

GAMES AND INTERACTIVE ENTERTAINMENT: THE AUSTRALIAN LEGAL ENVIRONMENT

**A SUPPLEMENT TO
DOING BUSINESS IN AUSTRALIA**

2022



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INTRODUCTION

The Australian interactive games and entertainment industry is undergoing a renaissance. Local developers are having international success with award-winning games. Government recognition and support is growing, including substantial tax incentives, funding and active promotion of the industry at international events such as Gamescom 2022.

This supplement to HWL Ebsworth's *Doing Business in Australia Guide* provides an overview of some of the key legal issues likely to be of relevance to international interactive games and entertainment industry organisations operating in the Australian market.

Our *Doing Business in Australia Guide* includes further information on the following general topics:

- > Key Regulatory Bodies
- > Foreign Investment in Australia
- > Business Structures
- > Employment Law
- > Real Property
- > Taxation
- > Competition and Consumer Laws
- > Intellectual Property
- > Privacy
- > Immigration

The information in the *Doing Business in Australia Guide* and this supplement is general in nature, so if you require advice tailored to your specific circumstances, you will need to obtain more detailed, specialist advice. We would be delighted to assist you.

HWL Ebsworth is a national independent Australian law firm, with highly skilled legal professionals across the full range of business legal services. The firm comprises more than 1500 staff including more than 250 Partners across offices in Adelaide, Brisbane, Canberra, Darwin, Hobart, Melbourne, Perth and Sydney. HWL Ebsworth is currently ranked in independent surveys as the largest legal partnership in Australia. Our lawyers have extensive experience in advising international clients investing and doing business in Australia, including entertainment and games companies operating in or seeking to enter the Australian market.

For a copy of HWL Ebsworth's *Doing Business in Australia Guide* or more information concerning the issues covered by this supplement, please contact:



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COMPETITION AND CONSUMER LAWS

Australia has strong competition (antitrust) and consumer protection laws.

The core regulatory and enforcement body, the Australian Competition and Consumer Commission (**ACCC**), has taken an active interest in digital platforms, including:

- > taking successful enforcement actions against game platforms and publishers concerning misleading representations made to Australian consumers;
- > reviewing competition and consumer issues associated with the operation of the Apple App Store and the Google Play Store as part of its ongoing Digital Platform Services inquiry;
- > obtaining leave to make submissions in litigation between Epic and Apple in Australia; and
- > recently, investigating the proposed acquisition of Activision Blizzard by Microsoft.

The Competition and Consumer Laws section of HWL Ebsworth's *Doing Business in Australia Guide* provides an overview of the *Competition and Consumer Act 2010* (Cth) (**CCA**), including the substantial penalties that may apply to breaches.

CONSUMER PROTECTION

This supplementary guide focuses on how the Australian Consumer Law (**ACL**) (Schedule 2 of the CCA) may apply to the supply of interactive entertainment and games to Australian consumers, including provisions:

- > establishing compulsory consumer guarantees; and
- > prohibiting:
 - misleading or deceptive conduct;
 - unconscionable conduct; and
 - unfair contract terms.

It can be difficult to apply some aspects of the ACL to the complex modern world of games and associated services. The law has been drafted with more traditional goods (defined to include 'computer software') and services in mind.

CONSUMER GUARANTEES AND REFUNDS

Most Australian consumers are aware that they have reasonably strong consumer rights and often assert those rights when making complaints about a game and requesting refunds.

The 'consumer guarantees' in the ACL give Australian consumers rights to obtain full refunds or replacement of goods, or to cancel service contracts and obtain refunds for unused portions in some circumstances, depending on the type and severity of breach. Consumers may also be entitled to compensation for any reasonably foreseeable loss due to a failure to meet a consumer guarantee.

These consumer guarantees and associated rights cannot be excluded by the terms of any terms of sale, user agreement or other contract - any provision purporting to do so is void.

The guarantees apply where products or services are acquired as a 'consumer': ie any acquisition of a good or service that is supplied for A\$100,000 or less, or that is ordinarily acquired for personal, domestic or household use. The guarantees can therefore also apply to supplies of commercial products to businesses where the purchase price is A\$100,000 or less.

Our *Doing Business in Australia Guide* includes more information about the nine consumer guarantees applicable to goods and three guarantees applicable to services. The guarantees most likely to apply to the supply of games products and services concern their quality and performance – that goods will be of acceptable quality and correspond with their description; and that goods and services will be fit for purpose.

The ACCC has taken enforcement action against major games companies that have denied or tried to exclude refund rights in dealings with Australian consumers. Penalties of up to A\$3.5 million have been awarded.

Decided cases have established that:

- > suppliers should not represent that customers have no guarantees as to the quality and performance of games or rights to refunds, unless non-excludable rights are appropriately acknowledged;
- > suppliers should take particular care to ensure such representations are not made in customer terms, via statements on websites, or by support personnel when interacting with customers via telephone or messaging; and
- > enforcing policies such as limitations on refunds after activation or a period after purchase, or providing credit only, or referring retail customers to the original publisher or developer, may also be inconsistent with consumer guarantees.

Not all breaches of consumer guarantees will automatically entitle consumers to a refund or other remedies, and refund rights do not apply where consumers simply change their mind. However, it is important for customer service personnel to be aware of Australian consumers' rights and how to respond to complaints and refund requests in a way that is consistent with those rights, including what constitutes a 'major failure' that may entitle a consumer to a refund. Awareness training and scripts can be important for this purpose.

