercially exploited in Australia or another eligible country.

The owner of an original circuit layout has exclusive Eligible Layout Rights (EL Rights), which include the exclusive rights to:

- i. Copy the layout, directly or indirectly, in a material form;
- ii. Make integrated circuits from the layout;
- iii. Exploit it commercially in Australia; and
- iv. Authorize another person to do any of the above acts. Authorization is usually given in the form of a license. Registration is not required for layout rights, and protection is automatic.

Legal framework

Circuit layouts are governed by the Circuit Layouts Act 1989 (Cth).

Duration of right

The duration of protection is 10 calendar years after the calendar year in which the circuit layout was made. If the circuit layout is first commercially exploited within that period, the term is 10 calendar years after the year in which commercial exploitation first took place.

Ownership / licenses

The maker of an eligible circuit layout is generally the first owner of its EL Rights (please refer to exceptions enumerated in the “Intellectual Property in Employment Context” section). EL Rights are personal property rights that may be assigned, licensed and devolved in a will.

Remedies for infringement

Available remedies for infringement are an injunction to stop the infringing activities and either damages or an account of profits.

If the defendant’s act was an innocent infringement (that is, they were not aware, and had no reasonable grounds for suspecting, that their act constituted an infringement), the plaintiff is not entitled to any damages against the defendant. In such circumstances, the plaintiff is, however, entitled to an account of profits.

Additional damages may be awarded on the same basis as additional damages for infringement of copyright under the Copyright Act 1968 (Cth).

PATENTS

Nature of right

A patent is a statutory right that must be applied for and that may be granted following examination. An owner of a granted patent for a product has exclusive rights to:

- i. Make, hire, sell or otherwise dispose of the product;
- ii. Offer to make, sell, hire or otherwise dispose of the product;

- iii. Use or import the product; and
- iv. Keep the product for the purpose of doing any of the above.

An owner of a granted patent that is a method or process has exclusive rights to use the method or process, or exercise any of the above exclusive rights in respect of a product resulting from such use.

The owner also has an exclusive right to authorize another person to exercise the above rights.

There are currently 2 types of patents: standard patents and innovation patents. However, the innovation patent system was abolished on August 25, 2021. Existing innovation patents filed on or before August 26, 2021, or divisional innovation patent applications claiming priority from an application filed prior to August 26, 2021, that undergo examination and are certified will continue in force until they expire.

To be patentable, an invention must be a manner of manufacture, novel, involve an inventive step (or innovative step for innovation patents), useful, and not have been secretly used.

Legal framework

Patents are governed by the Patents Act 1990 (Cth).

Australia is a party to the Paris Convention, the Patent Cooperation Treaty, the Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the Purposes of Patent Procedure 1977, the TRIPS Agreement, the Patent Law Treaty, the Strasbourg Agreement Concerning the International Patent Classification, and the Comprehensive and Progressive Agreement for Trans-Pacific Partnership.

Duration of right

The duration of patent protection is 20 years from the effective date of filing for a standard patent, except for pharmaceutical standard patents, which may have a maximum of up to 25 years to allow for the regulatory approvals processes. The duration of protection for an innovation patent is 8 years from the effective date of filing. Patent rights are based on a first-to-file system.

Ownership / licenses

A patent owner may grant a license to another party. The patent owner should register the license for it to be defensible against third parties. However, failure to register the license does not affect the validity of the license. Compulsory licenses may be granted in limited circumstances, including if the owner fails to exploit their patent.

A patent owner may assign their patent interest – or part of the interest – to another person. They must register the assignment for it to be defensible against third parties. However, failure to register does not affect the validity of the assignment.

Patents may be co-owned. Co-owners may exercise their exclusive rights without accounting to the other. Co-owners cannot grant a license or assign their interest without the consent of the other co-owners.

Remedies for infringement

Available remedies for infringement include injunction and damages or an account of profits. The damages may be calculated with reference to the value of the diverted sales or the going royalty rate that the infringer would have had to pay had a license been granted.

A court may refuse to award damages or make an order for an account of profits if it determines that the infringement was innocent. An innocent infringement occurs when the defendant was not aware, and had no reasonable grounds for suspecting, that their act constituted an infringement.

