

# | A Guide to Doing Business in Australia

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## Australia

The continent of Australia has an area of approximately 7.7 million square kilometres and its landform is the lowest, flattest and the driest of all inhabited continents.

Australia is a land rich in resources and natural beauty, which brings with it some unique environmental challenges. Many of Australia's natural tourist attractions are ecologically fragile and under threat from the level of tourism itself. Finding a balance between protecting the environment and fostering primary industries such as farming and mining has long been a topic of discussion among the population.

There are 11 UNESCO World Heritage Sites (Natural) in Australia. One of them, the Great Barrier Reef, is the world's largest coral reef. The 2000-kilometre long reef lies a short distance off the north-east coast and is a prime destination for both national and international tourists. Uluru (Ayers Rock), an icon of Australia's dry inland, rises from the red sands of the world heritage listed Uluru Kata Tjuta National Park in the Northern Territory. It was previously thought to be the world's largest monolith, but it is neither a monolith nor as large as the almost 50 square kilometre Mount Augustus, located in Western Australia.

Australia has three major landform features: the western plateau, the central lowlands and the eastern highlands. The western half of the continent consists of a great plateau at an altitude of 300–600 metres. The central lowlands include the channel country of south-west Queensland, which drains into Lake Eyre, and the Murray-Darling drainage system in the south, which flows into the Southern Ocean near Adelaide. The eastern highlands consist of a broad belt of varied widths extending from north Queensland to Tasmania. This largely comprises of tablelands, ranges and ridges, with only limited mountain areas above 1,000 metres.

## Population

For historic, climatic and economic reasons Australia is highly urbanised, its population of a little more than 22 million is concentrated in the capital cities and a handful of major cities mainly on the south and east coasts of the continent. More than 14.3 million people, close to two-thirds of Australia's population, reside in a capital city. Sydney and Melbourne are the two major cities. Other major cities include Brisbane, Perth, Adelaide, Canberra, Hobart and Darwin and 11 other major population centres of 100,000 or more people.

Because of traditionally high immigration rates, particularly since 1945, more than 23% of the population was born overseas with a wide range of birthplaces. There has been an

The weather varies greatly over the expanse of the continent. The south-east and south-west corners are temperate, while the northern part of the country is tropical. Large areas away from the coastal fringe are semi-arid or arid. The weather in the south is generally cooler, while the north is warmer and often subject to cyclones and other large storms during the Australian summer (December to February). Other natural hazards include bushfires, droughts and floods, depending on location.

Australia has many environmental issues with which it is dealing, including soil erosion and high salinity levels from overgrazing and deforestation; general urbanisation; clearing for agricultural purposes, which threatens the natural habitat of many unique animal and plant species; the Great Barrier Reef off the north-east coast, the largest coral reef in the world, is threatened by increased shipping and its popularity as a tourist site; limited natural fresh water resources and threats from invasive species.

increasing diversification of the population over time. In 1947, 81% of the overseas-born population came from the major English-speaking countries (the United Kingdom and Ireland, New Zealand, South Africa, Canada and the United States) but mainly from the United Kingdom and Ireland. In the second half of the 20th century, sources of migration shifted from Britain to Europe (especially Italy, Greece, and Malta) and, from the mid-70s, to Asia, the Middle East and West Africa. By June 1999, only 39% of the overseas-born population had been born in the main English-speaking countries, there being an increasing representation of Asian-born immigrants in Australia.

# Introduction

1.2

## Industry and infrastructure

Most manufacturing establishments are situated in and around capital cities, principally Sydney and Melbourne. The trend since the late 1960s has seen a reduction in employment in manufacturing and a similar reduction in the number of manufacturing establishments. Australia has traditionally been heavily unionised but union membership is steadily declining. Approximately 1.7 million Australians are union members, that is close to 20% of the workforce. They belong to 46 major unions in Australia representing every industry.

Australia is a major world exporter of a range of commodities including coal, iron ore, bauxite, alumina, manganese, liquefied natural gas, mineral sands, uranium, wool, meat, dairy products, wheat wine and sugar. In the past decade, however,

exports of services and manufactured goods have been rising faster than exports of rural and resource commodities.

Australia relies greatly on international trade for its economic wellbeing. Imports, particularly of capital equipment, play a vital role in the country's economic development. Australia's principal trading partners for its imports are the United States and China. Its biggest export market is Japan, followed by China, South Korea, the United States and New Zealand.

Australia has a large road and rail network with approximately 40,000 kilometres of railway system. Air transport is also used throughout the country because of the large distances involved.

## Form of Government

The Commonwealth of Australia inherited from Britain a system of democracy and common law within the Westminster style of representative government. It is a constitutional monarchy with three tiers of government – federal, state and local. Queen Elizabeth II is the Queen of Australia and nominally its non-elected head of state, which is separate to her role as the Queen of England. She is represented in Australia by the Governor-General at federal level and by Governors at state level. Each of these appointments is traditionally made on the recommendation by the Government of the day in the appropriate jurisdiction.

Australia is a federation. There are six States – New South Wales, Victoria, Queensland, South Australia, Western Australia and Tasmania – two internal Territories – Northern Territory and the Australian Capital Territory – and a number of external territories. A written constitution adopted in 1901 and seldom modified sets out the powers of the Federal Parliament, which has control over income tax and thus over the principal source of revenue. The separate states have written constitutions and can make laws on any matters other than those which are reserved to the Commonwealth under Section 51 of the Constitution. Where a law of a state is inconsistent with a law of the Commonwealth, the latter prevails and the former is, to the extent of the inconsistency, invalid. Each of the states has a separate Parliament, as does each internal territory (although Territory laws can be overridden by the Federal Government).

A third tier of government, Local Government, exists throughout most of Australia. It consists of city, municipal, shire and county councils. These raise revenue through rates on properties and provide residents with a range of services including roads, water, drains, parks, gardens and leisure facilities. These bodies are capable of passing ordinances or regulations relating to their responsibilities, especially in regard to urban planning, nuisances, health and sanitation and the supervision of building construction. The Australian Local Government Association is the national voice of local government, representing 560 councils across the country.

In setting up business or investing in Australia, a variety of federal, state, territory and local government laws and regulations may have to be considered.

## General

The capital of Australia is Canberra which is located in the Australian Capital Territory about 300 kilometres by road south-west of Sydney and 650 kilometres by road north-east of Melbourne. English is the official language. The currency is the Australian dollar (\$, or AUD) and is divided into 100 cents. Australia uses the metric system for all measurement.

## About Middletons

### Straight talking lawyers...

Middletons is an Australian commercial law firm that prides itself on a straight talking approach in the delivery of legal services.

Straight talking sounds simple and to us, it is. We don't sit on the fence, we provide timely advice that can be easily understood and applied.

However, there is more to straight talking than just clear communication. The talk needs to be supported by accurate analysis of the law. Commercial advice based on technical excellence, timeliness and value for money.

That is the Middletons' difference.

This is what straight talking means to us. We save you frustration, time and money because we understand it's our business to understand your business.

### ...client focused advice

We have extensive experience acting for industry leaders, major corporations and government on groundbreaking legal transactions in Australia and internationally. Our commercial expertise and knowledge in specific industries ensures we add value to our clients' businesses.

We provide clients with commercial solutions and innovative ways to achieve their business goals.

We build enduring relationships with our clients based on mutual respect and trust. Informality, friendliness and approachability are the hallmarks of our culture. Our commitment to professionalism, ethical conduct and dedication to providing the best imaginable client service experience is absolute and non-negotiable.

### Areas of service

- Anti-Counterfeiting
- Banking & Financial Services
- Biotechnology & Life Sciences
- Capital Markets
- Commercial Litigation
- Competition & Regulatory
- Corporate Advisory
- Corporate Recovery & Insolvency
- Dispute Resolution
- Energy & Resources
- Funds Management & Superannuation
- Government
- Innovations & Intellectual Property
- Insurance
- Major Projects & Infrastructure
- Mergers & Acquisitions
- Planning & Environment
- Property, Construction & Development
- Taxation & Revenue
- Technology & Telecommunications
- Transport, Logistics & Defence
- Workplace Relations & Safety.

# Introduction

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## Industry/Government information

The information in this guide is a general overview of the regulations governing business in Australia. As Australia operates under numerous federal and state laws, we have not attempted to offer a detailed explanation of all relevant laws. Therefore, before any specific action is undertaken, it is essential that specific legal advice be obtained.

Other websites you may wish to visit to find out more about doing business in Australia, Government grants, regulations, trade permits, licences and assistance are:

### **www.austrade.gov.au/Invest**

AUSTRADE – The Australian Trade Commission is the Australian Government’s trade and investment development agency.

### **www.dfat.gov.au**

Department of Foreign Affairs and Trade.

### **www.ato.gov.au**

Australian Taxation Office.

### **www.ausindustry.gov.au**

Commonwealth agency for delivering information, programs and seminars to businesses.

### **www.acci.asn.au**

Australian Chamber of Commerce & Industry.

### **www.aigroup.asn.au**

Australian Industry Group.

### Other useful websites

#### **www.australia.gov.au**

Australian Government Entry Point. Lists and provides links to all Australian Government Departments and Agencies.

#### **www.business.nsw.gov.au**

State Government Offices NSW – Department of State & Regional Development.

#### **www.business.vic.gov.au**

Business Victoria.

#### **www.sd.qld.gov.au**

Queensland Department of State & Regional Development.

#### **www.doir.wa.gov.au**

Western Australia – Department of Resources Development.

#### **www.southaustralia.biz**

South Australia – Department of Industry and Trade.

#### **www.development.tas.gov.au**

Tasmania – Department of State Development.

#### **www.nt.gov.au**

Northern Territory – Department of Industries and Small Business. Click through from main page.

#### **www.business.act.gov.au**

Australian Capital Territory – Office of Business Development and Tourism.

## Foreign investment in Australia

The Federal Government regulates foreign investment primarily through the Foreign Investment Review Board (FIRB) which administers the *Foreign Acquisitions and Takeovers Act 1975 (Cth)* (FATA) and Federal Government Foreign Investment Policy (Policy). The Australian Federal Treasurer is responsible for the ultimate approval or refusal of applications for proposed investments.

The effect of the FATA and the Policy is to require certain proposals by “foreign persons” to be notified to FIRB or submitted for examination prior to implementation. Foreign persons are broadly defined under the FATA as:

- a natural person not ordinarily resident in Australia (for a period of at least 200 days in the preceding 12 months)
- any corporation in which a person not ordinarily resident in Australia, or an entity incorporated overseas, holds an interest of 15% or more
- any corporation in which two or more persons not ordinarily resident in Australia or in which two or more of the overseas incorporated entities jointly hold an interest of 40% or more
- a trustee of a trust in which a person not ordinarily resident in Australia, or an overseas incorporated entity, holds a beneficial interest of at least 15% of the assets or income of the trust, or
- a trustee of a trust in which two or more persons not ordinarily resident in Australia, or two or more overseas incorporated entities, jointly hold a beneficial interest of at least 40% of the assets or income of the trust.

## Foreign investment & takeovers

2.2

### FIRB approval

#### Compulsory notification

It is compulsory for a foreign person or corporation to notify FIRB where they propose to acquire:

- a “substantial or controlling interest” in an Australian company through an acquisition of shares (either shares of that company or of a parent, whether Australian or foreign) where the proposal values it to be above, A\$231 million (or A\$1005 million for US investors in non-sensitive sectors)
- a “substantial interest” in an existing Australian business where the value of its gross assets, or where the proposal values it to be above, A\$231 million (or A\$1005 million for US investors in non-sensitive sectors) (2011, indexed annually), or
- an interest in any Australian urban land (subject to an exemption).

Acquisitions of a substantial (or controlling) interest in a corporation, business or trust are those with a holding of 15% or more by a single non-resident person or foreign corporation (alone or with associates) or 40% or more in the aggregate by 2 or more corporations (alone or with associates). A substantial or controlling interest in an Australian corporation includes where that foreign person is in a position to control the requisite percentage of the potential voting power.

#### Voluntary notification

The Policy, rather than FATA, requires prior approval and notification for certain investment proposals, including proposed investments where any doubt exists as to whether the investment is notifiable. For example:

- acquisitions of substantial interests in an offshore company whose Australian subsidiaries or downstream gross assets are valued at A\$231 million or more (or A\$1005 million for US investors in non-sensitive sectors) (2011, indexed annually) and represent less than 50% of global assets
- acquisitions of interests in urban real estate regardless of value, subject to certain exemptions (a corporation or trust is deemed to be an urban land corporation if it holds more than 50% of its assets in any non-rural land)
- all investments in the media sector of 5% or more
- takeovers of offshore companies whose Australian subsidiaries or gross assets exceed A\$231 million and represent less than 50% of global assets
- direct investments by foreign governments or their related entities of greater than 10% or less than 10% where the interest can be used to influence or control the company (for example, where acquiring preferential voting rights, the right to appoint directors, or enter into certain contractual agreements such as off-take agreements). Foreign governments and their related entities are now able to acquire up to a 10% interest in an Australian enterprise without the need to notify FIRB (unless the acquisition is

one which could influence the control of the target company or is preparatory to a takeover bid).

The benefit of voluntary notification is that once approved, it avoids the potential for likely investigation, rejection and the making of adverse orders by the Australian Federal Treasurer after the proposed transaction has been effected. In addition, failure to adhere to the Policy may result in refusals to grant other necessary ministerial approvals or general resistance from the Federal Government to the proposed investor, including the potential refusal of future applications under the FATA.

#### Types of investments captured

On 22 September 2009, the Federal Government made changes to Australia’s foreign investment screening framework including abolishing the requirement that private investors notify proposals to establish a new business in Australia valued above A\$10 million.

The types of foreign investments that the approval requirements currently capture are:

- an acquisition
- a right to exercise an option
- where the potential voting power of potential shareholdings will be acquired (ie convertible notes)
- holdings of associates of a foreign corporation
- certain board representation arrangements or alterations of the constitution or other constituent documents of an Australian corporation carrying on an Australian business
- certain arrangements for leasing, hiring, managing or otherwise participating in the profits or management of an Australian business.

#### Timing of applications

Applications for approval must be in writing and normally take between 30 and 40 days to be determined once a proposed acquisition is notified to FIRB under FATA. The Federal Treasurer then has 30 days to decide whether or not to object to the acquisition and a further 10 days to notify the applicant of the decision. Generally, if no response is made within 40 days, then provided the application is made in the prescribed form, FIRB is effectively deemed to have no objection to the proposal. However, an interim order can be made extending this initial 30 day period for up to a further 90 days.

#### Consequences of non-compliance

The consequences of failure to comply with the FATA depend on the nature of the transaction undertaken. For example, where the Treasurer decides not to object to a proposal, subject to certain conditions being satisfied, and the proposal proceeds without satisfying those conditions, the following penalties may apply:

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## Foreign investment &amp; takeovers

- for an individual – a fine not exceeding A\$55,000 and/or up to two years imprisonment
- for a corporation – a fine not exceeding A\$275,000.