WARRANTIES AND REFUND TERMS AND POLICIES – MANDATORY TEXT

The ACL requires that where a supplier makes any express warranty against defects or states a refund policy – such as a statement that if the consumer returns the product with a certain time, the supplier will provide some remedy or refund – the terms must include or be accompanied by prescribed mandatory text acknowledging that the goods or services 'come with guarantees that cannot be excluded under the Australian Consumer Law' and that remedies – including refunds in case of major failures – will be available if those guarantees are breached.

The text is available on the ACCC's website: www.accc.gov.au/business/treating-customers-fairly/offering-warranties/warranties-against-defects.

CUSTOMER AGREEMENTS AND THE UNFAIR CONTRACT TERMS LAW

Care is required to ensure that standard customer agreements – such as end user licence agreements and terms of service – are consistent with the ACL.

Potential issues include terms purporting to exclude non-excludable consumer guarantees, as discussed above, as well as the application of the Unfair Contract Terms Law (**UCTL**).

In summary, the UCTL will have the effect that any 'unfair' terms in standard form consumer contracts will be void. More information concerning the UCTL is set out in our *Doing Business in Australia Guide*.

A term will be considered unfair if:

- > it would cause a significant imbalance in the parties' rights and obligations under the contract;
- > it goes beyond what is reasonably necessary to protect the legitimate interest of a party to the contract; and
- > it would cause detriment to a party to the contract if it were to be applied or relied upon.

The ACL includes a detailed, non-exhaustive list of examples of the types of terms in a standard form consumer contract that the Court may regard as unfair. Enforcement activity by the ACCC has also established a body of other examples, although games industry contracts have not been specifically considered. Clauses providing for overly broad discretions to override customer rights (such as cancellation of accounts, virtual property or virtual currency without cause) may be problematic.

A regulator or a consumer may commence proceedings for remedies such as a declaration that all or part of a contract is void. Suppliers may also contravene the prohibition of misleading and deceptive conduct if they insist that an unfair term is enforceable.

There are currently no pecuniary penalties for including unfair contract terms. However, the Federal Government has indicated that it will be introducing new legislation against unfair terms in the near future. There are indications that this will include a penalty regime.

PRICING

Prices for goods and services should be presented in a way that is clear and complete, in order to avoid breaching the prohibition of misleading and deceptive conduct under the ACL. The ACL also specifically requires that prices for goods and services be presented as a total price, including any tax (such as Australian Goods and Services Tax), duty, fee, levy or additional charges (such as credit card processing charges).

The CCA prohibits vertical price restraints imposed by suppliers – ie resale price maintenance. More information concerning resale price maintenance is set out in the Competition Laws section of our *Doing Business in Australia Guide*.

GIFT CARDS

The ACL includes requirements concerning gift card terms, including that cards must be redeemable for at least three years.

CONTRACTS WITH SMALL BUSINESSES

The ACL does not just apply to dealings with consumers. The laws can also apply to transactions with corporations and particularly small businesses:

- > consumer guarantees can apply to supplies of commercial products to businesses where the purchase price is A\$100,000 or less; and
- > the UCTL can apply to standard form contracts with a business that employs fewer than 20 persons, where either the upfront price payable under the contract is under A\$300,000, or the contract has a term of more than 12 months and the upfront price payable under the contract is under A\$1 million.

It is possible that the new Federal Government legislation referred to above will change these thresholds and broaden the small business classification.

USEFUL WEBSITES

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



INTELLECTUAL PROPERTY AND TAKEDOWN NOTICES

Our *Doing Business in Australia Guide* includes a general introduction to the protection of intellectual property in Australia.

Australia is a signatory to all major intellectual property conventions including the Berne Convention, Paris Convention, Patent Cooperation Treaty and TRIPS Agreement.

Most forms of interactive entertainment, games and associated material will be protected as copyright works. Copyright protects computer code as a literary work.

Copyright protection applies automatically on creation and is not a registrable right in Australia.

TAKEDOWN NOTICES FOR INFRINGING MATERIAL HOSTED IN AUSTRALIA

The *Copyright Act 1968* (Cth) and *Copyright Regulations 2017* (Cth) (**Copyright Regulations**) include safe harbour provisions protecting Australian internet service providers (**ISPs**) against liability for copyright infringement by users.

These provisions apply where the ISP is not involved in the infringing activity and promptly removes or disables access to infringing material when it becomes aware of the infringement.

The legislation provides a takedown notice mechanism. Takedown notices should:

- > be sent by the copyright owner, or a licensee or agent, by post or electronic communication to the ISP's designated representative (as identified in a mandatory notice on the ISP's website);
- > be in the form prescribed in Schedule 2 of the Copyright Regulations; and
- > specifically identify the allegedly infringing material.

Different forms apply to different circumstances – for example, where an Australian court has also found the material to be infringing.

Upon receiving a takedown notice, the ISP must:

- > 'expeditiously remove, or disable access to, the copyright material specified in the notice'; and
- > as soon as practicable afterwards, notify the user responsible for the material, providing a copy of the takedown notice and informing the user of its rights to provide a counter-notice.

Users have three months after receiving the ISP's notice to give to the ISP's designated representative a counter-notice disputing the claims. A counter-notice form is also included in Schedule 2 of the Copyright Regulations.

The ISP must send a copy of the counter-notice to the complainant, who then has 10 business days to bring an action seeking a court order to restrain the infringing activity. If the complainant does not bring an action, or such an action is discontinued or unsuccessful, the ISP must restore the copyright material.

There can be consequences if a takedown notice includes false representations that are found to have been made knowingly. A person knowingly makes a material misrepresentation in a notification, notice or counter-notice if the person does not take reasonable steps to ensure the accuracy of the information and statements included in the notification, notice or counter-notice. A party that suffers loss or damage because of such a misrepresentation can take action seeking civil remedies.