TRADEMARKS

Nature of right

Trademarks in Australia are protectable on a first-to-use or register-based system. Both registered and unregistered marks may be protected. A registered trademark is a sign used to distinguish the goods and services of one trader from those of another.

A sign may be a word, phrase, letter, number, color or combination of colors, sound, smell, shape, logo, picture, movement, aspect of packaging or a combination of these.

Legal framework

Australian trademark law is sourced from the Trade Marks Act 1995 (Cth) (TMA) as well as common law use-based rights, which provide protection for unregistered rights under the common law tort of passing off.

Trade practices legislation, principally Australian Consumer Law contained in the Competition and Consumer Act 2010 (Cth) (CCA), provides additional remedies to trademark owners of registered and unregistered trademarks.

Registered trademarks may be signified through use of the ® symbol. Unregistered trademarks may be signified through use of the TM symbol.

Australia is a party to the Trademark Law Treaty, the Madrid System, the Singapore Treaty on the Law of Trademarks, and the Nice Agreement.

Duration of right

Subject to fulfilling the necessary requirements, a trademark registration provides a valuable statutory monopoly for an indefinite period of time. There is an initial 10-year registration period, and the registration may be renewed indefinitely every 10 years without the need to provide evidence of use. However, a trademark registration that is more than 3 years old may be removed from the register if it has not been used for a period of 3 years or more.

Ownership / licenses

A trademark registration grants exclusive rights in the trademark to use, license or sell the trademark within Australia for the goods and services for which it is registered. This means the owner of a registered trademark may prevent others from using the mark or a deceptively similar mark in relation to the same or similar goods or

services.

Licenses concerning registered trademarks do not need to be recorded to be effective, and there is no specific provision allowing recordal on the Trade Marks Office Register. However, it is important for trademark owners to be able to demonstrate that they are exercising financial and/or quality control over the use of their trademarks in any licensing arrangement to ensure that it does not become vulnerable to removal for non-use.

The owner of a registered trademark may assign the registered trademark to another person. The assignment may be partial so that it applies to only some of the goods and/or services in respect of which the trademark is registered. However, the assignment may not be partial in relation to the use of a trademark in a geographical area. Further, the assignment may be with or without the goodwill of the business concerned in the relevant goods and/or services.

With respect to unregistered trademarks, although capable of being assigned or licensed, the Full Court of the Federal Court of Australia reconfirmed in April 2020 that it is not possible to assign or license unregistered trademarks without the assignment of the underlying goodwill of the business.

Remedies for infringement

Where infringement of a registered right is established, the relief that a court may grant includes an injunction to prevent further infringement and either damages or an account of profits at the plaintiff's option, and legal costs. Registered trademark owners may also give the Australian Border Force a notice objecting to the importation of goods that infringe their registered trademarks.

If a trademark is not registered and another person uses it, a passing-off action under common law and/or a claim for a breach of the prohibition against misleading or deceptive conduct (under the CCA) may be pursued. Successfully pursuing an action for passing off may be considerably more difficult than taking action under the TMA because an action for passing off requires proving goodwill or reputation in the trademark and proof that use of the trademark has misled or deceived consumers as to the origin of goods and services sold under the mark.

TRADE SECRETS

Nature of right

Trade secrets are treated as "confidential information" and may be protected through a breach of confidence claim.

Such a claim may be brought if:

- i. The information may be identified with specificity
- ii. The information was confidential
- iii. There was an obligation of confidence on the defendant; and
- iv. The defendant used the information without the plaintiff's consent and to their detriment.

Legal framework

Confidentiality of trade secrets is usually stipulated in the contracts between parties and is therefore enforceable under such contract. However, in instances where there is no contract, a plaintiff may be able to rely upon the equitable doctrine of breach of confidence.

Duration of right

There are no specific statutory limits applicable to trade secret rights. For breach of a confidentiality agreement (or provisions), a 6-year limitation period applies in New South Wales, Queensland, Victoria, Tasmania, South Australia, Western Australia and the Australian Capital Territory. A 3-year limitation period applies in the Northern Territory.

Ownership / licenses

Trade secrets cannot be assigned as they are not property. However, contractual rights to trade secrets may be assigned and licensed. An assignee or licensee may sue others for a breach of confidence.