Where a transaction which falls within the FATA is not notified and it is subsequently found that it is not in the national interest, the Treasurer may order the divestment of the shares or unwinding of the investment or may issue fines.

### US investments and exemptions

Following the Australia-United States free trade agreement, amendments were made to the FATA. Essentially these changes relate to United States citizens, United States entities, Puerto Rican entities and the United States government, and provide an exemption from the FATA for interests in financial sector companies and introduce screening thresholds of A\$1005 million for acquisitions of interests in Australian businesses in non-sensitive sectors and A\$231 million for acquisitions of interests in Australian businesses in sensitive sectors.

Sensitive sectors include media, telecommunications, transport (airports, port facilities, rail infrastructure, international and domestic aviation and shipping services), defence force or military, security technologies and communications systems, extraction of uranium or plutonium or the operation of nuclear facilities.

### Real estate under the FATA

Urban land refers to all Australian real property other than land which used wholly or exclusively for the business of primary production.

Acquisitions of interests in urban land (including interests that arise via leases, financing and profit sharing arrangements and the acquisition of interests in urban land corporations and trusts) that require prior approval include those that involve the:

- acquisition of developed non-residential commercial real estate, where the property is subject to heritage listing, valued at A\$5m or more or A\$1005 million for US investors
- acquisition of developed non-residential commercial real estate, where the property is not subject to heritage listing, valued at A\$50m or more or A\$1005 million for US investors
- acquisition of accommodation facilities irrespective of value
- acquisition of vacant urban real estate irrespective of value
- acquisition of residential real estate irrespective of value, or
- shares or units in Australian urban land corporations or trust estates, irrespective of value.

### Exempt urban real estate

Certain urban land acquisitions are exempt from the need for prior examination. These include acquisitions:

- by foreign-controlled charities or charitable trusts operating in Australia for the primary benefit of Australians
- by life insurance companies, representing investment of their Australian statutory funds (the proceeds of which are

primarily for the benefit of Australians)

- by general insurance companies operating in Australia where the acquisitions are made from the reserves of the companies and are consistent with the company's obligations under the *Insurance Act 1973*
- by Australian superannuation funds conducted for corporate foreign employers, representing the investment of superannuation funds for the benefit of Australian employees and their dependants
- of an interest in land on which a dwelling will be or is being constructed and the Treasurer has certified that the sale of that interest by a specified real estate developer to foreign persons is not contrary to the national interest subject to certain conditions
- of land which is being used or is able to be used immediately for industrial or non-residential commercial purposes, and where the acquisition is wholly incidental to the conduct of the existing or proposed business activities of the foreign person (other than where the normal business activities include acquisition, development and investment in land or the development or operation of any form of accommodation facility)
- of a time share scheme where the entitlement of the foreign person and any of his or her associates, is not greater than four weeks per year
- pursuant to a land acquisition program certified by the Treasurer as not being contrary to the national interest
- of shares as a consequence of which the foreign person holds less than a substantial interest in a publicly listed Australian urban land corporation, where less than 10% of its real estate assets relate to developed residential real estate, or, where 2 or more foreign persons hold interests in the Australian urban land corporation, those foreign persons hold less than an aggregate substantial interest in that corporation
- by an Australian citizen not ordinarily resident in Australia
- by a corporation in which a foreign government holds a substantial interest and the acquisition is to be used exclusively for the diplomatic purposes related to that government
- by an Australian corporation that is a foreign person only because of direct interests held in it by Australian citizens not ordinarily resident in Australia
- by a trustee of a trust estate where the trustee is a foreign person only because of direct interests held in the trust estate by Australian citizens not ordinarily resident in Australia
- of units in a unit trust as a consequence of which the foreign person holds less than a substantial interest in an Australian urban land trust estate of a type prescribed
- of non-residential commercial land valued at less than A\$50 million and the land is not vacant or the whole or part of which comprises an accommodation facility or valued at less than A\$5 million, the whole or part of which is entered in the Register of the National Estate

## Foreign investment & takeovers

## 2.4

- of an interest in land zoned residential property and the person acquiring the land is the holder of a permanent visa or a special category visa within the meaning of the *Migration Act 1958* or, if he or she had lawfully entered Australia immediately before the acquisition, would have been entitled to the grant on presentation of a passport, of a special category visa within the meaning of that Act
- of an interest in land on which a dwelling exists that is or may be used for residential purposes or may be constructed, or would be part of, a subdivided building in which hotel services are provided and that the Treasurer certifies is not contrary to the national interest
- by Australian citizens and their foreign spouses purchasing residential property as joint tenants
- by foreign owned responsible entities of managed investment schemes registered under section 601EB of the *Corporations Act 2001 (Cth)* where investments are made primarily for members ordinarily resident in Australia.

### Approved real estate

The following categories of proposed real estate acquisitions should be submitted for examination, but are normally approved subject to certain conditions, unless the Treasurer considers them to be contrary to the national interest:

- commercial real estate where continuous construction commences within five years and a minimum amount equivalent to 50% of the acquisition cost or current market value of the land (whichever is higher) being spent on development
- residential real estate for development (including vacant building allotments for construction of residential accommodation within 24 months) provided that the existing residence cannot be rented out prior to demolition and redevelopment and the existing dwelling must be demolished and continuous substantial construction of the new dwellings must commence within 24 months
- developed residential real estate by foreign owned companies operating a business or businesses in Australia seeking accommodation for their senior executives resident in Australia continuously for periods longer than 12 months provided the company undertakes to sell or rent the property if it is expected to remain vacant for six months or more
- home units, condominiums or similar accommodation prior to completion or “off the plan” or newly constructed provided that the dwelling is purchased from the developer and has not been occupied for more than 12 months. There are no restrictions on the number of units in a new development which may be acquired by foreign persons, provided that the developer markets the units locally as well as overseas, or
- developed residential real estate by foreign nationals temporarily resident in Australia for a period exceeding 12 months, provided the real estate is used as the principal place of residence and is sold when the purchaser ceases to be a temporary resident.

On 24 April 2010, the Assistant Treasurer announced changes to the screening of foreign investment in residential real estate. Temporary residents now need to seek FIRB approval before buying residential real estate in Australia\*.

### Acquisitions of Australian agricultural land

*The Foreign Acquisitions Amendment (Agricultural Land) Bill 2010* has been sent to the Senate Economic Committee for inquiry and report. If passed, the Bill proposes to:

- change the monetary threshold (currently, A\$231 million) to a spatial one, requiring notification of an acquisition of an interest in agricultural land of more than five hectares
- empower the Treasurer to make an order prohibiting a proposed acquisition by a foreign person of an interest in “Australian agricultural land” (which includes a legal or equitable interest, profit sharing arrangements, an interest in a share in a company that owns Australian agricultural land, and an interest as lessee or licensee in a lease or licence giving rights to occupy Australian agricultural land), where the land is greater than five hectares and the acquisition would be contrary to the national interest
- empower the Treasurer to direct a foreign person to dispose of an interest acquired in Australian agricultural land within a specified period, where satisfied that the acquisition is contrary to the national interest
- require the Treasurer to have regard to certain matters when determining whether an acquisition of an interest in Australian agricultural land is contrary to the national interest, including national security issues, any impact on competition and global industry or market outcomes, any impact of tax revenues and any impact on the Australian economy or the community
- impose compulsory notification obligations in relation to certain transactions, so that a person who enters into an agreement to acquire an interest in Australian agricultural land and failed to give notice to the Treasurer of his or her intentions to enter into the agreement is guilty of an offence
- require the Treasurer to publish on the Treasury website details of the agreement to which that notice relates, including identifying the person intending to enter into the agreement, the country of residence or place of business of that person and the amount of the investment proposed, and require the Treasurer to regularly update the website on the status of the notice which is under consideration.

### Queensland foreign ownership registration

The State of Queensland has enacted legislation which requires a foreign person (which is similarly defined in the FATA) to notify the appropriate authority of the acquisition and disposal of an interest in Queensland land. Interests in Queensland land include leasehold interests where the term of the lease (including option period) is 25 years or more and effectively transfers the beneficial ownership of land. Failure to comply with the notification requirements or the provision of false or misleading information may result in a fine of up to A\$83,500 for a first offence with provisions for forfeiture of the relevant interest.

\* *Foreign Acquisitions and Takeovers Amendment Regulations 2010 (No. 2)*

## 2.5

## Foreign investment &amp; takeovers

**Commonwealth Government assistance programs**

The Commonwealth Government provides a wide range of services for international companies seeking to establish or invest in operations in Australia. The most important organisation is the Investment Unit, which is run by Austrade and the Australian Department of Foreign Affairs and Trade and is responsible for:

- providing advice on strategic direction and analysis of investment opportunities and proposals
- major project facilitation
- national investment promotion activities
- coordination with State and Territory Governments on investment promotion and facilitation.

**Major project facilitation**

The major project facilitation service, administered by the Department of Infrastructure and Transport on behalf of the Minister for Infrastructure and Transport, assists companies by providing a single contact point with the Government, which is tailored to suit the nature and complexity of each project. Austrade provides information and advice designed to assist proceeding through government approval processes quickly and efficiently.

**Venture Capital Limited Partnerships program**

The Venture Capital Limited Partnerships (VCLP) program is aimed at stimulating the Australian venture capital sector by attracting foreign investors. A venture capital fund registered as a VCLP receives flow-through tax treatment and its eligible foreign investors are exempt from capital gains tax on their share of the funds profits.

**Other legislative requirements**

There are specific restrictions on foreign investment in more sensitive sectors such as residential real estate, banking, telecommunications, shipping, civil aviation, airports and the media. For example, proposed investments by foreign persons may give rise to the following additional requirements and limitations:

- foreign investment in the banking sector must be consistent with the *Banking Act 1959*, the *Financial Sector (Shareholdings) Act 1998* and banking policy
- total foreign investment in Australian international airlines (including Qantas) is limited to 49%
- the *Airports Act 1996* limits foreign ownership of airports offered for sale by the Commonwealth to 49%, with a 5% airline ownership limit and cross ownership limits between Sydney airport (together with Sydney West) and Melbourne, Brisbane and Perth airports
- the *Shipping Registration Act 1981* requires a ship to be majority Australian-owned if it is to be registered in Australia
- aggregate foreign ownership of Telstra is limited to 35% of the privatised equity and individual foreign investors are only allowed to own up to 5%.

## Business organisation

3.1

### Business structures

Popular business structures in Australia include:

- companies incorporated in Australia
- Australian branches of foreign companies
- partnerships
- joint ventures
- sole proprietorships
- trusts.

### Companies incorporated in Australia

Most foreign companies operate in Australia through a locally established subsidiary company (rather than by the establishment of a branch office) with the benefit of limited liability and separate legal status.

In Australia there are both proprietary (private) and public companies and procedures exist for changing the status of a company. A proprietary company's disclosure requirements are less onerous, but for this reason its shares may not be offered to the general public (and therefore cannot be traded on a public stock exchange). This is the major distinguishing feature between a proprietary limited company and a public limited company. Most companies, particularly small companies, are proprietary. Proprietary companies must include the word "Proprietary" or "Pty" in their name.

A proprietary company must have at least one shareholder and must have no more than 50 non-employee shareholders and at least one director who must live in Australia. A secretary can be appointed that must be at least 18 years of age. One person may simultaneously hold the positions of company director and secretary. A public company must have one shareholder and a minimum of three directors, of which, at least two such directors must be resident in Australia.

Proprietary limited companies are also classified as large or small. A proprietary company is classified as small only if it meets specified criteria relating to its gross operating revenue, consolidated gross assets, and the number of its employed persons.

Most large proprietary companies are required to appoint an auditor and lodge appropriate financial statements with the Australian Securities and Investments Commission (ASIC). Small proprietary companies need only prepare audited financial statements if ordered to do so by ASIC or in particular circumstances, where required by its members or where it is controlled by a foreign company.

The most common type of company in Australia is the proprietary company limited by shares. This type of company has shareholders and the liability of each shareholder to the

company or its creditors is limited to the capital originally invested. A shareholder's personal assets are protected in the event of the company's insolvency, but money originally invested will be lost. Most limited liability companies are required to have the word "Limited" or "Ltd" included in their names.

Distinct from a company limited by shares is a no liability company. In Australia, no liability status is restricted only to mining companies whereby the company is not entitled to calls on the unpaid issue price of its shares. A no liability company must include the words "No Liability" or "NL" in its name.

An Australian Company Number (ACN) or an Australian Registered Body Number (ARBN) will be assigned by ASIC to each newly registered company or foreign company. The ACN or ARBN must appear on all of the company's public documents, negotiable instruments and where relevant, the company seal. Most companies will also apply for an Australian Business Number (ABN) for Goods and Services Tax (GST) purposes. GST and ABN's are discussed in Chapter 9.

#### Australian branches of foreign companies

A foreign company wishing to establish a place of business or carry on a business in Australia must register as a foreign company with ASIC and obtain an ARBN. The requirements for registration of a foreign company include:

- appointment of an Australian resident individual or company to act as an agent for the service of notices and who may also be liable for acts of the foreign company in Australia
- maintenance of a registered office in Australia
- lodgement of a certified copy of its certificate of incorporation and constitution, and a list of its current directors including names, addresses, dates and places of birth
- a list of powers of the Australian resident directors
- details of any charges, mortgages or similar security over any of the company's property located in Australia.

## 3.2

# Business organisation

Foreign companies are prohibited from carrying on business in Australia without becoming registered. Most registered foreign companies must lodge a copy of their annual accounts together with any other documents which they are required to prepare under the laws of their place of incorporation with ASIC.

### Partnerships

Partnership law is set out in the relevant state or territory legislation and is also provided for by case law (known as common law in Australia). A partnership is a valid agreement typically formed between one or more businesses or individuals in which the partners (owners) agree to carry on a business (any trade, occupation or profession) in with a view to generate a profit. The partners ultimately share the profits or losses formed by the partnership. As a partnership must operate with a view to profit, charitable organizations cannot operate under this business structure. A partnership is not a separate legal entity and partners are, therefore, collectively and individually liable for the debts and obligations of the partnership.

### Joint ventures

A joint venture (JV) is a term that describes the relationship between two or more parties entering into an agreement to work towards the same strategic goals while remaining separate legal entities. Joint ventures occur across most industries where companies may combine forces for a specific project but may be competitors for other projects.

A JV is usually constituted by a formal agreement which specifies the rights and obligations of parties. A JV may be incorporated by each party subscribing for shares in a JV company, or unincorporated, where the parties agree by contract to a particular arrangement. Care must be taken in the constituent document to ensure that the relationship does not, for tax and liability purposes at least, constitute a partnership.

Generally, the proceeds of an unincorporated JV is proportionately distributed to each of the joint venturers and, accordingly, each joint venturer may adopt differing accounting and tax treatments for the income and expenses of their part of the JV. In an unincorporated simple JV there is no other legal entity through which gains and losses must pass. However, to facilitate dealing with third parties, the title to the property of the JV may be held by a separate entity which may also serve as manager of the JV.