The Copyright Regulations also provide processes for:

- > copyright owners to apply for an injunction requiring ISPs to block access to infringing websites; and
- > ISPs to initiate their own takedown of copyright material where they become aware that material is infringing or likely to be infringing.

USEFUL WEBSITES

IP Australia: www.ipaustralia.gov.au

CLASSIFICATION

The Australian National Classification Scheme covers the classification of publications, films and computer games. The scheme is co-regulated by the Federal Government and each Australian State and Territory.

Under the *Classification (Publications, Films and Computer Games) Act 1995* (Cth) (**Classification Act**), it is mandatory to obtain a classification rating from the Australian Classification Board (**Classification Board**) before selling a game in Australia.

The National Classification Scheme is currently being reviewed and amendments are to be expected in future, particularly to develop a framework more suitable to modern technology.

CLASSIFICATION OF GAMES

Games are assigned ratings in accordance with the National Classification Code and the accompanying Guidelines for the Classification of Computer Games 2012 (**Computer Games Guidelines**).

The rating categories consist of both advisory and restricted classifications:

- > Advisory classifications:
 - General (**G**) - very mild impact.
 - Parental Guidance (**PG**) - mild impact, not recommended for viewing by people under 15 without parental guidance.
 - Mature (**M**) - moderate impact, not recommended for people under 15.
- > Restricted classifications:
 - Mature Accompanied (**MA 15+**) - strong impact, legally restricted to people over 15, proof of age is required before watching, buying or hiring unless in the company of an adult.
 - Restricted (**R 18+**) - high impact, legally restricted to people over 18, proof of age is required before watching, buying or hiring. This category was only introduced in Australia for computer games in 2013.

- Restricted (**X 18+**) - very high impact - not available for games.
- Refused classification (**RC**) - very high impact material that is outside of generally accepted community standards. Games that would otherwise fall within the X 18+ category will be RC and must not be sold, hired, advertised or imported into Australia.

COMPUTER GAMES GUIDELINES

The Computer Games Guidelines are a tool to assist in classifying games.

The guidelines identify:

- > factors that will be considered in assessing impact, including interactivity, repetition, realism, and use of incentives and rewards (particularly in relation to drug use, nudity and sexual activity); and
- > six specific classifiable elements, together with detailed commentary on acceptable and unacceptable treatment of these elements for each of the classification categories:
 - violence
 - sex
 - language
 - drug use
 - nudity
 - themes (defined as 'social issues such as crime, suicide, drug and alcohol dependency, death, serious illness, family breakdown and racism')

The guidelines acknowledge the importance of context when classifying material, ie whether or not a classifiable element is justified by the story line.

PROCEDURES AND TIMELINES

Applications to the Classification Board must include a copy of the game, a completed Application for Classification of a Computer Game form, and the applicable fee, together with certain other material depending on the type of application being made – for example, whether or not the applicant is submitting footage, supplying an authorised assessor report or proposing to demonstrate the gameplay. Fees range from A\$430 to A\$2,460.

Applicants may engage a qualified private 'authorised assessor' to prepare a report and recommend classification, provided that the game is not likely to be classified higher than an M rating. Authorised assessor training courses are free and available online by submitting a request to the Classification Board.

The Classification Board's website suggests that decisions will be available in up to 25 working days for a standard application and up to 7 working days for a priority application, an additional fee of A\$420 applies.

INTERNATIONAL AGE RATING COALITION

The International Age Rating Coalition (**IARC**) Global Rating Tool has been approved for use in Australia for the classification of mobile and online games (available from storefronts including Google Play, the Microsoft Store for Windows and Xbox, Nintendo eShop, Oculus Store and the Origin Store). A decision produced by the tool has the same effect as a decision of the Classification Board, subject to review.

REFUSAL OF CLASSIFICATION

Reasons for refusal of classification can include:

- > actual sexual violence;
- > depictions of actual sexual activity or actual sexual violence;
- > detailed and realistic interactive drug use;

- > incentives or rewards related to illegal drug use or sexual violence;
- > sexual activity involving minors; and
- > other illegal sexual activities.

Applicants can appeal against classification decisions or resubmit games after modification to remove objectionable content. An application for appeal must be lodged within 30 days of the initial decision and a A\$10,000 fee applies.

GAME UPDATES AND PATCHES

Updates will not require a game to be classified again provided that the update meets certain criteria specified in the Classification (Publications, Films and Computer Games) (Modifications of Computer Games) Instrument 2015. In summary, an update must be minor or technical, and not change the title or significantly change the original game, gameplay or impact.

ADVERTISING AND DEMONSTRATING GAMES

The Classification Act and associated State and Territory legislation also regulate certain games advertising and public demonstrations (which may include some esports activities). These include:

- > requirements for advertisements, packaging and other material to display prescribed markings and consumer advice, depending on their classification;
- > prohibition of advertising in games for other games that have a higher classification level, have been refused classification or are unclassified; and
- > prohibition of advertising or demonstration of games in public if they have been refused classification or are unclassified. Restrictions apply to advertising and demonstration of games classified MA 15+ or above.

Publishers seeking to advertise an unclassified game may seek an assessment of likely classification. Other exemptions may be available for some demonstration activities.

INTERACTIVE FILMS

Interactive films defined as films that enable viewers to choose from two or more visual images, or that are recordings ‘from which a computer generated image can be produced’ – are generally classified in the same way as standard films, except that the application must include information concerning any contentious material.

PUBLICATIONS AND ONLINE CONTENT

The National Classification Scheme only requires classification review of publications that are likely to be restricted to adults or refused classification. This scheme applies to any written or pictorial matter not including a film, computer game or advertisement for a film or game and uses different classification nomenclature. It is generally applied to printed materials, while regulation of online material is addressed by legislation discussed in the Child Protection and Online Content Regulation section below.