Remedies for infringement

Remedies for a breach of confidentiality in trade secrets include the equitable remedies of injunctions, imposition of a constructive trust, delivery-up of documents, equitable damages or compensation and an account of profits, in addition to usual remedies for breach of contract where relevant.

In determining the severity of the remedy, the court may take into account the advantage given to the defendant when they acquired and exploited the plaintiff's trade secrets.

OTHER KEY IP RIGHTS

Nature of right

Not applicable.

Legal framework

Not applicable.

Duration of right

Not applicable.

Ownership / licenses

Not applicable.

Remedies for infringement

Not applicable.

INTELLECTUAL PROPERTY IN EMPLOYMENT CONTEXT

Employees

Copyright

The Copyright Act provides that the employer owns the copyright if an employee made the work "in pursuance of the terms of his employment by another person under a contract of service or apprenticeship." Case law has clarified that it is not sufficient that an employment relationship exists and, instead, the employee must have made the work within the scope of their duties or because the contract of employment expressly or impliedly required – or at least authorized – the work to be made.

Patent

Patent legislation does not provide for the ownership of an invention in an employment context. Under the common law, the issue is whether the invention was made in the course of the employee's employment and whether it was the employee's role to invent (ie, whether they had a "duty to invent"). This frequently is – and should be – dealt with in the terms of the contract of employment, although the contract may not always be determinative in deciding whether the employee owns the patent.

Confidential information

Employment contracts frequently include confidentiality provisions. Alternatively, standalone confidentiality agreements may exist. Even where there is no express agreement, a court will usually imply an obligation of confidence in an employment relationship and will consider factors such as the nature of the relationship and the nature of the information.

Mask works / circuit layouts

Under the CLA, if a circuit layout was made by a person in the course of their employment under a contract of service or apprenticeship, the employer is the owner unless there is an agreement in writing to the contrary.

Consultants / contractors

An independent contractor, including a consultant, owns the copyright in any work, unless there is an agreement in writing executed by the parties to the contrary.

Equally, an independent contractor has the right to patent an invention that they invented unless the contract between the contractor and the principal states otherwise.

It is often presumed that an independent contractor and a principal have a confidential relationship and thus the independent contractor has an obligation of confidentiality. However, specific confidentiality obligations are usually – and should be – included in the agreement between the parties.

KEY COMMERCIAL CONTRACT CONSIDERATIONS

Registration of commercial agreements

There is no requirement to register commercial agreements. However, if security interests over personal property are created pursuant to an agreement, they should be registered under the Personal Properties Securities Act 2009 (Cth). Registration is generally required to perfect the security interest and make it enforceable against third parties. Failure to register will not void the security but may result in the unregistered security interest being defeated by a later-registered security interest or a bona fide purchaser without notice.

Recognized language of commercial agreements

It is preferable to use consumer-friendly English to ensure transparency.

Country-specific issues for online content

The Copyright Act provides a safe harbor regime for service providers (or "carriage service providers," as defined in the Telecommunications Act 1997 (Cth)), which limits their liability for copyright infringement by their customers (ie, liability by authorizing the infringing acts of their customers). Service providers must satisfy certain criteria in order to be protected by this scheme. Recent case law has left open the possibility of service providers being found to have authorized copyright breaches through a failure to act against infringing customers.

Copyright holders may issue "take down notices" to internet service providers (ISPs) if, on reasonable grounds, they believe that there is infringing material located on a webpage or network that is under the control of the ISP. Upon receipt of this notice, the ISP is required to immediately remove or block the content and issue an infringement notice to the individual or entity that posted the material.

Enforceability of online/clickwrap/shrinkwrap terms

These types of terms and contracts are enforceable provided they are validly made, which includes ensuring that the users are made aware of (and, ideally, actively and explicitly accept) the terms of the contract prior to purchase or use of online services. This is usually done by a "tick-a-box" method of acceptance of terms of sale where consumers are purchasing goods or services online.

Governing law

Governing law and choice of jurisdiction (ie, venue for resolution) clauses are generally upheld by state and Federal Courts in commercial contracts, provided such choice of law does not, and will not, avoid any mandatory law (eg, the ACL for consumer contracts) that would otherwise be applicable. That is, for example, one cannot contract out of the ACL for a consumer contract in Australia by choosing the law of a foreign jurisdiction to apply to govern the contract.