An alternative vehicle for two or more parties who wish to operate a business venture jointly is by means of a JV company. In this scenario, the shares and directorship in the JV company are proportionately held by the JV parties. A written shareholders agreement governs the relationship between the parties and the operation of the JV company. The main advantage of this structure is the limited liability conferred on its participants as shareholders.

## Sole proprietorships

A sole proprietorship is a type of business entity that is owned and run by one individual and in which there is no legal distinction between the owner and the business. The owner receives all profits (subject to taxation specific to the business) and is personally liable for all losses, debts and other obligations incurred by the business. Every asset of the business is owned by the proprietor and all debts of the business are the proprietor's. This means that the owner has no less liability than if they were acting as an individual

instead of as a business. If a sole proprietor uses a name other than its own name as the trading name of the business, that name must be registered in accordance with the applicable legislation of each state in which it carries on business. This requirement applies to all forms of business entity carrying on business under a name which is not the entity's name. This type of structure is rarely used by foreign persons investing in Australia.

## Trusts

A trust is a legal relationship which arises when a person (the trustee) is compelled by the principles of equity to hold property for the benefit of some persons (the beneficiaries) or for some object permitted by law (such as a charitable object) in such a way that the real benefit of the property accrues to the beneficiary or other object of the trust and not to the trustee. The trustee has a fiduciary relationship with the beneficiaries of the trust who may enforce those fiduciary obligations. A business may be carried on by means of a trust where a trustee (often a company), owns assets of the business and carries on the trading activities on behalf of the beneficiaries of the trust.

There are various types of trust arrangements. The most common business trust is a unit trust under which the interest in the trust is divided into "units". Units may be transferred in a similar manner to shares of a company. Subject to laws regulating fund raising, these trusts may be subscribed for by the public, eg public property and cash management trusts, and may in addition be listed on the stock exchange where they comply with certain regulations with respect to managed investment schemes.

## Distribution, licensing and franchising

Under a distribution agreement the distributor is usually granted “sole” or “exclusive” rights of distribution. It is vital that the rights and liabilities of the parties be defined with precision in a written agreement. Particular care must be taken not to infringe the *Competition and Consumer Act 2010* by entering into “anticompetitive” agreements.

The advantage of dealing with a distributor is that an enterprise wishing to do business in this way need only deal with a single person whose credit and standing are capable of being accurately assessed. The distributor’s profit is the difference between the buying and selling price of the merchandise, whereas an agent earns a commission.

Generally speaking a distributor is not an agent. Subject to some exceptions relating to manufacturers’ liability, a distributor, as principal, will itself have legal responsibility to third parties, following distribution and sale of the supplier’s products. An agent, however, unless acting outside the agent’s authority, will legally bind his or her principal in relation to the agent’s dealings with third parties. A disadvantage is that the price of the merchandise which an enterprise is attempting to market may be raised as a result of using a distributor, thus weakening the competitiveness of the merchandise in the local market.

The owner of a form of intellectual property (eg patents, trademarks etc) may wish to conduct business in Australia through a licensing or franchising structure. Franchising is an extremely successful and rapidly growing aspect of Australia’s small business sector. The franchising sector has been regulated by the Franchising Code of Conduct which is

administered by the Australian Competition and Consumer Commission and enacted under the *Trade Practices Act 1974* (renamed the *Competition and Consumer Act 2010*, effective 1 January 2011).

Franchising comprises a business relationship between the franchisor (the owner of the business providing the product, service and or intellectual property) who assigns to independent people (the franchisees) the right to market and distribute the franchisor’s goods, services or intellectual property. The International Franchise Association defines franchising as a “continuing relationship in which the franchisor provides a licensed privilege to do business, plus assistance in organising training, merchandising and management in return for a consideration from the franchisee”.

Franchising is a fast growing business model and has spread to virtually every sector of the economy in Australia. Franchising enables a franchisor to expand its market presence without eroding its own capital, and the franchisee benefits by gaining access to established business systems, at lower risk, for their own commercial advantage.

The relationship between franchisor and franchisee is a legal relationship, with the obligations and responsibilities of both parties outlined in a highly detailed franchise agreement. This commercial contract will vary in length and conditions between systems. As the franchisor must at all times remain in control over certain standards critical to the ongoing success of the business format, most franchise agreements are in favour of the franchisor.

## Agency

Notwithstanding international measures aimed at unifying the principles of agency law, in particular the Convention on Agency in the International Sale of Goods, this is a complex area of law. In Australia, the relationships and rights created in contracts of agency are largely defined by common law rules. An agency agreement creates three relationships: principal/agent, principal/third party and agent/third party. Depending on whether the principal is undisclosed, unnamed or named, the third party may have the right to sue either the principal or the agent in the event of a breach of contract. In each case, the principal will be in a position to sue the third party should the latter be at fault. Agents are bound to use reasonable diligence in carrying out their duties, to disclose material acts which concern their principals, not to make hidden or secret profits, not to divulge information of a confidential nature and finally, to account to their principals in respect of all agency transactions. A principal is bound to pay the agent’s commission and to indemnify the agent on account of expenses and liabilities if incurred with the principal’s approval.

## Company formation regulatory framework

Federal legislation enables the Federal Government and the authority established by it, the Australian Securities and Investments Commission (ASIC), to assume the regulation of companies and securities. The administration is regulated nationally, with ASIC's computer system containing a public record of certain particulars of all companies operating in Australia.

Establishment Investors may choose to either incorporate a company themselves or to purchase all the issued shares in a "shelf company", being a company which has not traded. Incorporation involves lodgement with ASIC of a prescribed form which requires the following information:

- type of company to be registered
- proposed name of the company

- name and address of each person who consents to become a member
- share structure of the company
- details of each person who consents to become a director
- proposed registered office and principal place of business.

A certificate of incorporation is then issued. Acquisition of a shelf company is faster and often more convenient, with the "changeover" involving a change of name and a transfer of directorships, secretary, registered office and shareholdings. Costs for acquiring a shelf company are approximately A\$1,200 with legal and other costs in addition.

## Capital

Subject only to the requirement that there be at least 1 shareholder, there is no prescribed minimum for shareholders' capital. The thin capitalisation tax rule may influence debt/equity capital structure. If certain procedures and requirements are met, companies may buy back their shares which are then cancelled. Different shareholder approval processes apply to equal reductions and selective reductions; but both require that approval be obtained at a general meeting. Before the notice calling the general meeting is sent

to shareholders, the company is required to notify ASIC of the proposed buy back thereby enabling creditors and other interested persons to receive advance notice of a proposed reduction in capital. Also, the notice of the meeting sent by the company must include a statement which sets out all information known to the company that is material to the decision on how to vote on the resolution. Companies may also cancel or reduce their issued share capital with requisite members' approval.

## Company administration

For proprietary companies, a minimum of one director is required. At least one director of a private company must be resident in Australia. Public companies require at least three directors, two of whom must be resident in Australia. One secretary resident in Australia is also required (that person can also be a director) for a public company. A proprietary company is not required to have a secretary but if it does appoint one or more secretaries, at least one must ordinarily reside in Australia. All must be natural persons. The head of the board of directors (if any) is called the chairperson and he or she is also normally the chairperson of the company in general meeting. Typically, the day-to-day management of a trading company is in the hands of a general Manager, a managing director or a chief executive officer. For tax purposes, a public officer must be appointed and the

Commissioner of Taxation (Commissioner) notified of the details. All companies are required to maintain a registered office in Australia. Agreements and documents which are signed by a company may be signed by a duly authorised officer (usually a director or secretary) or under a power of attorney. For more important or certain types of documents, a company may execute a document without a seal if the document is signed (or where a seal is fixed to the document and the fixing of the seal is witnessed) by:

- two directors of the company
- a director and a secretary of the company
- for a proprietary company that has a sole director who is also the sole company secretary - that director.

## Company formation & administration

## 4.2

### Meetings

Public companies must convene and hold a general shareholders' meeting within 18 months after its registration, and thereafter at least once in each calendar year and within five months after the close of each financial year of the company (the annual general meeting). A proprietary company is not required by law to hold an annual general meeting, although it may be required by its constitution.

The financial year of most Australian taxpayers ends on 30 June, so for public companies most annual general meetings must be held prior to 30 November. The agenda for the annual

general meeting includes the presentation of the company's accounts including group accounts where applicable, together with directors' and auditors' reports. The constitutions of public companies usually provide that a proportion of the directors (e.g. one third) must retire by rotation each year, and the resignations and appointments of directors are also usually considered at the annual general meeting. Other meetings may be convened by directors or members from time to time, in accordance with the company's constitution and the *Corporations Act*.

### Notification and lodgement

A public register of certain company information is maintained by ASIC which may be accessed by the public for a small fee. Changes of name or address of shareholders (for proprietary companies only) or officers, allotment of shares, passing of special resolutions, registration of charges against the company and the like are all required to be notified to or lodged with ASIC, usually within 28 days of the event happening (45 days for registration of a charge). As from 1 July 2003, annual returns for companies have been abolished. Instead, ASIC will send each company (or its agent, if one is used) within 14 days of the company's review date (which is based on the anniversary of the company's registration date) an annual statement to review and update, and an invoice statement to pay, which will include an annual review fee. The annual statement is a statement of the company details as held by ASIC (e.g. details of the current directors, issued shares, options, top 20 members, holding company), and any change must be notified to ASIC within 28 days after the issue date of the annual statement.

Public companies, large proprietary companies and, in some circumstances, small proprietary companies (refer to definitions of large and small proprietary companies below) must provide ASIC with a copy of its audited financial report and directors' report within four months of the end of its financial year. The directors of a company (including small proprietary companies) that has not lodged a financial report with ASIC within the period of 12 months before its review date must pass a solvency resolution within two months after its review date. The company must notify ASIC within seven days after the two month period where no solvency resolution is passed or within seven days after a negative solvency

resolution is passed. A company is large proprietary company for a financial year if it satisfies at least two of the following three tests:

- the consolidated revenue for the financial year of the company and the entities it controls (if any) is A\$25 million
- the value of the consolidated gross assets at the end of the financial year of the company and the entities it controls (if any) is A\$12.5 million
- the company and the entities it controls (if any) have 50 or more employees at the end of the financial year.

A company is small proprietary company for a financial year if it satisfies at least two of the following three tests:

- the consolidated revenue for the financial year of the company and the entities it controls (if any) is less than A\$25 million
- the value of the consolidated gross assets at the end of the financial year of the company and the entities it controls (if any) is less than A\$12.5 million
- the company and the entities it controls (if any) have fewer than 50 employees at the end of the financial year.

## 5.1 Other laws regulating companies & business

### Takeovers

In general, the *Australian Corporations Act* prohibits any person (alone or together with associates) acquiring an interest in 20% or more of the securities of a limited company incorporated in Australia (or an unlisted company with more than 50 members) or increasing an existing 20% or more interest in a company, other than by way of one of the specific exceptions. The major exceptions are:

- making an off market takeover bid under which target shareholders are offered either cash or scrip consideration
- making a cash only on market takeover bid
- having the relevant acquisition approved by target shareholders
- implementing a scheme of arrangement which must be approved by the court and target shareholders
- satisfying the "creep" provisions (ie the number of target securities acquired by the person in any six month period does not exceed 3% of the target's securities on issue).

The principal laws which regulate share acquisitions in Australia are:

- the *Corporations Act*
- the *Competition and Consumer Act*
- the *Foreign Acquisitions and Takeovers Act*
- industry specific laws in areas such as broadcasting and banking.

### Dealings in securities

Dealings in securities (which includes shares, debentures and options) are heavily regulated under Australian law. For example:

- subject to limited exceptions, a person may not raise equity in Australia other than pursuant to a formal disclosure document (commonly referred to as a prospectus) lodged with the Australian Securities & Investments Commission
- persons may not engage in misleading or deceptive conduct (either by act or omission) in relation to any dealings in securities
- persons may not trade on inside information
- various obligations are imposed on Australian public companies in relation to the public disclosure of price sensitive information. Participants in the securities markets (eg brokers, dealers and investment advisers) are also subject to additional licensing and regulatory controls.

Companies listed on the official list of the Australian Stock Exchange are subject to the ASX Listing Rules and Business Rules. Among other things these Rules regulate:

- issues and trading of shares and other securities
- the transfer of listed securities
- transactions involving related parties
- substantial transactions
- the disclosure to the market of price sensitive information.

Foreign companies may apply for admission to the Australian Stock Exchange. To avoid being subject to all the requirements of the Listing Rules, the entity can apply for "exempt foreign entity" status. An exempt foreign entity is exempt from complying with the majority of the Listing Rules (including rules relating to the disclosure of price sensitive information) provided the foreign entity is subject to the equivalent rules of its home exchange. The criteria for admission as an exempt foreign company includes:

- being a member of certain approved overseas exchanges (including the New York, London, Paris, Hong Kong, Tokyo and Amsterdam Stock Exchanges)
- having net tangible assets of at least A\$2,000 million or having an operating profit before tax over each of the last three years of at least A\$200 million per annum
- having at least 1000 members with a parcel of securities in excess of A\$500.

## Other laws regulating companies & business

5.2

### Exchange control

Currently, few formal exchange control requirements apply. From time to time, Reserve Bank approval may be required in relation to transactions involving countries subject to international sanctions. Under the *Financial Transactions Reports Act 1988* there are reporting obligations imposed upon cash dealers with respect to certain transactions involving amounts over A\$10,000. Individuals are also obliged to report transfers of Australian or foreign currency in or out of Australia of amounts greater than A\$10,000, to the Australian Transaction Reports and Analysis Centre (AUSTRAC).

### Competition and consumer law

The *Competition and Consumer Act 2010 (Cth)* (CCA) is Federal legislation which regulates corporations and individuals in all their business dealings. The CCA seeks principally to:

- encourage corporations and individuals to act fairly in their business dealings
- encourage competition and through it efficiency in the economy
- encourage consumer protection.

### The Australian Competition and Consumer Commission

The CCA is administered by the Australian Competition and Consumer Commission (ACCC) and is enforced by Australian courts and tribunals. Its role includes:

- encouraging compliance by investigating breaches of the CCA and, if necessary, taking legal action
- ensuring that consumers are treated fairly
- determining whether businesses should be exempted from the restrictive trade practices provisions of the CCA, on the grounds of public benefit under authorisation or notification procedures
- providing guidance in compliance with the CCA through education programs, publications and the media to make businesses and consumers aware of their rights and responsibilities under the CCA.

The ACCC also has wide powers to compel the production of information, to require evidence to be given on oath and to enter premises to inspect, copy and possibly seize documents.

### Consumer protection

The CCA includes a number of provisions which govern and prohibit certain activities relating to consumer protection. These provisions are known as the *Australian Consumer Law*. Some important provisions include:

#### Misleading or deceptive conduct

The CCA prohibits individuals and corporations from engaging in conduct that is misleading or deceptive. It is irrelevant whether the person engaging in the conduct intended to mislead or deceive. A claim or statement is misleading if it is likely to lead an ordinary member of the public into error.