USEFUL WEBSITES

Australian Classification: www.classification.gov.au



GAMBLING AND LOOT BOXES

GAMBLING REGULATION

Gambling is a significant and heavily regulated industry in Australia. Prize promotions and competitions are also regulated to an extent.

The regulatory environment is particularly complex because the Commonwealth and each State and Territory has its own set of legislation. Each jurisdiction's legislation usually consists of several different Acts applicable to particular categories. Definitions and regulatory requirements differ significantly between some jurisdictions.

As a result, activities conducted in one State or Territory must be considered under the relevant legislation of that jurisdiction; and activities conducted online or at a national level must be considered under the legislation of all jurisdictions.

The legislation most likely to be relevant to overseas interactive entertainment and games companies is the *Commonwealth Interactive Gambling Act 2001 (IGA)*. The IGA makes it unlawful for overseas-based operators not holding a relevant State or Territory licence to provide online gambling services to Australian residents.

The IGA defines a 'gambling service ... for the conduct of a game' as a game:

- > played for money or anything else of value;
- > that is a game of chance or a mixed chance and skill; and
- > where the customer gives or agrees to give consideration to play or enter the game.

Generally, any game with the above criteria will attract regulation and licensing requirements in all jurisdictions under local legislation.

Games that are not 'played for money or anything else of value' and prize promotions that are free to enter or are games of skill (rather than chance) attract the least regulation. However, depending on the exact nature of the game they may still be subject to registration, procedural and rule requirements in some jurisdictions,

and a review of potentially applicable legislation is therefore recommended.

When selecting prizes, it is also necessary to take into account restrictions in the relevant jurisdictions, particularly for alcohol, tobacco products and weapons.

LOOT BOXES

Loot boxes are not directly regulated in Australia at this time. Existing gambling laws, including the IGA, are generally regarded as not being applicable to loot boxes because they are not 'played for money or anything else of value'.

This was confirmed by the relevant regulator, the Australian Communications and Media Authority (**ACMA**), in its submission to the 2018 Senate Environment and Communications References Committee review of gaming micro-transactions for chance-based items.

The situation is likely to be different where a loot box or its contents have monetary value, including where they can be 'cashed out' or exchanged for tangible objects or money outside of the game, or used for other gambling activities, eg through a third party site.

As it is possible that some loot box mechanisms eg where rewards have monetary value, may contravene gambling laws, it is prudent to consider the application of gambling laws to each new mechanism.

The Federal Government has indicated that it will extend a trial of online age verification requirements to video games with loot boxes later in 2022, but little is known about these plans at this time.

The Classification Board has added in-game purchases as one of its categories for video game ratings, mandating that the inclusion of in-game purchases is to be disclosed on physical game boxes. Further, applications for classification of video games must disclose whether the game includes 'microtransactions', 'simulated or real world gambling', or 'other gameplay mechanics which may be likened to gambling'.

LOOT BOXES AND CONSUMER PROTECTION LAWS

Australian consumer protection laws will apply to loot boxes generally, as they would the supply of any other goods or services in Australia. The ACL governs unfair commercial practices such as misleading and deceptive conduct and unfair contract terms.

The ACL is addressed in further detail in the Consumer Protection section of this supplementary guide.

The ACL specifically prohibits offering gifts, prizes and other free items 'with the intention of not providing it, or of not providing it as offered'.

Accordingly, disclosing the likelihood of winning a specific virtual item or class of item may not be legally mandated, but would be considered good practice. Such disclosure must be authentic and accurate because causing users to form false impressions about their chances of winning could amount to misleading and deceptive conduct under the ACL.

THE FUTURE OF LOOT BOXES IN AUSTRALIA

Loot boxes have attracted significant attention and comment from regulators over the past few years, particularly at the Commonwealth level.

In the Protecting the Age of Innocence Report 2020, a Parliamentary Committee noted the 'potential for loot boxes to act as a gateway to problem gambling and associated harms later in life' and recommended that, 'given their resemblance to gambling', loot boxes should be restricted to adults over 18 through the use of mandatory age verification.

At this time, it seems likely that future regulation of loot boxes (if any) will be through the classification system rather than reform of gambling legislation. The Australian classification regulation system is currently under formal review.



CHILD PROTECTION AND ONLINE CONTENT REGULATION

New online content and child protection laws have recently been introduced in Australia and, in some cases, are still being 'bedded down', with further details expected to be released in future or developed further in industry codes.

AGE OF MAJORITY AND CONSENT

The age of majority in Australia is 18 years.

Concerning privacy consents, the Office of the Australian Information Commissioner has indicated that:

- > effective consent turns on whether or not individuals have the maturity to understand; and
- > organisations can generally assume an individual over the age of 15 has capacity.

Under common law, only contracts for necessities or employment may be enforced against minors.

ONLINE CONTENT REGULATION

Online content is now regulated by the *Online Safety Act 2021* (Cth) (**Online Safety Act**), as administered by the eSafety Commissioner (**eSafety**).

Regulated or restricted online content is material that:

- > is available to users in Australia;
- > is 'provided from Australia'; and
- > falls within class 1 or class 2, as determined by reference to the National Classification Scheme system (see Classification section above).

'Material' is defined broadly to include text, data, speech, music, and visual images, and would include films, websites and computer games.

eSafety has indicated that when 'considering whether a service is "provided from Australia" [it] will take into account factors such as whether the online service is being hosted in Australia, or whether the online service provider has a registered Australian business presence (for example, if it has an Australian Business Number or

an Australian Company Number)' and that there 'may be other factors which indicate that an online service is provided from Australia' (*Online Content Scheme Regulatory Guidance* eSC RG 4).