KEY COMMERCIAL CONTRACT TERMS

Enforceability of warranty disclaimers

Warranty disclaimers which purport to exclude, restrict or modify the consumer guarantees as contained in the ACL are unenforceable.

If a warranty against defects is provided in relation to goods or services, it must be provided in addition to the

consumer guarantees. A warranty against defects is a representation made to a consumer that, if goods or services (or part of them) are defective, a business will repair or replace goods (or part of them), resupply or fix a problem with services (or part of them) or provide compensation to the consumer.

Documents that evidence a warranty against defect, which may include receipts, labels or packaging in addition to a more formal contract, must contain certain information including the following mandatory text for the supply of goods which is provided under the ACL:

Our goods come with guarantees that cannot be excluded under the Australian Consumer Law. You are entitled to a replacement or refund for a major failure and compensation for any other reasonably foreseeable loss or damage. You are also entitled to have the goods repaired or replaced if the goods fail to be of acceptable quality and the failure does not amount to a major failure.

From June 9, 2019, the mandatory text for the supply of services is:

Our services come with guarantees that cannot be excluded under the Australian Consumer Law. For major failures with the service, you are entitled:

- to cancel your service contract with us; and

- to a refund for the unused portion, or to compensation for its reduced value

You are also entitled to be compensated for any other reasonably foreseeable loss or damage.

If the failure does not amount to a major failure, you are entitled to have problems with the service rectified in a reasonable time and, if this is not done, to cancel your contract and obtain a refund for the unused portion of the contract.

From 9 June 2019, the mandatory text for the combined supply of goods and services is:

Our goods and services come with guarantees that cannot be excluded under the Australian Consumer Law. For major failures with the service, you are entitled:

- to cancel your service contract with us; and

- to a refund for the unused portion, or to compensation for its reduced value.

You are also entitled to choose a refund or replacement for major failures with goods. If a failure with the goods or a service does not amount to a major failure, you are entitled to have the failure rectified in a reasonable time. If this is not done you are entitled to a refund for the goods and to cancel the contract for the service and obtain a refund of any unused portion. You are also entitled to be compensated for any other reasonably foreseeable loss or damage from a failure in the goods or service.

Enforceability of exclusions/limitations of liability indemnification

Clauses that seek to exclude certain warranties or consumer guarantees or exclude or excessively limit liability will be construed strictly against the person who seeks to rely on the clause.

Clauses in standard form consumer contracts or standard form small business contracts that seek to limit or exclude liability are at risk of being considered unfair, and therefore void, under the unfair contract terms regime in the ACL. From November 10, 2023, it will be against the law to use or rely on an unfair contract term in a consumer or small business standard form contract. A court will also be able to impose serious financial penalties where businesses contravene these laws.

Consumer contracts cannot exclude or limit certain consumer guarantees provided under the ACL or limit or exclude liability for breach of them. Any clause that seeks to do this will be unenforceable, and such conduct could be considered misleading or deceptive and lead to legal action being taken against a person who included such clause in a contract or statement to a consumer.

Indemnification

Express indemnities are recognized and are generally enforceable.

Caps on liability under indemnification clauses are generally enforceable but, in some circumstances, may be considered unfair, particularly where they are onerous on consumers, and therefore unenforceable.

Electronic signatures

Electronic signatures are acceptable and enforceable in Australia in most instances in which the law requires a signature. Electronic signatures are valid if they are a method that identifies the person who is signing and indicates the person's intention with respect to the information communicated (eg, that the person agrees to the terms of a contract). The method of providing the electronic signature must generally be as reliable as appropriate for the purpose for which the electronic communication was given. Some laws exclude the use of electronic signatures in particular instances. Individuals and corporations may execute electronic deeds in New South Wales, Queensland and Victoria. In all other states and territories, certain additional requirements may apply to the execution of documents as deeds (eg, that execution must be witnessed, and the deed must be printed on paper, parchment or vellum), which means there is a degree of uncertainty about whether deeds can in all instances be validly executed using electronic signatures. From February 23, 2022, following the passing of the Corporations Amendment (Meetings and Documents) Bill 2021 (Cth), an attorney or other agent for a company can sign a deed electronically, irrespective of the State or Territory law on electronic signatures.

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