Although there are no criminal sanctions or fines which apply to misleading or deceptive conduct, the ACCC or any other party can seek damages, compensatory orders or an injunction to restrain misleading or deceptive conduct. Further the ACCC may apply for probation, community service or corrective advertising orders.

#### False or misleading representations

Essentially it is unlawful to make false or misleading representations in connection with the supply or promotion of goods or services, including making false or misleading representations relating to:

- the standard, quality, value, grade, price of or need for goods or services
- the newness, composition, style, model or history of goods;
- testimonials or sponsorships
- the place of origin of goods
- the availability of repair facilities or spare parts for goods
- any conditions, warranties, guarantees or rights of remedy, including the statutory guarantees.

#### Unconscionable conduct

The CCA prohibits unconscionable conduct in trade or commerce. "Unconscionable" conduct essentially involves the unfair exploitation of a weaker party by a stronger party. Certain prohibitions require the weaker party to suffer from a special disability or disadvantage, while other prohibitions may extend to protect from unfair exploitation a party who is less sophisticated, not legally represented, may not possess all relevant information and may have a weaker bargaining position than the other party.

## 5.3 Other laws regulating companies & business

### Unfair trading and marketing practices

The CCA prohibits specific types of unfair trading and marketing practices, including bait advertising, pyramid selling and referral selling.

The CCA also regulates the conduct of offering gifts, prizes, rebates or other free items, as well as unsolicited supplies.

Further, the CCA includes specific provisions relating to multiple pricing (where suppliers must sell a product at the lower, or lowest, of the displayed prices, unless the seller chooses to withdraw the product from sale) and component pricing (where suppliers must not promote or state a price that is only part of the cost, unless also prominently disclosing the total price, expressed as a single figure).

### Unsolicited selling

The CCA contains provisions governing unsolicited selling, including door-to-door selling, telesales and other direct or indirect marketing, which amongst other things, regulates the times during which unsolicited sales approaches can be made and provides for a 10 day cooling off period.

### Lay-by agreements

The CCA contains detailed rules relating to lay-by agreements, including requirements that these agreements must be in writing and transparent and any termination charges must reflect the reasonable costs to the business of the agreement being terminated.

### Consumer guarantees

The CCA creates statutory guarantees in favour of consumers which require that:

- goods are of acceptable quality
- goods are reasonably fit for any disclosed purpose
- goods match their description or correspond to the sample or demonstration model
- repair facilities and spare parts are reasonably available for a reasonable period after the goods have been supplied.

Significantly, any express warranties made by a retailer, supplier or manufacturer, which include any pre-contractual statements and representations must be honoured.

Services provided to consumers must:

- be rendered with due care and skill
- ensure that the services and any product resulting from the services must be reasonably fit for any particular purpose made known to the supplier
- any services are provided within a reasonable time, where no time is specified.

The word "consumer" has a wide definition and includes:

- good or services sold up to a value of A\$40,000; and

- goods or services over A\$40,000 which are of a kind ordinarily acquired for personal, domestic or household use or consumption.

The consumer guarantees do not apply to:

- goods or services bought before 1 January 2011. These are covered by statutory implied conditions and warranties under the *Trade Practices Act 1974* and state and territory legislation in force before 1 January 2011
- goods costing more than A\$40,000 bought for business use
- goods or services acquired for the purposes of re-supply
- goods or services used up in the manufacturing or production process which are then to be on sold, or
- goods bought at auctions, where the auctioneer acts as an agent for the owner.

There are a number of remedies available for breaches of consumer guarantees. Consumers may be entitled to have a supplier or retailer offer a refund, replacement or repair if the standards required by the consumer guarantees are not met. The available remedies depend on the severity of the failure to comply with a consumer guarantee and are divided into "non-major" and "major" failures.

Additionally, under the CCA, consumers may recover damages directly from the manufacturer in respect of failures that relate to:

- acceptable quality
- correspondence with description
- repair facilities and spare parts, or
- express warranties.

The CCA also provides a statutory right to suppliers or retailers to be indemnified by manufacturers for certain breaches of consumer guarantees.

Importantly, the statutory guarantees cannot be excluded, restricted or modified by contract. However, where the goods or services are not for personal, domestic or household use or consumption, liability for certain statutory guarantees may be limited in accordance with the CCA.

### Product safety and liability

The CCA contains provisions governing product safety and liability. This regime specifically provides provisions relating to:

- product safety and information standards
- unsafe goods
- interim and permanent bans
- voluntary and compulsory product recalls
- safety warning notices.

Additionally, the CCA contains mandatory reporting provisions, whereby businesses must notify the Commonwealth Minister within 48 hours of discovering that goods or product related services that it has supplied have caused or may have caused a death or serious injury or illness.

## Other laws regulating companies & business

## 5.4

Broadly speaking a safety ban, recall or warning notice may be issued in respect of particular goods or product related services if the Minister considers that they will or may cause injury to any person, or a reasonably foreseeable use (including misuse) of that product will or may cause injury to any person.

### Unfair contract terms

The CCA provides that unfair contract terms in standard form consumer contracts are void and sets out the relevant criteria in order to determine whether a term of a consumer contract is unfair.

### Defective goods

The CCA provides a regime for actions by consumers directly against manufacturers and importers for defective goods and services.

## Remedies under the Competition and Consumer Act in relation to consumer protection provisions

Criminal or civil penalties can be imposed against both an offending corporation and, in some instances, those directors and employees who were involved in contravening conduct. Actions may be brought by affected individuals or businesses or the ACCC.

For a breach of the consumer protection provisions of the CCA, companies can be fined up to A\$1.1 million for each breach, and individuals can be fined up to A\$220,000 for each breach.

Additionally, the ACCC has the power to issue substantiation notices, infringement notices or public warning notices where it suspects or has reasonable grounds to believe that there has been a breach of certain provisions of the CCA.

The CCA also provides for remedies other than penalties or fines, including disqualification orders and third party consumer redress orders.

## 5.5 Other laws regulating companies & business

### Antitrust – competition law

The CCA also prohibits anti-competitive conduct.

#### Cartel conduct

Cartel conduct including price fixing, restricting output, allocating customers and bid-rigging is strictly prohibited by the CCA.

#### Price fixing

Price fixing occurs when a company enters into a contract, arrangement or understanding with a competitor that has the purpose, effect or likely effect of fixing, controlling or maintaining the price of goods or services.

Price fixing may occur in the form of:

- agreed selling or buying prices (this does not necessarily mean that prices are set at the same level by all parties to the agreement)
- agreed minimum prices
- an agreed formula for pricing or discounting goods and services, or
- agreed rebates, allowances or credit terms.

Such agreements may be in writing but are often informal and verbal.

Price fixing need not have any impact on competition for it to be strictly prohibited conduct. Evidence that a contract, arrangement or understanding has been reached between competitors to fix prices will suffice.

#### Restricting output

Restricting outputs in the production or supply chain occurs when a company enters into an contract, arrangement or understanding with a competitor that has the purpose of directly or indirectly preventing, restricting or limiting:

- the production, or likely production, of goods or services by any or all the parties
- the capacity, or likely capacity, of any or all of the parties, or
- the supply, or likely supply, of goods or services to persons or classes of persons by all or any of the parties.

#### Allocating customers

Allocating customers, suppliers or territories occurs when a company enters into a contract, arrangement or understanding with a competitor that has the purpose of directly or indirectly allocating between any or all of the parties:

- customers or classes of customer of goods or services of all or any of the parties
- suppliers or classes of suppliers of goods or services to all or any of the parties, or
- geographical areas in which goods or services are supplied or acquired by all or any of the parties.

#### Bid-rigging

Bid rigging occurs when a company enters into a contract, arrangement or understanding with a competitor that has the purpose of directly or indirectly ensuring that in the event of a request for bids:

- one or more parties bid but one or more do not
- two or more parties bid on the basis that one of those bids is more likely to be successful
- two or more parties bid but not all of those parties proceed with their bids
- two or more parties bid and proceed with their bids but on the basis that one of those bids is more likely to be successful, or
- two or more parties bid but a material component of at least one of those bids is worked out between the bidders.

#### Some exceptions to cartel conduct

There are some limited exceptions to the strict prohibitions against cartel conduct. They include:

- joint ventures
- the buying and selling activities of joint (or co-operative) buying and selling groups
- the joint advertising and re-supply of goods or services collectively acquired, or
- genuine recommended price arrangements.

If conduct between competitors falls within an exemption, it may still be prohibited if its purpose or effect is to substantially lessen competition.

#### ACCC immunity policy

The ACCC operates an immunity policy for companies and individuals who “blow the whistle” on cartel conduct in certain situations and subject to a number of conditions. Given that immunity is generally available only to those who are first to report the relevant cartel conduct to the ACCC – the timing of any approach to the regulator can be crucial.

#### Collective boycotts

Competitors cannot agree among themselves to boycott any supplier or customer or to trade only with selected suppliers or customers on particular terms.

## Other laws regulating companies & business

## 5.6

### Resale price maintenance

Minimum resale prices cannot be specified by a supplier to any customer nor can attempts be made to persuade a customer not to advertise or resell goods or services below a specified price.

There is scope, however, to recommend resale prices but a prominent statement must be included on a product or a price list that the price is a recommended price only.

### Third line forcing

A supplier cannot force or insist that a customer purchase goods and services from a particular third party as a condition of its supply of goods or services to that customer, although there is some scope to "recommend" suppliers of other goods and services.

### Misuse of market power

A corporation with substantial market power cannot use that power for the purpose of eliminating or damaging a competitor, preventing another person from establishing a business in any market, or deterring or preventing a person from engaging in competitive conduct in any market.

A corporation will generally have substantial market power if it can act independently of and not be constrained by other competitors in the market. A corporation will be taken to have misused its market power if it is established that it took advantage of that power for an illegal purpose.

### Predatory pricing

A corporation that has a substantial degree of market power (or even a substantial market share) must not supply, or offer to supply, goods or services for a sustained period at a price that is less than the relevant cost to it of supplying such goods or services, for the purpose of:

- eliminating or substantially damaging a competitor
- preventing a competitor from entering a market, or
- deterring or preventing another person from engaging in competitive conduct in a market.

There are other types of anti-competitive conduct which are only prohibited if their purpose or effect is to substantially lessen competition in a market. Such conduct includes:

### Anti-competitive mergers and acquisitions

A corporation is prohibited from acquiring shares in a body corporate or assets from a body corporate or a natural person, if the effect would be to lessen competition substantially in a market in Australia.

The CCA sets out a list of matters which must be considered when determining whether an acquisition is likely to lessen competition substantially in a market including, for example the actual and potential level of import competition in the market, barriers to entry and market concentration levels. The ACCC has also published useful guidelines on merger regulation to which any company considering an acquisition or merger should refer.

In certain circumstances the ACCC may grant an informal or a formal clearance of a proposed merger or acquisition.

If it is likely that a merger or acquisition would result in a benefit to the public, the Australian Competition Tribunal can grant an authorisation for the transaction to proceed (until recently the ACCC handled the granting of authorisations). An authorisation is granted if the Australian Competition Tribunal believes the public benefits likely to flow from the merger or acquisition, including benefits such as more jobs or greater opportunities in export markets, will outweigh any anticompetitive detriment

### Anti-competitive arrangements

A corporation cannot be a party to any contract, arrangement or understanding which has the purpose or effect of substantially lessening competition in an Australian market. Examples include contracts, arrangements or undertakings among competitors to divide up markets or to provide for common prices or other terms of trade.

### Exclusive dealing

Conditions cannot be imposed on the resupply or acquisition of goods or services if the purpose or effect of any such condition would be to substantially lessen competition in an Australian market. An example of this practice is supplying goods only on the condition a customer will not buy the same goods from a competitor of the supplier.

Certain exclusive dealing arrangements may be notified to the ACCC on public benefit grounds, which, if accepted, provide immunity.

## 5.7 Other laws regulating companies & business

### Remedies under the Competition and Consumer Act in relation to restrictive trade practices provisions

Penalties can be imposed against both an offending corporation and, in some instances, those directors and employees who were involved in the contravening conduct.

For a breach of the anti-competitive (anti-trust) conduct provisions of the CCA, companies can be fined up to the larger amount of:

- A\$10 million
- three times the value of the benefit obtained from the breach (if ascertainable)
- 10% of the annual turnover of the company (and its related companies) in Australia (if the benefit is not ascertainable).

Individuals (such as directors, employees and agents of a corporation) can be fined up to A\$500,000 for each breach.

Serious cartel conduct may constitute a criminal offence. Individuals involved in serious cartel conduct can face criminal fines of up to A\$220,000 and jail terms of up to 10 years.

The CCA also provides for remedies other than penalties or fines, including:

- injunctions to prevent the continuation of illegal conduct
- damages to compensate for loss or damage

- compensation orders such as an order to refund money
- orders for non-party consumers
- orders requiring contracts to be re-written or set aside
- a declaration that the law has been breached
- undertakings from the company to correct offending advertising or labels
- adverse publicity orders
- disqualification orders
- orders requiring community service to be performed
- orders requiring legal costs to be paid
- orders refunding any money received
- legally enforceable undertakings (often including a requirement to establish a trade practices compliance program approved by the ACCC).

### Anti-money laundering

The *Anti-Money Laundering and Counter Terrorism Financing (AML/CTF) Act 2006 (Cth)*, and its associated rules, address Australia's obligations concerning anti-money laundering and counter terrorism financing. The legislation brings Australia's laws into line with international money laundering and counter terrorist financing standards as established by the Financial Action Task Force (which is the international inter-governmental body responsible for setting those standards). Many foreign businesses, particularly financial services providers, are subject to AML/CTF regimes abroad and would therefore be familiar with the principles underlying anti-money laundering and anti-terrorist financing regulations generally. However, there are obligations imposed by the Australian regime which are specific to Australia and may be different to regulatory requirements in other jurisdictions. The Australian AML/CTF regime applies to those who provide what is defined as a "designated service". This includes a wide variety of banking and financial services, such as lending funds in the course of conducting a lending business, opening bank accounts, operating managed investment schemes and trading in securities and foreign exchange on behalf of another person. It also includes gambling services and bullion dealing. All those who provide designated services are considered "reporting entities" and will generally have onerous obligations imposed on them to identify and verify their customers and monitor their customers' transactions, with a view to mitigating the risk of money laundering and

terrorist financing. Reporting entities are required by law to, among other things:

- have in place an AML/CTF Program, which must comprise risk based systems and controls designed to identify, manage and mitigate the money laundering and terrorist financing risks a reporting entity may reasonably be exposed to when it provides designated services to its customers
- conduct customer due diligence in accordance with the requirements set out in the AML/CTF regime and the processes prescribed in the reporting entity's own AML/CTF Program
- report certain types of matters and transactions to the Australian Transaction Reports and Analysis Centre (AUSTRAC), including suspicious matters and international fund transfer instructions
- conduct due diligence on correspondent banking relationship.