CLASS 1 AND CLASS 2 CONTENT

A summary guide to classification is below:

Class	Type
1	Material that is or would be refused classification (RC) in Australia.
2	Material that is or would be classified as either X 18+ or R 18+ (games that would otherwise be X 18+ are RC in Australia and therefore Class 1).
2A	Contains real sexual activity between consenting adults, with violence, sexual violence or coercion/ no fetishes or purposely demeaning activities (pornography).
2B	Contains high impact depictions of simulated sexual activity, nudity, violence or drug use.

Generally, eSafety may take action in respect of Class 1 and 2A material, or Class 2B material that is not behind a restricted access system.

HARMFUL CONTENT

eSafety also has powers to take action in relation to specific types of harmful material. This includes material that, according to definitions and harm thresholds specified in the legislation, constitutes:

- > cyberbullying;
- > image-based abuse (non-consensual image sharing);
- > adult cyber-abuse;
- > seriously harmful material and (eg child abuse); or
- > promotion, incitement, instruction in or depiction of abhorrent violent conduct (eg terrorism, murder, torture, rape).

NOTICES AND OTHER ENFORCEMENT ACTIONS

The Online Safety Act provides a complaint-based framework. eSafety generally takes action in response to complaints, although in some cases it may take action on its own initiative.

With variations according to the type of notice, eSafety can send notices to providers of social media services, 'relevant electronic services' (messaging services, specifically including 'service that enables end users to play online games with other end users'), 'designated internet services' (eg websites), hosting service providers, internet carriage service providers and app distribution services; and in some cases, individual end users.

Notices may include (with some variations according to the type of material):

- > informal requests;
- > formal warnings;
- > service provider notifications;
- > remedial notices;
- > removal notices;
- > link removal notices;
- > app removal notices; and
- > blocking requests and orders to internet service providers in respect of abhorrent violent conduct material.

Non-compliance may lead to escalation of enforcement actions, including:

- > infringement notice requiring payment of a penalty;
- > civil penalty order - currently up to A\$550,000 for corporations;
- > injunction; and
- > orders to stop providing service in Australia (in severe cases of non-compliance).

In respect of restricted material available in Australia but not 'provided from Australia', eSafety's powers are limited, although it does manage a 'prohibited URL list' and engage with internet filter providers to assist with access control.

The Online Safety Act includes provisions protecting persons from civil proceedings (eg for breach of contract) for complying with a formal notice.

INVESTIGATIVE POWERS

eSafety has information-gathering investigative powers, including to require production of documents, and answers to questions and requests for information including contact details or other information about the identity of end users.

RESTRICTED ACCESS SYSTEMS

From January 2022, the Restricted Access System under the Online Safety Act requires providers to restrict minors from accessing Class 2B restricted content (such as games with an R18+ classification) and to incorporate 'reasonable steps' to confirm that a person applying for access to such content is at least 18 years of age. The Online Safety Act includes a legislative instrument prescribing new requirements about protecting minors from restricted content, the Online Safety (Restricted Access Systems) Declaration 2022 (**RAS Declaration**).

As with the other content regulation powers considered above, these laws only apply to online services with an Australian connection.

The RAS Declaration Explanatory Statement includes the following:

'Reasonable steps may be established by transaction type – use of a credit card where content is fee-based, for instance. Other reasonable steps might link the application process to an already-validated age-restricted platform, allow provision of other identity related information, or allow applicants to use a token generated during another age confirmation process.'

The access-control system for relevant Class 2 material must require an applicant who seeks this material to:

- > apply for access; and
- > submit a declaration that the applicant is at least 18 years of age.

For each application for access, the access-control system must give the applicant warning about the nature of the material and safety information about how a parent or guardian may control access to the material by persons under 18 years of age.

The access-control system must incorporate 'reasonable steps' to confirm that the applicant is at least 18 years of age.

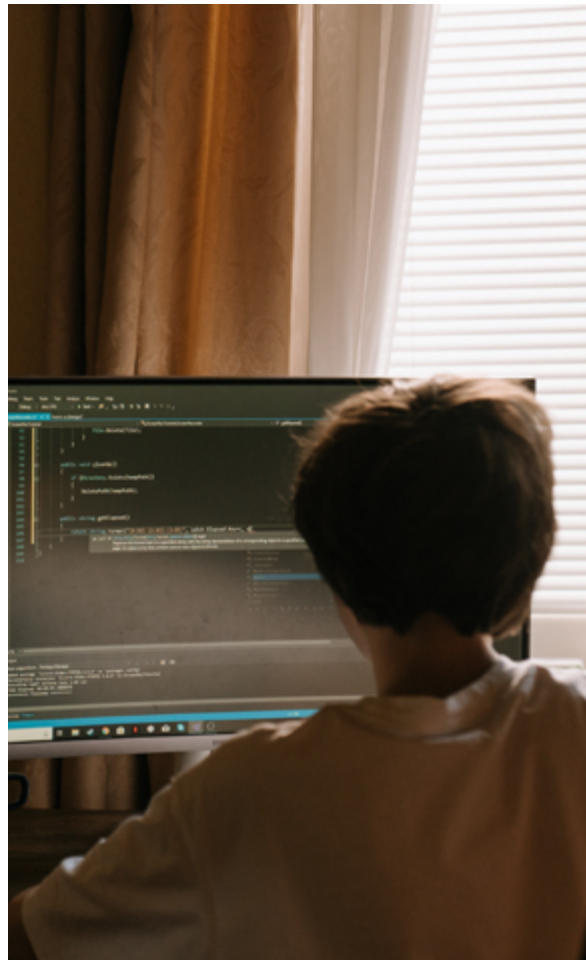
Exactly what processes will satisfy the above requirements is not yet fully understood. All options appear to be 'on the table' at present, including uploading of proof of age identification documents and facial biometrics. It is expected that this will become clearer as industry responds to the new laws and develops industry codes.

ADVERTISING TO CHILDREN

See Advertising section, below.

USEFUL WEBSITES

eSafety Commission: www.esafety.gov.au/



ADVERTISING

AUSTRALIAN CONSUMER LAW

As noted in the Competition and Consumer Laws section above, the Australian Consumer Law (**ACL**) prohibits misleading and deceptive conduct and false or misleading representations in the course of business, including in advertisements.

The ACL also includes a range of more specific prohibitions of particular kinds of misrepresentation in relation to the supply of goods or services to consumers, such as false or misleading representations concerning:

- > the price, standard, quality, value, performance characteristics, uses, benefits or origin of goods or services;
- > sponsorship, approval, testimonials; and
- > rebates, gifts, prizes or free items.

GAMBLING ADVERTISING

The Broadcasting Services, Online Content Service Provider Rules 2018 places a range of restrictions on gambling advertisements in relation to live broadcast of sporting events, including by online content service providers.

The *Interactive Gambling Act 2001* (Cth) prohibits offering interactive gambling activities online.

ADVERTISING CODE OF ETHICS

The Australian Association of National Advertisers (**AANA**) has established a self-regulatory system based around the Advertising Code of Ethics, including accompanying codes such as the Code for Advertising & Marketing Communications to Children and the Wagering Advertising Code. Ad Standards, another industry body, handles complaints in relation to the Codes.

The Code for Advertising & Marketing Communications to Children:

- > requires advertisements targeted at children to be presented in such a manner that a person under the age of 14 would clearly understand that it is, in fact, a commercial communication and not program content; and
- > imposes other obligations including:
 - limiting where advertisements directed at children can be placed in relation to other content;
 - imposing certain obligations as to maintaining factual accuracy in the advertisement;
 - prohibiting advertisements from including sexual imagery, undermining the authority of parents, frightening children, demeaning any person or group, depicting unsafe uses, or relating to alcohol; and
 - limiting the types of foods and beverages that can be advertised to children.

The Advertising Code of Ethics also requires that advertising should only 'use language which is appropriate in the circumstances (including appropriate for the relevant audience and medium)' and that 'strong or obscene language' should be avoided.

ADVERTISING OF CLASSIFIED MATERIAL

The Classification section above addresses restrictions on advertising certain categories of material classified or refused classification under the Classification Act.

USEFUL WEBSITES

Australian Association of National Advertisers:
www.aana.com.au

Ad Standards: www.adstandards.com.au

PRIVACY AND DATA SECURITY

PRIVACY ACT

The *Privacy Act 1988* (Cth) (**Privacy Act**) regulates the handling and processing of personal information, including credit reporting information. Our *Doing Business in Australia Guide* provides an overview of the Privacy Act, as well as other privacy legislation including the *Spam Act 2003* (Cth) and the *Do Not Call Register Act 2006* (Cth).

As noted in the *Doing Business in Australia Guide*:

- > the Privacy Act is similar to the European Union's General Data Protection Regulation (**GDPR**), however the GDPR tends to provide a higher level of protection. If an entity is compliant with the GDPR, it will usually be compliant with the Privacy Act - although it is advisable for overseas organisations to have a separate privacy policy for Australia and not rely on their GDPR policies; and
- > the Privacy Act requires that certain steps be taken prior to disclosing personal information to overseas recipients.

APPLICATION TO FOREIGN CORPORATIONS

The application of the Privacy Act expressly extends to 'an act done, or practice engaged in, outside Australia ... by an organisation, or small business operator, that has an Australian link'. A foreign corporation may have an Australian link in relation to personal information if it both carries on business in Australia and collected or held the personal information in Australia.

A 2021 decision by the Australian Information Commissioner and Privacy Commissioner concerning Uber indicated that: 'a collection is taken to have occurred "in Australia" where an individual is physically located in Australia... and information is collected from that individual via a website, and the website is hosted outside of Australia, and owned by a foreign company that is based outside of Australia and that is not incorporated in Australia.'

REFORM

An exposure draft of a new Privacy Legislation Amendment (Enhancing Online Privacy and Other Measures) Bill was released in 2021. With the change of Government in May 2022, the future of the draft legislation is not yet clear.

This legislation would, if passed, have clarified and strengthened the application of the Privacy Act to foreign corporations, particularly providers of social media services and 'large online platforms', ie service providers with over 2.5 million end-users in Australia.

LAW ENFORCEMENT POWERS TO ACCESS DATA

Australian law enforcement agencies have a range of powers to serve notices to Australian and foreign companies requiring access to data and systems and assistance to achieve such access, including access to encrypted data.

The new identify and disrupt powers introduced by the *Surveillance Legislation Amendment (Identify and Disrupt) Act 2021* are particularly controversial, allowing the issue of a new range of warrants in connection with investigating and taking action to prevent serious criminal offences, including:

- > data disruption warrants allowing the disruption of data through modification and deletion of data to frustrate the commission of serious offences;
- > network activity warrants allowing collection of intelligence on serious criminal activity carried out online; and
- > account takeover warrants allowing control of online accounts to gather evidence to further a criminal investigation.

USEFUL WEBSITES

Office of the Australian Information Commissioner:
www.oaic.gov.au/

ESPORTS

AUSTRALIAN REGULATION

Esports are gaining momentum in Australia but have not attracted substantial legislative attention to date.