There are also significant financial penalties and in some cases criminal penalties for persons who do not comply with their obligations under the AML/CTF regime.

In November 2010, the Commonwealth Government released draft legislation proposing amendments to the AML/CTF Act in the form of the *Combating the Financing of People Smuggling and Other Measures Bill 2010 (Cth)*. The primary purpose of this bill is to reduce the risk of money transfers by remittance dealers being used to fund people smuggling ventures and

## Other laws regulating companies & business

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other serious crimes by introducing a more comprehensive regulatory regime for the remittance sector. The bill proposes to extend the operation of the AML/CTF Act to remittance dealers, and introduces a requirement for remittance dealers to be registered with AUSTRAC. The bill also proposes amendments to the AML/CTF Act to enable reporting entities to use credit reporting data to verify the identity of their customers.

### Gas and electricity access

#### Access

To facilitate competition, legislative provisions and access arrangements ensure that entities who wish to establish new operations may access existing gas and electricity infrastructure services, subject to capacity.

Under the National Electricity Law and National Electricity Rules (applicable to the eastern States), registered participants (generally generators and retailers) are entitled to access network services provided by transmission and distribution systems in accordance with the Rules. Other users of electricity are generally entitled to receive a supply of electricity (and associated network access) under state based legislation. Western Australia and the Northern Territory have separate electricity access regimes with similar aims.

In respect of gas pipelines, third party access is addressed in the National Gas Law and National Gas Rules. Pipeline service providers may also need to have an approved access arrangement, depending on the classification of particular pipelines. Very large users of gas would generally negotiate an access arrangement with a pipeline operator whilst other gas users would rely on the access arrangement put in place between their gas retailer and a pipeline operator.

#### Markets/prices

In the electricity sector, a national wholesale spot market for trading electricity operates in Queensland, New South Wales, the Australian Capital Territory, Victoria, South Australia and Tasmania.

In the National Electricity Market, electricity generators and other participants (generally retailers) participate in a pooled system of exchange which instantaneously matches supply with demand. The spot market price is calculated at half hourly intervals and has a cap and a floor. For most participants in this market, the spot market is supplemented by bilateral contracts such as hedges.

Given its geographical distance from the states participating in the National Electricity Market, Western Australia has established a separate wholesale electricity market.

Electricity users who have not registered to participate in the National Electricity Market or the wholesale electricity market will generally buy electricity from a retailer, generally at a fixed negotiated price. There is some retail price regulation for small customers.

In all jurisdictions wholesale contracting for a long term supply of gas takes place through direct bilateral contracts. However the Victorian Gas Market and the Short Term Trading Market (which operates in New South Wales, South Australia, and shortly Queensland) allows participants in these markets to adjust their long term position by trading quantities of gas.

#### Trading in environmental products

Although Australia has no overarching Kyoto-style emissions trading scheme, a number of schemes for various types of environmental products are in existence. The most significant of these is the Renewable Energy Target scheme, which applies at the national level. In addition most states (and the Australian Capital Territory) have enacted their own schemes dealing with various types of environmental products designed to reduce carbon dioxide emissions (New South Wales and Australian Capital Territory), encourage electricity generation from gas (Queensland), or encourage energy efficiency measures (Victoria and New South Wales).

Various trading markets have arisen to assist parties buying and selling these products.

All of these schemes impose a cost on electricity retailers who pass the cost on to their electricity customers.

## 5.9 Other laws regulating companies & business

### Telecommunications

The Australian telecommunications sector has been deregulated for over 10 years, permitting additional carriers and providing a more defined operating environment for service providers. The telecommunications and radiocommunications regulator in Australia is the Australian Communications and Media Authority. The Australian Competition and Consumer Commission also has a role in relation to competition and consumer law in the telecommunications industry. Telstra, Optus and Vodafone Hutchison Australia own and operate Australia's national mobile networks. The introduction of Mobile Number Portability in 2001, and third generation (3G) services in 2003, has led to increased competition in the mobile market. Similarly, the unbundling of the local loop and the growth of ADSL and broadband services throughout the Australian telecommunications market has introduced greater competition between providers of fixed line services. Telecommunications equipment manufacture is dominated by the major foreign-based multinationals operating in the industry globally. Most have some manufacturing presence in Australia.

The Australian government is building a national broadband network (NBN), with the stated aim of bringing affordable high-speed broadband services to Australians. NBN Co was established to build and operate the NBN and will deliver the infrastructure using a combination of fibre, wireless and satellite technologies. NBN Co states that for most premises it will use either Gigabit Passive Optical Network or Ethernet Point to Point fibre, and will link some premises by wireless or satellite, depending on location and geography.

The *Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Act 2010*, is aimed at enabling a smooth transition to the NBN. The legislation allows for the structural separation of Telstra, Australia's incumbent telecommunications provider, into wholesale and retail operations (requiring the separation if Telstra does not separate voluntarily). Telstra and NBN Co are in the process of finalising a definitive agreement. This agreement will allow NBN Co to access Telstra's infrastructure and migrate Telstra's voice and broadband traffic from its copper and cable

networks onto the NBN Co fibre network, transferring its fixed line assets to the NBN. Telstra is not required to divest its wholesale operations, and so will still be able to sell access to its fibre, wireless and satellite services.

Australia's telecommunications access regime aims to assist telecommunications companies to obtain access to services supplied by other companies. The key elements of the telecommunications access regime are:

- the access regime is contained in Part XIC of the *Competition and Consumer Act 2010 (Cth)*
- the access regime provides for regulated access to declared carriage services by imposing standard access obligations on both carriers and carriage service providers
- a service must be declared before any access obligations are triggered under the *Competition and Consumer Act 2010 (Cth)*
- once a service is declared, carriage and content service providers must be provided with that service by any carrier or carriage provider who provides that service
- the terms of the access obligations are only indirectly regulated by the *Competition and Consumer Act 2010 (Cth)*.

The terms on which access is provided is determined in the following ways:

- by the parties pursuant to a commercial agreement; or if this does not apply
- by an access undertaking given by the access provider; or if none of the above apply
- by binding rule of conduct, or
- if none of the above apply, by an access determination.

The government is also considering the implementation of legislation to set out the access obligations applicable to NBN Co, and to establish the governance, ownership and operating arrangements of NBN Co and the rules for the supply of its wholesale-only telecommunications service.

### Electronic commerce

More and more Australian businesses are using the Internet and email to conduct transactions. Laws that effect any contract, marketing or public document continue to apply in the electronic environment and will need to be considered in relation to e-commerce transactions. In addition, various authorities play a role in overseeing certain aspects of e-commerce. These include the Privacy Commissioner, the Australian Communications and Media Authority and the Australian Competition and Consumer Commission. Some industries also have codes of conduct in place dealing with e-commerce transactions that are registered with relevant government authorities. Examples

include the Australian Direct Marketing Association and the Internet Industry Association. State and Commonwealth Electronic Transactions and Evidence Acts make provision for the enforceability of certain electronic transactions. The Commonwealth Corporations Act and Taxation legislation also recognise electronic records. Amendments made to State and Commonwealth Crimes Acts to protect electronic communications and data storage recognise the importance of e-commerce. Government funding is available on application for information economy research and development projects which meet relevant government criteria.

## Intellectual property

Intellectual property is protected in Australia primarily by federal legislation. Australia is also a party to most of the prominent international treaties dealing with intellectual property rights, including the Paris Convention, the Berne Convention, the Universal Copyright Convention, the Hague Agreement, the GATT Agreement on Trade Related Aspects of Intellectual Property, the World Intellectual Property Organisation, the Patent Cooperation Treaty and the Madrid Protocol.

## Patents

Patents in Australia are regulated by the *Patents Act 1990*. The *Patents Act* allows for the registration of two types of patents, a standard patent, for a term up to 20 years and an innovation patent for a term up to eight years from the date of the patent. The grant of a patent confers on the patentee the exclusive right during the term of the patent to exploit (or allow another person to exploit) the invention and prevent non-authorised use of the invention by third parties.

An application for the patent must be for new manner of manufacture, which is usually in respect of a vendible product or a process that has a distinct commercial value, and which has not been anticipated by prior use or publication and that involves an inventive step (for a standard patent) or an innovative step (for an innovation patent). To be novel, the invention must not have been publicly disclosed or used anywhere in Australia or around the world prior to the filing date. A patent application lodged at the Australian Patent Office must be either a complete application or a provisional application. A provisional application lapses after 12 months.

To continue the protection initiated by the provisional application, the applicant must lodge a complete application for the invention within that 12 month period. The provisional application is required to generally describe the invention, and it allows time to further develop the invention. The applicant will avoid invalidity if the applicant wishes to publish or use the invention prior to the patent being granted. The complete specification must include all the claims and the essential elements of the invention, and it must be fairly based on the provisional application to preserve the priority date of the filing of the provisional application. An application may also file a single international application under the Patent Cooperation Treaty (PCT) nominating the countries of interest on the PCT application that the applicant intends to enter National filings within 18 months of the PCT application.

## Copyright

Copyright in Australia is regulated by the *Copyright Act 1968*. Copyright confers no product monopoly, but simply gives to the copyright owner the exclusive right to do certain acts in relation to a literary, dramatic, musical or artistic work, or a sound recording, cinematograph film, broadcast or published edition. In Australia there is no system of registration of copyright work. For copyright to subsist it must be an "original work" from the person claiming to be its author, i.e. that the person has originated it or brought it into existence and has not copied it from another. The fact that another similar work is already in existence is not necessarily a bar to copyright subsisting in both.

The period for which copyright subsists depends on the particular work. For literary, dramatic, musical or artistic works, sound recordings, films, television and sound broadcasts, copyright subsists for 70 years after the end of the

calendar year in which the author died. For published editions of works, copyright subsists for 25 years after the calendar year in which the edition was first published.

The *Copyright Act 1968* also provides for moral rights of authors, giving creators of certain works rights of attribution as owner and rights to prevent unfair treatment of the work. These moral rights are personal and therefore not assignable and are separate from the commercial exploitation rights. The Act provides that the holder of moral rights may consent to the doing of acts which would otherwise infringe those moral rights. International treaties such as the Berne Convention, TRIPS Agreement and Rome Convention facilitate automatic protection of Australian copyright material overseas, whereby other treaty members would extend the same rights to Australian copyright owners as they would to their own nationals.

## 5.11 Other laws regulating companies & business

### Designs

Designs in Australia are regulated under the *Designs Act 2003 (Cth)*. A design, as defined in the *Designs Act 2003 (Cth)*, in relation to a product, means the overall appearance of the product resulting from one or more visual features of the product. Design protection only operates to protect the appearance of articles, not, as for patents, the way they are made or in which they operate.

To be registrable in Australia, a design must be “new or distinctive”.

A design is considered to be “new” unless it is identical to a design that forms part of the prior art base. The design must also not have been used prior to the design application being lodged. Such use includes where articles to which the design has been applied are disclosed or are accessible to members of the public without any obligation of confidentiality. A design is considered to be distinctive unless it is substantially similar in overall impression to a design that forms part of its prior art base. The “prior art base” for a design includes designs publicly used in Australia, published anywhere in the world or disclosed in other design applications with earlier priority dates. In considering whether a design is substantially similar in overall impression to an existing design, more weight is given to the similarities between the two designs than the differences between them.

A person will be found to have infringed a registered design if the person, without the consent of the owner of the registered design, makes, imports, sells, hires or offers for sale or hire “a product, in relation to which the design is registered, which embodies a design that is identical to, or substantially similar in overall impression to, the registered design”. The considerations set out in relation to the registrability of designs must be considered in determining whether a design is substantially similar in overall impression.

Under the *Designs Act 2003 (Cth)*, the maximum term of protection that is afforded to a registered design will be 10 years.

Design applications can also be filed in other countries. As Australia is party to relevant international conventions governing industrial designs, if an international design application based on an Australian design application is filed within 6 months of the Australian application it is possible to claim “convention priority” of the earlier priority date of the Australian application. If an international application for a design the subject of an Australian design application is filed more than six months after the Australian application, the Australian priority date cannot be claimed and the newness of the design may be affected.

### Trade marks

Trade marks in Australia are regulated by the *Trade Marks Act 1995 (Cth)*. A trade mark is a sign which is used to indicate the trade origin of goods or services. A trade mark can include, or comprise of any combination of, any letter, word, name, signature, numeral, device, brand, heading, label, ticket, aspect of packaging, shape, colour, sound or scent. The trade mark must be able to be represented graphically to be registrable.

Registration of a trade mark provides the owner of the trade mark with the right to exclusively use the trade mark in relation to the goods or services (and goods or services closely related to the goods and services) for which the mark is registered. Applications are examined by IP Australia in order of filing, to see if they meet the requirements of the *Trade Marks Act 1995 (Cth)*.

To be registrable as a trade mark in Australia, generally a trade mark must not be the same as, substantially identical with or deceptively similar to another trade mark which is subject to a prior application or registration in Australia. A further consideration under the *Trade Marks Act 1995 (Cth)* is the extent to which the trade mark is inherently adapted to distinguish. If a trade mark is not capable of distinguishing the applicant’s goods and services from those of others, the trade mark will be initially rejected. In certain circumstances IP Australia may decide whether a trade mark is capable of

distinguishing an applicant’s goods or services if the trade mark has acquired distinctiveness.

Once accepted by IP Australia, the trade mark is advertised for acceptance for three months. Opposition to registration may be filed by any person, but is generally filed by a person who will be in some way affected by the presence of a trade mark on the Register. The opposition process provides for such a person to make out a case under the grounds specified in the *Trade Marks Act 1995 (Cth)* for the purpose of persuading the Registrar that the trade mark should not be registered. Once achieved, registration of a trade mark can be maintained indefinitely provided renewal fees are paid every 10 years. Unregistered trade marks in Australia or “common law” trade marks, are capable of being protected in the Australian courts through a common law action for passing off, and in appropriate circumstances, the misleading and deceptive conduct provisions of the *Trade Practices Act 1974* (or state equivalents) (for conduct that occurred prior to 1 January 2010) or the *Competition and Consumer Act 2010* (for conduct that occurred on or after 1 January 2010).

Since July 2001 Australia has been a signatory to an international treaty known as the Madrid Protocol for International Trade Marks (Madrid Protocol). The Madrid Protocol enables trade mark applicants to seek protection

## Other laws regulating companies & business

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in all or any of the countries that are currently signatories to the Madrid Protocol by filing a single application in Australia. Applicants can also designate any countries which become members in future without filing a new application. The application will then be considered by the trade marks office of each designated country and, if registration is achieved, the mark will be granted the same protection afforded to marks registered in that country.

In order to seek protection under the Madrid Protocol an application must be based on an Australian trade mark registration or application. Therefore the specifications for goods and services must be the same as those detailed in the corresponding Australian application or registration. International registrations achieved under the Madrid Protocol will continue to exist indefinitely, subject to renewal every 10 years. Any further maintenance of the trade mark such as assignment or change of address will be streamlined through IP Australia.

### Circuit layouts

Original layout designs for integrated circuits and computer chips are protected under the *Circuit Layouts Act 1989 (Cth)*.