Tournaments and associated activities are therefore generally subject to the same laws as traditional competitions and sporting matches – particularly gambling legislation, consumer laws, classification laws and general contract law.

As noted in the Gambling and Loot Boxes section above few regulations apply to offering prizes to participants in games of skill, but different legislation applies in each State and Territory and at the Commonwealth level.

Betting with agencies on esports tournaments is not uncommon and is regulated in the same way as other betting activities.

The *Broadcasting Services (Online Content Service Provider Rules) 2018* (Cth) recognise ‘electronic sports competitions’ as a ‘sporting event’ and therefore applies certain restrictions to promotion of gambling services during streaming of such competitions.

Match fixing is a criminal offence under a range of legislation and several individuals have been arrested and charged for fixing esports tournaments.

As noted in the Classification section above, some esports activities could constitute public demonstration of a game and attract regulation under the Classification Act.

NATIONAL INTEGRITY FRAMEWORK

The National Integrity Framework is a Federal Government initiative intended to assist national sporting organisations implement integrity measures and protect participants. It was introduced by Sport Integrity Australia in March 2021.

The framework provides national sporting organisations with template policies to implement the framework, including processes for addressing complaints, disputes and discipline issues; harmful conduct and child protection; competition manipulation and sport wagering; and drug misuse.

Sport Integrity Australia has indicated that the organisation regards esports as within the scope of its responsibilities. However, the Australian Sports Commission (responsible for supporting and investing sport) has not officially recognised esports as a sport.

Australian esports industry bodies that exist do not appear to have adopted the National Integrity Framework policies at this time.

USEFUL WEBSITES

Sport Integrity Australia: www.sportintegrity.gov.au

Australian Esports Association: www.aesa.org.au

Australian Esports League: <https://ael.org.au/>

Esports Games Association: www.egaa.com.au

IMMIGRATION

The Immigration section of our *Doing Business in Australia Guide* provides information on requirements for migration to and temporary entry into Australia, and the different visa classes available.

These regulations favour certain occupations relevant to the interactive entertainment and games industry.

In 2021, the Federal Department of Home Affairs added two relevant occupations to the Priority Migration Skilled Occupation List (**PMSOL**). Employer nominations and visa applications for PMSOL occupations are given priority processing.

This applies to the temporary skill shortage visa (subclass 482), the most commonly used visa subclass, as well as other employer nominated or sponsored visa applications.

The occupations are:

- > Multimedia Specialist role (ANZSCO code 261211), including persons who create computer animation, audio, video and graphic image files for multimedia presentations, games, motion pictures and other applications; and
- > Software Engineer (ANZSCO code 261313), including persons who design, develop, modify, document, test, implement, install and support software applications and systems.

These occupations are also included in the Medium and Long-term Strategic Skills List, which is relevant to persons seeking permanent residency.

USEFUL WEBSITES

Department of Home Affairs: www.homeaffairs.gov.au



GOVERNMENT SUPPORT AND TAX INCENTIVES

Government recognition and support is growing at the Federal and the State and Territory levels. Listed below are just some of the incentives and assistance programs being offered.

Many initiatives have been announced in the 12 months or so preceding publication of this supplementary guide as government interest has gained momentum.

TAX INCENTIVES

Federal

The 30% Digital Games Tax Offset (**DGTO**) commenced in 2022.

The DGTO will provide eligible game developers with a 30 percent refundable tax offset for qualifying Australian games expenditure. It is:

- > limited to games with at least A\$500,000 of qualifying expenditure;
- > capped at A\$20 million in claims per annum;
- > available to Australian resident companies or foreign resident companies with a permanent establishment in Australia; and
- > available in the year when the qualifying expenditure has ceased on a game.

The DGTO may be combined with some state-based incentives.

State and Territory

Queensland: 15% Digital Games Incentive

<https://screenqueensland.com.au/games/digital-games-incentive/>

New South Wales: 10% Digital Games Rebate

www.screen.nsw.gov.au/funding/incentives/nsw-digital-games-rebate

South Australia: 10% Video Game Development Rebate

<https://www.safilm.com.au/games/#VGDRbate>

OTHER ASSISTANCE

Austrade

The Australian Trade and Investment Commission (**Austrade**) is a Federal Government Agency that promotes Australian trade, investment, tourism and

education. It is actively promoting the Australian games development industry internationally and can offer a range of assistance to foreign investors. More information (including a comprehensive 2022 publication entitled *Level Up: A Guide to the Australian Games Industry*) is available here: www.globalaustralia.gov.au/industries/digital-games

Screen agencies

While a range of Federal Government, State and Territory bodies provide support to the games industry, most States and Territories offer particular funding and assistance through government screen agencies. Some of these initiatives are aimed at games that have development budgets under A\$500,000 and are therefore not eligible for the DGTO.

Federal government	Screen Australia: www.screenaustralia.gov.au
Victoria	VicScreen: www.vicscreen.vic.gov.au
Australian Capital Territory	Screen Canberra: www.screencanberra.com.au
New South Wales	Screen NSW: www.screen.nsw.gov.au
Queensland	Screen Queensland: www.screenqueensland.com.au
Tasmania	Screen Tasmania: www.screen.tas.gov.au
Northern Territory	Screen Territory: www.screenterritory.nt.gov.au
Western Australia	Screenwest: www.screenwest.com.au
South Australia	South Australian Film Corporation: www.safilm.com.au

IGEA GOVERNMENT INCENTIVES FOR GAME DEVELOPERS IN AUSTRALIA LISTING

The Interactive Games & Entertainment Association (**IGEA**) publishes a listing entitled *Government Incentives for Game Developers in Australia* on its website: www.igea.net

KEY INDUSTRY BODIES

INTERACTIVE GAMES & ENTERTAINMENT ASSOCIATION

The Interactive Games & Entertainment Association (**IGEA**) is the peak industry association representing the voice of Australian and New Zealand companies in the computer and video games industry. IGEA supports the business and public policy interests of the games industry, through advocacy, research and education programs, and works with many stakeholders including all levels of government, agencies, media and other trade associations.

USEFUL WEBSITES

Interactive Games & Entertainment Association:
www.igea.net

Australian Esports Association: www.aesa.org.au

Australian Esports League: <https://ael.org.au/>

Esports Games Association: www.egaa.com.au



ABOUT US

HWL Ebsworth is the largest legal partnership in Australia according to recent Partnership Surveys in The Australian and the Australian Financial Review. We are a full service commercial law firm and provide expert legal services at competitive rates, focusing on client outcomes.

Through our combination of legal specialists and industry experience, HWL Ebsworth has established a reputation as a legal service provider of choice for organisations across Australia and internationally.

As Australia's largest legal partnership, we can provide our clients with access to a significant depth of talent, consolidated expertise and in-depth knowledge.

HWL Ebsworth offers expertise in:

- > Aged Care and Retirement Living
- > Banking and Finance
- > Building and Construction
- > Commercial Contracting
- > Competition and Consumer
- > Corporate Governance
- > Energy and Resources
- > Environment and Planning
- > Capital Markets
- > Financial Services Regulatory
- > Foreign investment
- > Government
- > Health
- > Information Technology
- > Infrastructure
- > Insolvency and Security Enforcement
- > Insurance
- > Intellectual Property
- > Litigation and Dispute Resolution
- > Media and Communications
- > Mergers & Acquisitions
- > Property
- > Retail and Franchising
- > Taxation
- > Transport
- > Workplace Relations & Occupational Health Safety

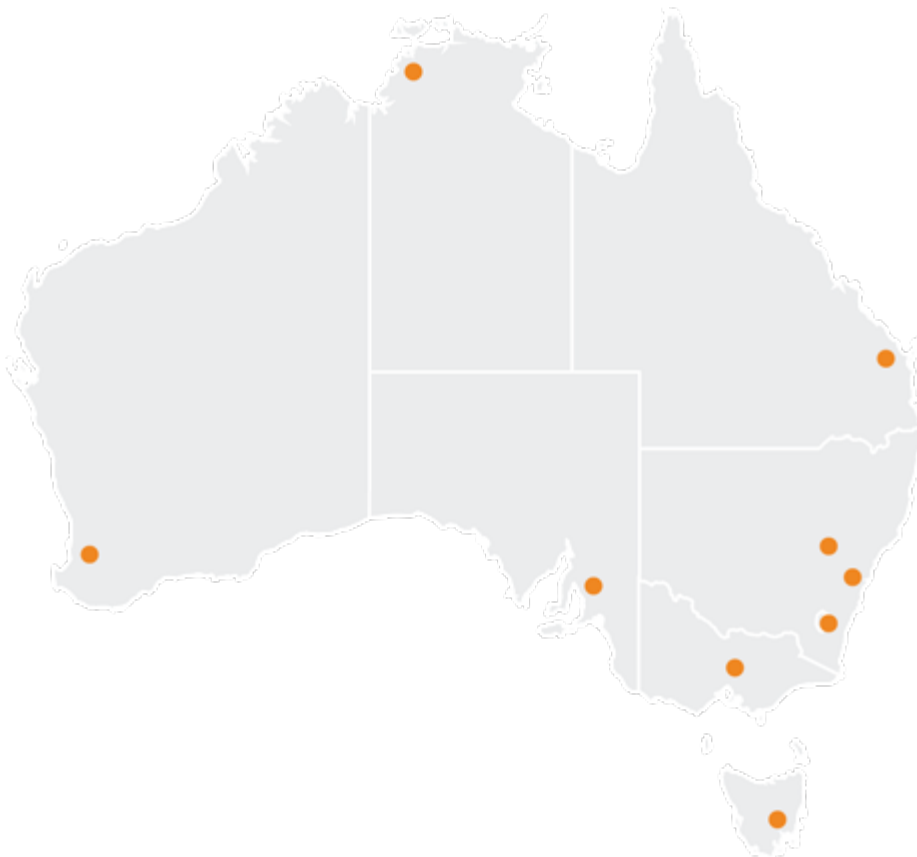
OUR OFFICES

HWL Ebsworth is the only Australian firm to have coverage in every State and Territory. The firm has offices in nine locations across Australia: Adelaide, Brisbane, Canberra, Darwin, Hobart, Melbourne, Norwest (North West Sydney), Perth and Sydney.

HOW WE ARE DIFFERENT

HWL Ebsworth operates a different business model from other leading national law practices, and this allows us to offer top tier practitioners at rates which are significantly lower than those of our competitors. A fundamental principle on which our model is built, however, is that the quality and timeliness of advice provided is not negatively impacted by our desire to offer clients exceptional value.

We understand the critical importance of effectively managing costs. By focusing our internal investment on areas that will provide tangible benefits to our clients, such as quality lawyers, training, knowledge management resources and IT systems, and choosing not to invest in unnecessary activities, we are in a position to offer exceptional value for money without compromising on quality and service.



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DISCLAIMER

This guide provides only general information as to current Australian laws as at 1 August 2022. It is not legal advice and should not be relied upon for that purpose. You must obtain your own legal advice applicable to your specific circumstances in respect of any matter contained in this guide.

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