Similar to copyright, the protection provided under the *Circuit Layouts Act 1989 (Cth)* is automatic and no registration is required. To qualify for protection, the circuit layout must be original and made by an Australian person or corporation or first commercially exploited in Australia. Original circuit layouts created by a citizen, resident or national of a WTO member country or first commercially exploited in such a country are also protected.

The maximum term of protection under the *Circuit Layouts Act 1989 (Cth)* is 20 years.

### Plant breeder's rights

Plant breeder's rights in Australia are regulated by the *Plant Breeder's Rights Act 1994 (Cth)* (PBR Act), and administered by the Plant Breeder's Rights Office. The PBR Act protects new plant varieties and their reproductive material. The owner (usually the original breeder) of such rights is exclusively entitled to produce, reproduce, commercially exploit and market the new plant. Only new or recently exploited varieties can be registered under the PBR Act, so it is important to consider filing applications to register to varieties at an early stage. Also, the new variety must be "distinct, uniform and stable" to be registrable. Comparative trials are conducted by an accredited qualified person to establish whether the new plant variety will satisfy these criteria.

The length of protection for trees and vines is 25 years from the date of granting and 20 years for all other varieties. The International Union for the Protection of New Varieties of Plants provides for international protection between member states, of which Australia is one.

Penalties under the PBR Act are substantial - intentional infringement of a breeder's rights attracts a penalty of A\$55,000 for individuals and for corporations up to A\$275,000.

## 5.13 Other laws regulating companies & business

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### Domain names

Although not strictly intellectual property, domain names are an increasingly important area for consideration. The rules governing the registration of domain names vary depending upon the level of the domain name (for example, .com, .biz, .info and .org). The .com.au domain is administered by .au Domain Administration Ltd (auDA). To register a .com.au domain name, the applicant must have a business, partnership, statutory body, association or company name or a registered or pending trade mark application from which the domain name can be derived. Domain names are granted to registrants meeting these criteria on a first come, first serve basis. As there can be numerous parties with a legitimate interest in any one domain name, it is therefore important to assess the availability of and apply to register your business' preferred domain name at the earliest opportunity.

Where a party without a legitimate interest in a domain name has registered or used the domain name in bad faith, it may be possible to have the domain name transferred to a party with a legitimate interest in the domain name by filing an application under the .au Dispute Resolution Protocol (in the case of .com.au domain names) or the Uniform Dispute Resolution Protocol (in the case of most other domain names, including .com domains). Depending upon the circumstances, such conduct may also amount to trade mark infringement of passing off.

### Breach of confidence

Generally the cause of action known as breach of confidence protects the holder of confidential information from an improper use of that information by another party. The elements of the action are that the information must be confidential, have been imparted in circumstances which the law regards as creating an obligation of confidence and have been used without the owner's actual or implied consent. Accordingly, confidential information should only be made available to a third party if a written agreement by which the third party acknowledges the confidential nature of the information and an undertakes to keep the information confidential is first executed.

### Privacy

Pursuant to the *Privacy Act* 1988, the public sector is subject to rules concerning collection and use of, and access to, personal information. Since December 2001 the private sector is subject to similar constraints. The new privacy provisions do not apply to "small businesses" – those with a turnover of less than A\$3m unless the business deals with certain types of information. The provisions also do not generally apply to employee information.

## Industrial relations

The *Fair Work Act 2009 (Cth)* is the primary piece of legislation governing relationships between employers, their employees and, where relevant, unions.

The *Fair Work Act* provides for enterprise agreements to be made that set out the terms and conditions of employment for particular workplaces. Employees have the right to be represented by bargaining representatives of their choice during negotiations for an enterprise agreement, with the default position being representation by any union to which the employees are members. The employer and employee representatives must bargain in good faith, which means they must, amongst other things, attend and participate in meetings, give genuine consideration to any proposals put forward by the other party, and refrain from engaging in capricious or unfair conduct. A government body known as Fair Work Australia (FWA) has powers to facilitate bargaining and deal with bargaining disputes.

Under the *Fair Work Act*, employers must not take adverse action against employees and contractors, and prospective employees and contractors, for specified reasons. These reasons include because the person is entitled to the benefit of a workplace law or instrument, has made a complaint on inquiry in relation to his/her employment (if an employee), or the person is, or is not, a member of a union, or has, or has not, engaged in industrial activity. Adverse action is defined to include terminating the employment or contractor relationship, altering the position of the employee or contractor to the

employee or contractor's prejudice, and refusing to employ or engage the prospective employee or contractor.

In Australia, industrial action is unlawful unless it meets specific criteria. Employees may generally only take industrial action to support or advance claims in relation to a proposed enterprise agreement and the action must be approved by a majority of employees. An application must be made to FWA for approval to conduct the vote. If it appears to FWA that unlawful industrial action is happening, threatened, or impending, it is required to make an order that the industrial action stop, not occur or not be organised. Significant penalties are available against organisations and persons involved in unlawful industrial action.

In addition, unions in Australia have limited rights of entry into workplaces. Right of entry is available to union officials who hold entry permits for the purpose of investigating suspected breaches of industrial legislation that relate to, or affect a member of, the union and suspected contraventions of occupational health and safety legislation. Right of entry is also available for the purpose of holding discussions with employees whose industrial interests the union is entitled to represent. Unless FWA has issued an exemption certificate for the entry, the permit holder must give at least 24 hours notice of the intention to enter the workplace.

Additional information on Australia's employment laws is set out in 6.1.

## 5.15 Other laws regulating companies & business

### Banking regulation

The Commonwealth Parliament has power to make laws relating to banking (other than banking conducted by a state of Australia) and the issue of money. It also has power to legislate with respect to currency, coinage and legal tender, and bills of exchange and promissory notes. The prudential regulation of the banking system is undertaken by the Australian Prudential Regulation Authority (APRA). APRA also oversees other members of the financial services industry, including credit unions, building societies, general insurance and most members of the superannuation industry. Australia's capital adequacy requirements are comparable with other industrial nations. There are four major trading banks in Australia, numerous smaller regional banks and a number of significant international investment banks.

In addition to the banks, there are other financial institutions, including credit unions, building societies and credit cooperatives. Although traditionally state regulated, these financial institutions are now subject to a national scheme of prudential supervision. The practices of Australian banks are very much in line with those of the banks of Australia's trading partners. Prudential requirements are in line with those specified under the Basel Concordat and APRA adopted the Capital Accord (Basel II) standards into the Australian banking system on 1 January 2008. The Anglo-American system relating to the law of bills of exchange (as opposed to the Geneva System) applies and Australian banks have adopted most of the international conventions relating to trade finance including the Uniform Rules for Collections (1995 Revision) and the Uniform Customs and Practice for Documentary Credits (1993 Revision).

In July 2010 Australia introduced an updated regime of consumer credit regulation in the form of the *National Consumer Credit Protection Act 2009 (Cth)* and associated legislation (National Consumer Credit Laws). The National Consumer Credit Laws affect most credit transactions with debtors who are individuals who borrow for personal or domestic purposes, and cover all credit providers such as banks, finance companies, building societies, credit unions and other regular providers of credit for personal or domestic purposes.

The National Consumer Credit Laws also include a "National Credit Code" which replaced the previous "Uniform Consumer Credit Code". The National Credit Code sets out a range of requirements including requirements relating to advertising

and disclosure, variation and enforcement and the treatment of mortgages and guarantees.

The National Consumer Credit Laws also introduce a requirement that credit providers and advisers hold an Australian Credit Licence (ACL). The ACL regime, which came into force in July 2010, replaces the various credit licensing regimes of the Australian states and territories.

The banking industry has an independent, self-regulatory scheme for the resolution of banker-customer disputes called the Financial Ombudsman Service.

In October 2008, the Commonwealth Government introduced the Financial Claims Scheme (FCS). Under the FCS, a depositor with an authorised deposit-taking institution (ADI), such as a bank or credit union, is protected from loss of their deposits up to \$A1 million (in total per ADI). The FCS, in its current state, is scheduled to remain in place until 12 October 2011. The Government has indicated that any new limit applying after this date will be announced prior to 12 October 2011.

In 2009, the Commonwealth Government introduced the *Personal Property Securities Act 2009 (PPS Act)* and the online PPS Register. The PPS Act introduces a new regime for the registration of security interests in virtually all forms of property other than land and some statutory licences. Such personal property includes goods and equipment, inventory, intellectual property (such as trademarks and patents), currency, contractual rights, shares, units and debt securities, livestock, crops and artworks. The PPS Act also introduces new rules for the creation, priority and enforcement of security interests in personal property. These reforms bring together the different Commonwealth, state and territory laws and registers under one national system.

## Financial services reform

The *Corporations Act 2001 (Cth)* (Corporations Act) provides a uniform licensing regime for entities which provide financial services (which includes the giving of advice about financial products, operating managed investment schemes and dealing in any of a wide range of financial products) as well as those entities operating financial products markets and clearing and settlement facilities.

The Corporations Act also includes training, competency and related requirements (particularly for those who offer to sell products to retail clients) and uniform disclosure requirements in regard to the provision of financial products and services. The Corporations Act licensing regime promotes fairness, efficiency, flexibility and transparency and removes statutory barriers to competition in the financial service industry, thereby providing certainty for the industry itself and promoting consumer confidence in the system's integrity. It is worth noting that licences issued under this regime are often subject to various conditions and impose statutory notification

and client obligations on licence holders. Licensing exemptions exist for foreign financial service providers who only wish to provide financial services to wholesale clients (provided they are based in a qualifying jurisdiction). These exemptions are included on the basis that foreign service providers are already subject to regulation comparable to that under the Australian regime.

In 2010, following a review of the financial advisory industry, the Australian Government announced a package of reforms to the laws regulating the provision of financial advice to retail clients. These reforms include a ban on conflicted remuneration structures (including commission based payments) for advisors and introduce a fiduciary duty for advisors to act in the best interests of their clients. At this stage the draft legislation articulating these reforms has not been released, however the Government has indicated that it intends for the reforms to commence on 1 July 2012.

## Workplace relations

The *Fair Work Act 2009 (Cth)* is the primary piece of legislation governing relationships between employers and employees in Australia.

The Fair Work Act prescribes the minimum safety net of terms and conditions of employment for employees. This safety net is comprised of ten minimum terms and conditions of employment known as the National Employment Standards (NES) and the modern award system.

The NES includes terms and conditions in relation to maximum ordinary hours of work, annual leave, personal leave, parental leave, requests for flexible working arrangements, and notice of termination and redundancy.

Modern awards prescribe minimum terms and conditions of employment which must be provided to employees engaged in certain industries and occupations who fall within specified classifications. Modern awards provide terms and conditions of employment in relation to both monetary and non-monetary matters, including minimum wage rates, overtime and penalty rates, allowances, dispute resolution procedures and consultation.

Significant sanctions are available against employers that fail to comply with the NES or any applicable modern award.

An employer may exclude or vary its award obligations by entering into an enterprise agreement with its employees. To be valid, the employees to be covered by the enterprise agreement must be better off overall under the agreement than they would be under any applicable modern award and the agreement must be approved by a majority of employees who are subject to the agreement and vote. The parties must comply with specific good faith bargaining obligations when negotiating an agreement.

An employer in the process of setting up a new business may

seek to make an enterprise agreement with relevant unions before any employees are employed. Further, a group of employers carrying on the same type of business, such as in a franchise situation, may seek to make a multi-enterprise agreement which would set the terms and conditions of employees employed by all the employers involved.

Under the Fair Work Act, employers must not terminate the employment of eligible employees in a manner that is harsh, unjust or unreasonable. In short, this means that the employer must have a valid reason for the termination (such as poor performance or misconduct) and must afford the employee procedural fairness in the termination process. The primary remedy for breaching this requirement is reinstatement of employment or, where impractical, compensation of an amount equal to up to six months remuneration (less mitigation).

Employers in Australia also have obligations under federal and state legislation not to discriminate against their employees or against potential employees on certain grounds including age, sex, race, disability, and family responsibilities. Employers are not permitted to discriminate when hiring, in the terms and conditions of employment they offer to employees, during employment, or when terminating an employee's employment.

Employers must also satisfy occupational health and safety obligations under federal and state legislation. These obligations generally require employers to ensure the health, safety and welfare of their employees and other persons may be affected by the employer's business. Both corporations and individuals involved in the management of corporations may be liable for breaches of these obligations. Amongst other things, corporations and other persons convicted of breaches may be subject to criminal penalties.

## Migration

Non-Australian citizens coming to Australia may only do so with a visa. The rules and criteria governing any change of status from visitor or temporary resident to permanent resident for business or employment reasons are strict.

Generally, people applying for Australian temporary or permanent residence visas must undergo health and character checks as part of the migration application process, as well as fulfilling a number of other criteria. The health requirement for temporary workers varies according to the type of visa and the country of origin.

There are a multitude of options for people seeking to live and work temporarily or permanently in Australia. It is important to remember that only lawyers or migration agents registered with the Migration Agents' Registration Authority are permitted to give advice in relation to migration issues in Australia. The advice given here is very general in nature and is intended as a broad overview only. Specific migration advice should be sought by anyone wishing to travel to Australia.

### Temporary residence

Broadly, there are two types of business visas that address the labour needs of Australian employers:

- a short-term visa for people who have a genuine intention to come to Australia for business purposes for periods of up to three months at any one time. The Australian government has also introduced electronic travel authorities, which are available for this type of visa in some participating countries
- a long-term stay visa – this is most commonly used when companies wish to sponsor foreign senior executives, technical or specialist personnel for a specified period of employment in Australia. Temporary residence is generally permitted for periods of up to a total of four years, although it is possible to apply for an extension of the initial period of temporary residence, depending on the circumstances involved in each case.

## Workplace relations & migration

## 6.2

### Permanent migration

#### Economic migration

The Economic Migration Program is intended to attract migrants with entrepreneurial or specific skills and may be divided into the Business Skills, Employer Nomination, Independent and Distinguished Talent categories.

#### Business skills migration

Applicants for a Business Skills Visa must intend to establish a new business in Australia and/or invest substantial funds or assets in Australia. Subclasses of this category include:

- Senior Executive (employed at senior management level by a qualifying company)
- Business Owner (involved in the management of a qualifying business either owned, or partly owned, by the applicant)
- Investment Linked (lodge either A\$750,000 (if state-sponsored) or A\$1.5 million (without state sponsorship) with a Government nominated investment.

Most of these visa categories are now provisional four-year visas. During this period, an applicant must either establish a business (assessed by reference to turnover, employee numbers etc) or maintain their required investment and meet threshold requirements before applying for permanent residence. The exception to this is the Business Talent Visa for high-calibre business people where, among other things, their business(es) turnover exceeds A\$3 million, and their personal and business net worth is at least A\$1.5 million.

All applicants for a Business Skills Visa must also:

- have an overall successful business career and a good record of achievement in business, commerce and related activities
- have a genuine and realistic commitment to engage in business in Australia
- register the applicant's business intentions with the relevant authorities in Australia (except for the Investment Linked subclass).

If a Business Skills applicant is successful, their progress in achieving their nominated economic objectives is monitored. If they fail to take steps to achieve these nominated objectives or otherwise do not attempt to participate in business activity in Australia, they may have their visa cancelled.

#### The Employer Nomination Scheme

This visa enables Australian employers to sponsor highly skilled, experienced personnel from overseas for permanent employment in specific positions. The Employer must be able to show that the position is highly skilled, that there is a need for the position, that they have a satisfactory record of training permanent residents and citizens, that the position is for three years and that (at least) the minimum salary as set by the Government is paid. The Applicant must:

- have their skills positively assessed by a relevant authority and have at least three years post-qualification experience, or
- have worked for the Australian Employer for 12 months whilst the holder of a Temporary Sponsored Business Visa for at least two years, or
- be paid a base salary of over A\$150,000. An applicant should also be under 45 and speak English, unless exceptional circumstances apply.

#### Skilled migration scheme

These visas are designed for applicants who are relatively young and well qualified, with matching skills, English language ability and experience. Skilled Applicants generally must pass a "General Points Test", with points awarded for various factors including age, qualifications, experience and training and English language ability. Applicants can be independent (i.e. not sponsored) or be sponsored by relatives who have permanent residency in Australia or Australian citizenship.

#### Distinguished Talent Visa

This Visa is designed for applicants with unique and beneficial talents and experience (e.g. sporting, the arts) and an exceptional record of achievement in their field. Relatively few Distinguished Talent visas are granted each year.

#### Other options

Family Migration includes visas for spouses, prospective spouses, dependent children, fiancées, retired parents, parents who have at least half of their children residing in Australia, aged dependent relatives and remaining relatives of permanent residents or citizens in Australia.

Student Visas are also available for people wishing to undertake schooling, undergraduate, postgraduate and nonaward courses in Australia.

Visitor Visas for either single or multiple-entry travel for people who intend to visit Australia as a tourist, for prearranged medical treatment, to visit relatives or for short term academic purposes (of less than three months).

## Sea

As a major exporter and importer of goods, in particular bulk commodities, Australia relies heavily on both local and international shipping services. Approximately 12% of world trade by volume either comes into Australia or out of Australia by sea.

The majority of shipping services into and out of Australia are conducted by non-Australian shipowners. Sydney and Melbourne are among the largest container ports in the Southern Hemisphere and are hub ports for cargo movements to and from Tasmania, South Australia, Queensland and New Zealand. Regional centres such as Newcastle, Port Kembla, Geelong and Portland are linked to specific products such as grain, coal and metals. These regional centres also have a modest container handling capacity, which relieves pressure from the major centres, Sydney and Melbourne. In more recent times we have seen the growth and development of single commodity ports, exporting principally iron ore and coal. Ports such as Dampier and Port Hedland in Western Australia (iron ore) and Dalrymple Bay, Gladstone and Abbot Point in Queensland (coal) are examples of these types of ports.

Import and export liner trade is largely organised through formal Shipping Conferences. Government policy is to permit liner carriers to operate through Conferences, provided that the Conference complies with the requirements of the *Competition and Consumer Act* (formerly the *Trade Practices Act*) and is registered with the Register of Liner Shipping. There are strict requirements for registration, including an obligation to negotiate rates and cargo volumes with the peak shipper bodies, formed to represent cargo shippers. Registration provides limited exemption from some of the anti-trust provisions of the *Competition and Consumer Act*.

Australia has adopted many international maritime conventions in relation to the carriage of cargo. The Hague Rules were adopted in 1924 followed by the adoption of the Visby and SDR Protocols in 1991. In 1998, Australia introduced a hybrid cargo liability regime still based on the Hague-Visby Rules but incorporating some features of the Hamburg Rules. Amongst other things these changes extended the carriers' liability to cargo, from the ships' rail to the container yard gate. Australia is yet to sign up to the Rotterdam Rules.

Ship arrest in Australia is relatively straightforward and inexpensive in comparison to a number of other jurisdictions in the Asia-Pacific region. Australia is not a signatory to the Arrest Convention although there are many similarities between the Arrest Convention and Australia's governing legislation for ship arrest, the *Admiralty Act 1988*.

Australia's cruise industry has experienced remarkable growth in recent years, expanding 18% annually, on average making

it the fastest growing area of the Australian tourism sector. Australia has not enacted the Athens Convention although commercial operators often seek to incorporate the limitation of liability provided for in the 1974 version of the Convention.

Following the election of the Howard Government in 1996, Australia experienced a dramatic improvement in waterfront productivity and efficiencies with record container liftings now being achieved. Nevertheless, labour-related disputes on the waterfront are not uncommon. The International Transport Federation, in conjunction with Australian trade unions, continues to be vigilant in protecting what it sees as exploitation by foreign ship owners, particularly in relation to crew wages.

The Gillard Government is in favour of ratifying the Maritime Labour Convention which sets minimum requirements for seafarers to work on a ship and contains provisions on conditions of employment, hours of work and rest and medical care. Amendments will be made to the *Navigation Act* throughout the course of 2011 to ensure Australia's compliance with the MLC.

A single voyage permit system has more recently seen coastal trade around Australia being increasingly undertaken by foreign flagged (non-Australian) ships.

Apart from the United States, Australia is the only country that has a full visa system for foreign seafarers. Maritime Crew Visas have recently been introduced as a means of strengthening Australia's border security. Any foreign seafarer on a vessel entering Australia without a passport and a visa can be subjected to a substantial fine and/or detention.

Protection of the environment continues to be a high priority for federal and state governments alike with both Commonwealth and state legislation governing the area. Legislation is frequently enacted in response to marine disasters or near-disasters such as the "Bunga Terati Satu", which ran aground on the Great Barrier Reef, the "Pasha Bulker" which ran aground in Newcastle and the "Pacific Adventurer" oil spill in Queensland. The Australian laws provide for some of the most severe penalties in the world for breach of environmental legislation and defences are limited.

Apart from some defined small craft, all Australian owned vessels are required to be registered under Commonwealth legislation. The *Shipping Registration Act* also provides for the recording of liens, mortgages and charges over vessels.

Australia has a number of shipyards capable of constructing small to medium size vessels and a progressive ship design industry.

## Transport

7.2

### Air

In a country as large and as isolated as Australia, air travel is a necessity. Australia therefore has a number of air carriers, operating nationally and internationally. The two major carriers are the Qantas Group and Virgin Blue, however in recent years the launch of Tiger Airways Australia and the growth of regional airlines such as Regional Express, Skywest and Skytrans have added to the Australian aviation landscape.

The Qantas Group (which includes QantasLink and Jetstar) operates an average of 5,600 domestic flights and around 970 international flights every week, serving more than 182 destinations in 44 countries. The Qantas Group is a OneWorld alliance partner.

Virgin Blue also services the domestic market and in 2009 expanded its international operations with the launch of its V Australia premium airline. Virgin Blue now operates an average of 2,100 flights per week to 32 domestic and international destinations, including New Zealand and other destinations in the South Pacific region, the United States, South Africa and Thailand. Virgin Blue has also recently entered into an alliance with United Airways in the US.

The number of international airlines travelling to Australia has been in steady decline since the turn of the century. However, in recent years, the duopoly enjoyed by the Qantas Group and Virgin Blue has come under serious challenge with the arrival of a number of new entrants, including Asian low-cost carriers Air Asia X and Tiger Airways. A number of international airlines have also recently increased the frequency of their flights to Australia.

All of Australia's state capital cities are serviced by major international airports. Sydney Airport, the nation's busiest, conducts around 850 aircraft movements per day and caters to around 33 million passengers per year. There are also a vast number of major regional airports, some of which are also capable of handling international services. All airports close to the capital cities and major regional centres, are serviced by efficient local transportation (which in a number of cases is presently being improved by major infrastructure projects).

### Land

Australia has a comprehensive network of highways and other roads linking all capital cities and regional centres. Haulage contractors compete strongly for business with the national and state railway systems and are capable of reaching many urban and industrial centres not served by the rail network. Australia's rail network comprises approximately 41,000 kilometres of track of three major gauges. Generally, only the larger cities and their environs are served by electrified lines with reliance on diesel services for country and interstate services.

The freight rail operations of the Commonwealth, New South Wales, Victoria, Queensland and Western Australia have now been privatised. However, rail infrastructure assets such as track, sleepers, ballast and formation remain largely publicly owned. Some jurisdictions have also leased the corridor and track to private operators in addition to selling rail assets (such as rolling stock and locomotives).

Australia has not adopted any of the International Conventions on liability for the carriage of goods by road or rail. However, both the road and rail transport industries have had to adjust to an avalanche of major state-based regulatory changes over the past

The resources boom of recent years has seen huge growth in charter operations known as Fly-In-Fly-Out (FIFO), particularly in Queensland and Western Australia. These operations carry workers and equipment from the more highly populated regional centres and urban areas to remote mining operations. A number of these airports regularly cater to the Antonov 124, among the world's largest aircraft, ferrying mining and military equipment. Other than for limited curfew arrangements, there is no restriction on access to any of Australia's main airports, other than for some limited peak controls at Sydney airport which have little effect on international or domestic regular public transport.

Airfares, airport and other user charges are competitive on an international basis. Australia's air and safety record is unparalleled. Despite recent incidents involving Qantas' A380 aircraft, Australia's domestic and international airline operations are among the safest, if not the safest, in the world and Australia maintains a Category 1 safety rating according to a US Federal Aviation Administration audit in 2010.

In January 2009 Australia ratified the Montreal Convention 1999 through amendments to the *Civil Aviation (Carriers' Liability) Act 1959 (Cth)*. The Carriers' Liability Act also gives the provisions of the Warsaw Convention, the Hague Protocol, the Guadalajara Convention, Montreal Protocol No. 3 and Montreal Protocol No. 4 the force of law in Australia. Australia previously ratified the Convention on Damage Caused by Foreign Aircraft to Third Parties (the Rome Convention) but denounced the Rome Convention in 1999 and in lieu thereof enacted the *Damage by Aircraft Act 1999* which imposes a strict and unlimited liability regime in Australia on aircraft engaged in overseas or interstate operations. Complimentary legislation also imposing a strict liability regime for damage by aircraft has been enacted in all Australian states.

Australia was the first jurisdiction where a claim relating to deep vein thrombosis was brought against a carrier. However, after progressing through to the High Court, this claim was determined in favour of the defendant airline on the basis of the terms of Article 17 of the Warsaw Convention.

several years. Much of this legislation is based on the concept of "chain of responsibility" - the notion that all parties in the road transport supply chain (including consignors, packers, loaders, operators, drivers, owners and consignees) have obligations to improve safety and prevent a breach of the transport laws from occurring. The concept does not lead to equal responsibility between those parties, but rather to responsibility proportionate to each party's level of involvement in the transport supply chain. Notable regulatory changes include legislation that imposes liability for serious road traffic infringements, mass, dimension and load infringements and driver fatigue.

The introduction of this concept of "chain of responsibility" into road and rail legislation has meant that consignors (which by definition under the legislation can include air and sea carriers needing to subcontract for inland transport) need to familiarise themselves with the "chain of responsibility" laws as a matter of risk management.

## 8.1

## Property, planning &amp; environment

## Buying and selling property

### The Contract of Sale and Vendor's Statement

Contracts of Sale for land (and, in Victoria, Vendor's Statements) are ordinarily prepared by the solicitors for the vendor.

In Victoria, the Vendor's Statement is attached to the Contract of Sale and is required by law to contain information regarding:

- the certificate of title
- any mortgages on title
- covenants
- easements
- zoning regulations
- building permits
- any agreements or other restrictions which the vendor has entered into with others in relation to the property
- outgoing (such as rates and land tax) payable by the registered proprietor of the property.

In New South Wales there is a requirement to annex a number of prescribed documents to the Contract of Sale. Several warranties are also implied into the Contract of Sale including a warranty that there is nothing that would entitle the local council to issue an upgrading or demolition order in respect of the property.

Vendors in Victoria must also disclose any information they are aware of that may impact on the value of the property, such as road widening or whether the land is on, or in close proximity to other land, that is on the contaminated sites register. Vendors in New South Wales are deemed to have given a number of warranties that the property is not affected by proposals of certain government authorities.

In Victoria, if the Vendor's Statement is insufficient or incorrect in its detail, a Contract of Sale can be void and the purchaser may take legal action to recover any loss suffered as a result of reliance on the information contained in the Statement.

In New South Wales, a vendor's failure to annex a prescribed document to the Contract of Sale or a breach of an implied warranty might permit the purchaser to rescind the Contract of Sale.

In Western Australia, a Contract of Sale of Land is commonly prepared using the current version of the:

- Contract for Sale of Land or Strata Title by Offer and Acceptance (O&A Contract); and
- Joint Form of General Conditions for the Sale of Land (General Conditions).

Together, the O&A Contract and the General Conditions constitute the typical contract of sale of land in Western Australia however there is no requirement to use either or both of these documents as the basis for the contract, and frequently special conditions are added and the General

Conditions are also commonly amended to suit the particular circumstances.

The General Conditions are produced in cooperation between the Real Estate Institute of Western Australia (REIWA) and the Law Society of Western Australia.

The O&A Contract includes specific details about the particular contract including the names of the parties, description of the land, encumbrances, price, deposit, finance conditions if any and timing for settlement. The General Conditions were primarily developed for use in the sale of residential property however they have become commonly used for the sale of other land (including commercial and industrial land). The General Conditions unless amended include various standard warranties and representations by the seller and buyer as well as other important provisions such as penalty interest for delays in settlement. It is also quite common for the standard GST provisions under the General Conditions to be replaced with special GST provisions to suit the specific circumstances.

Although the law in Western Australia does not require that contracts for the sale of land contain a cooling off period, where the property is part of a strata subdivision then further seller disclosures are required under the relevant Western Australian laws. If the required disclosures are not made, buyers in some circumstances may be entitled to avoid the Contract or obtain compensation.

### Caveat emptor – buyer beware and the need for due diligence

Both vendors and purchasers should consider whether there are any requirements in relation to disclosure including:

- in Victoria a Vendor's Statement must by law contain certain information relating to title, encumbrances and outgoing
- in New South Wales a vendor is required to annex the prescribed documents to the Contract of Sale and make several implied warranties, a vendor is not required to disclose all matters relating to the property
- in Western Australia, in addition to any Strata disclosures which will apply if the property is a strata property, a vendor is also required in some special circumstances to disclose, in writing, any mortgage, encumbrance, lien or charge over the property (section 7 of the *Sale of Land Act 1970* (WA)).

Accordingly, it is important for purchasers to undertake due diligence inquiries before entering into the Contract of Sale including (as appropriate):

- undertaking an inspection of the property
- obtaining and reviewing title searches to verify information provided by the vendor
- reviewing the terms of easements, restrictions on use and leases affecting the title to the property

## Property, planning & environment

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- obtaining a survey report to identify any encroachments on or by the property
- obtaining reports in relation to the condition and state of repair of any buildings, plant, machinery and equipment on the property
- obtaining an environmental audit.

### Buying "off-the-plan"

Buying "off-the-plan" occurs where a property is purchased before a particular building has been constructed on the property. Prospective purchasers view architectural plans and models or visit display suites in order to see what they will be purchasing.

Contracts for off-the-plan sales can be complicated and subject to restrictive terms and conditions. Purchasers must be aware of the:

- quality of construction and need to ensure that the vendor is contractually obliged to deliver the promised product
- effect of price increases
- risks associated with delays in the vendor providing the finished product
- wording of variation, withdrawal and sunset clauses.

It is common in Victoria and New South Wales for off-the-plan contracts to contain provision for settlement to be the later of:

- within 14 days of the Plan of Subdivision being registered; and
- within 14 days of a Certificate of Occupancy being issued.

In Western Australia it is common for off-the-plan contracts to contain provision for settlement within 14 days of the Certificate of Title being issued.

Properties bought off-the-plan are usually part of larger complexes governed by an owners' corporation (Victoria). In Western Australia the equivalent to the "owner's corporation" is the strata company (previously called the body corporate).

### Owners' corporations/strata companies

Purchasers should be aware of any property subject to an owners' corporation/strata company. These entities are created upon the registration of a plan of subdivision (Vic and NSW)/strata plan or survey strata plan (WA), with all lot owners on the plan automatically becoming members.

Any area of property that is co-owned among several property owners is called common property. Owners' corporations/strata companies operate to provide a democratic process by which to govern this common property. Standard rules are established under State regulations, but additional rules can be created by resolution of the owners' corporation/strata company.

Plans of subdivision often creating common property include:

- medium density housing
- blocks of apartments or flats
- warehouse conversions

- mixed use commercial and residential properties
- industrial complexes and building parks
- shopping complexes.

Common property rests in the possession of lot owners at a rate proportionate to their lot entitlement. Owners' corporations/strata companies are primarily responsible for repairs and maintenance and the provision of insurance over the structure of the buildings and on the common property. A fee for such services is charged to lot owners, either quarterly or annually. Purchasers should make full enquiries as to any owners' corporation issues before purchasing a property.

### Settlement

Settlement is the date on which the balance of the purchase price is to be paid to the vendor and when the title of the property is handed to the purchaser. This date is normally stated in the Contract of Sale and:

- in Victoria is often 30, 60 or 90 days after the date of the Contract
- in New South Wales, the date is normally 42 days after the date of the Contract of Sale
- in Western Australia, is often 30, 60 or 90 days after the date of the Contract.

A Statement of Adjustments/Settlement Statement is prepared at the final stage of settlement, detailing the purchase price, the deposit and the pro-rata adjustment of rates such as council, water and owners corporation/strata fees.

In Victoria, New South Wales and Western Australia, the purchaser will also be liable to pay stamp duty on the purchase price of the property and:

- in Victoria, stamp duty is payable within three months of settlement
- in New South Wales, stamp duty must be paid within three months of the date of entry into the Contract of Sale (and whether or not settlement of the Contract of Sale has occurred before that date)
- in Western Australia, a Contract must be lodged within two months of the date of the dutiable transaction although some "conditional agreements" have an extension of time to lodge in some circumstances. In most instances, duty is then payable within one month from the date the duty assessment is issued.

In Victoria and New South Wales the Transfer of Land form, which records the transfer from the vendor to the purchaser, must be stamped and lodged with the relevant State land titles office following completion/settlement. In Western Australia the Transfer Form is stamped at or prior to the settlement and then lodged with the Western Australian land titles office (known as Landgate) following settlement.

## Leasing of property

A large number of businesses in Australia operate from leased premises, whether they be commercial, industrial or retail. While some business owners opt to purchase business premises rather than lease, the leasing of business premises is far more common, particularly for commercial offices and retail shops. Furthermore, the leasing of premises, rather than purchasing offers numerous advantages to business owners, including:

- less capital required to lease premises as opposed to having to purchase the premises
- often a more flexible arrangement where a business owner is able to exit the premises after a set period of time, without having money tied up in the premises
- rent is fully tax deductible, as opposed to purchasing premises where payments towards the premises are not deductible, other than the interest on borrowings to purchase the premises.

### Legal nature of a lease

In basic terms, a lease is a right granted by the owner (usually called a lessor or landlord) for the occupant (usually called a lessee or tenant) to use land or building in return for a regular payment (usually monthly) of rent.

A lease constitutes a legal interest in the land. By having a legal interest in the land, the tenant has various rights which flow from that interest, including the following:

- the lease is binding on subsequent purchasers (although if it is a lease of property in any state or territory other than Victoria, then it might (depending on the length of the term of the lease) need to be registered to be binding on subsequent purchasers), meaning that if a landlord sells the land after having leased it to a tenant, the purchaser will buy the land subject to the terms of the lease
- a tenant is usually able to transfer its lease interest to another party (for instance, if the tenant wanted to sell its business, it is able to transfer the lease to the purchaser, subject to certain conditions specified in the lease including obtaining landlord consent)
- a tenant is usually able to mortgage the lease, so that if a tenant requires finance for its business, a bank is able to take a mortgage over the lease and loan against the security of the lease (again, subject to certain conditions specified in the lease including obtaining landlord consent)
- a tenant may have certain statutory rights, including the right to have a lease reinstated, where the lease is terminated by a landlord for breach by a tenant, subject of course, to the terms of the lease and the ability of a tenant to remedy any breach of the lease
- where the lease is of a retail premises a tenant will have various rights which arise under retail legislation in Australia (see further below).

As will be noted from the above, a lease gives a tenant numerous rights but even more important are the terms of the lease.

### Normal terms of a Lease

While all leases are different, most, if not all, leases will have the following terms:

#### Term

A lease will be for a period of time and can be for as short as a few months or more than 50 years. However, most leases of business premises will be between 3-15 years depending upon whether the lease is of commercial, industrial or retail premises. Of course, the parties to the lease are free to negotiate any term.

#### Rent

As mentioned above, the rent is usually paid to the landlord on a monthly basis. Prospective tenants requiring advice as to the appropriate market rent to be paid can obtain advice from specialised real estate agents and valuers.

#### Outgoings

In addition to the rent, most leases provide for a tenant to pay the outgoings of the premises. The outgoings will include rates on the property levied by local government, rates and drainage/sewerage charges levied by the local water authority, land tax levied on the premises by the state government (although for certain retail leases, the landlord cannot require the tenant to pay or reimburse the landlord for land tax) and other charges that a landlord may incur in managing, repairing and maintaining the premises.

#### Repair and maintenance

A tenant is usually responsible for many of the repairs and maintenance required to be carried out to the premises during the term of the lease. This will usually include an obligation at the end of the lease to reinstate the premises to the condition the premises were in when the tenant first entered occupation.

#### Insurance

A tenant will be responsible for maintaining public liability insurance, usually for A\$20 million. A tenant may also be required to effect other insurances, including insurance for breakage of glass and reimbursing the landlord for building insurance.

#### Permitted use

The lease will usually provide that the premises can only be used in a certain manner, such as commercial offices, a warehouse or retail shop for the sale of certain items.

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### Indemnity and release

A tenant will normally be required to release the landlord from all claims for loss or damage which arise under the lease and also to indemnify the landlord for any loss or damage which occurs in the premises. A tenant should ensure that it has adequate insurance to cover any indemnities provided to a landlord.

### Security deposit

Many leases provide for a tenant to provide a security deposit or bank guarantee which can be as little as one month's rent or possibly as much as 12 months' rent. The security deposit or bank guarantee is held by the landlord and returned to the tenant at the end of the lease. Of course, if the tenant has breached the lease, the landlord is entitled to draw upon the security deposit/bank guarantee to satisfy any amount outstanding by the tenant.

### GST

Australia has a goods and services tax which is levied at 10% on the sale of certain goods and services. A grant of a lease will usually attract GST, meaning that a GST of 10% will be added to the rent. As long as the tenant is registered for GST, the tenant is entitled to receive an input tax credit for the GST, meaning that the tenant will have the GST refunded from the government.

### Rent review

Most leases will provide for the rent to be reviewed on an annual basis, usually to be increased by a fixed amount of say between three to five%, or increased by movements in the Consumer Price Index, being the measure of inflation in the relevant city in which the premises are located. Most leases will provide for a market review every five years or on the commencement of a further term, and if the parties cannot agree on the market rent, the market rent will be determined by an independent valuer.

### Quiet enjoyment

Landlords generally have very few obligations under leases, except a landlord is required to provide a tenant with what is known as "quiet enjoyment". This means that a landlord cannot interfere with a tenant's occupation of the premises other than in very limited circumstances as set out in the lease. It is in the interests of the tenant to negotiate for the lease to include additional landlord obligations (eg an obligation to keep the premises structurally sound and watertight or to keep air conditioning and lifts operating at acceptable levels).

### Termination

Most leases will provide a landlord with a right to terminate the lease in the event that a tenant does not remedy a breach within 14 days of receipt of notice from a landlord.

The above sets out the main terms to be found in leases in Australia but of course, there are many other clauses and obligations on both landlords and tenants and expert advice should be obtained in negotiating any lease of business premises.

### Legislation

Leases in Australia are governed by property law legislation, which is generally similar throughout the states and territories. With the exception of retail leases, the legislation in general has little effect on the lease, other than requiring landlords to give tenants an opportunity to remedy a breach before a lease can be terminated. Further, if a tenant leaves property in the premises at the end of the lease, some states require that the landlord take steps to notify the tenant and auction the property, with the proceeds to be returned to the tenant, less any costs incurred by the landlord.

Leases of retail premises are heavily regulated in Australia. The various states and territories have legislation which governs retail leases largely, if not entirely, for the benefit of retail tenants.

As the legislation differs throughout Australia, so does the meaning of a "retail tenant" and "retail shop". Generally, a retail tenant will be a tenant which is engaged in the business of providing goods or services to the public, such as fashion retailers and convenience shops. The retail legislation implies numerous terms into leases for the benefit of tenants and in many instances, imposes fines on landlords if a landlord fails to comply with various obligations under the legislation.

One such obligation is the duty of a landlord to provide a disclosure statement to a tenant, which sets out various information about the lease, prior to the tenant entering into the lease. A disclosure statement will usually specify the rent payable, the manner in which the rent is reviewed, the outgoings being payable and other pertinent information about the lease.

Due to the impact of the legislation, retail leasing is particularly complex and landlords and tenants should ensure that they obtain advice from specialists before entering into any such retail lease. In this regard, you should also note that even commercial office premises might be considered 'retail' premises in certain states and territories.

## Environmental protection and planning

### Environmental protection

The continual evolution in environmental law has resulted in more stringent standards and public accountability for owners and developers when using their property. While not every activity requires a licence from the relevant state environment protection authority, many property owners and developers are often unaware of their environmental obligations.

### State regulation for environmental protection

The state and territory parliaments of Australia have the principal authority to legislate for the protection of the environment. State legislation has created various environment protection agencies that prosecute any breach of licence conditions.

In Victoria, the principal act is the *Environment Protection Act 1970 (Vic)* which is administered by the Environment Protection Authority Victoria (EPAV). The EPAV is responsible for preparing State Environment Protection Policies which have the force of law and provide detailed requirements for the application of the principal legislation. The Act requires that before prescribed activities on a particular property are established the person intending to establish that activity must have approval from the EPAV. Approval is also required where changes to an existing activity are planned that will have an effect on waste on the surrounding environment.

Activities that are subject to the approval and licence process are specified in the *Environment Protection (Scheduled Premises and Exemptions) Regulation 1996 (Vic)*. The activities prescribed include those likely to discharge waste to the atmosphere and where waste is likely to be discharged or deposited on land or water. It is an offence to fail to obtain a works approval or to breach the conditions of a licence.

The New South Wales parliament has enacted similar legislation in the form of the *Protection of the Environment Administration Act 1991 (NSW)* and the *Protection of the Environment Operations Act 1997 (NSW)*. These Acts provide for the issue of environment protection licences which are required to:

- authorise scheduled development work
- authorise scheduled activities
- control non-scheduled activities that may lead to water pollution.

The NSW Acts are primarily administered by the Environment Protection Authority (NSW EPA) which is an independent statutory body within the Department of Environment, Climate Change and Water. Some administration responsibilities are shared with other authorities such as local councils.

It is an offence to undertake any scheduled development work or activities otherwise than in accordance with a licence from the NSW EPA.

In Western Australia, the principal act is the *Environmental Protection Act 1986 (WA)* (EP Act) which is administered by the Environmental Protection Authority of Western Australia (EPAWA). The EPAWA prepare statutory policies for environmental protection and guidelines for managing environmental impacts. The EPAWA may require development proposals to undergo an environmental impact assessment before they can be implemented. Any development that appears to be likely, if implemented, to have a significant effect on the environment may be referred by any person to the EPAWA (and is to be referred by any decision making authority if such an effect appears likely) for a decision by the EPAWA on whether or not to assess environmental impact, and if so the level of assessment. Certain types of development have also been prescribed as requiring registration and or works approval and licensing under the EP Act. Generally premises are “prescribed” where they or their operation involve potential to result in pollution of air, land or water. In considering an application for registration and/or works approval and licensing, the EPAWA will also decide whether an environmental impact assessment is required. Also, the *Contaminated Land Management Act 1997 (NSW)*, the *Environment Protection Act 1970 (Vic)* and *Contaminated Sites Act 2003 (WA)* establish a process for the identification, investigation and remediation of contaminated land. Landowners and occupiers may, in certain circumstances, be required to undertake remediation work in respect of contaminated land even if the contamination has been caused by another party. In New South Wales, landowners and polluters are required to report contaminated land to the NSW EPA. In Western Australia, land owners, occupiers and polluters are required to report known or suspected contaminated sites to the Department of Environment and Conservation. Reported sites are then classified, in consultation with the Department of Health, based on the risks posed to the community and the environment.

Other legislation aimed at protecting the allocation of natural resources, the conservation of native flora and fauna and the disposal of dangerous substances has also been enacted in all states.

# Property, planning & environment

## 8.6

### Federal regulation for environmental protection

The most significant federal legislation regulating environment protection is the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act). The EPBC Act sets out specific areas where the approval of the Federal Environment Minister is required before action can be undertaken that has the potential to impact the environment.

The EPBC Act creates an obligation on the Minister to decide whether an action should proceed that has, will have, or is likely to have, a significant impact on certain aspects of the environment. A person is prohibited from taking such action without the Minister giving approval or deciding that approval is not necessary.

Most commonly, the EPBC Act is concerned with nationally and internationally important flora, fauna, ecological communities and heritage places, such as a declared world heritage property or wetlands of international importance.

### Common law rights

It should not be forgotten that common law is also a source of environmental rights. Common law rights of action such as private nuisance, trespass and negligence can be used to enforce private rights where a person or entity's environment has been affected.

### Dealing with environmental obligations

The penalties for breach of environmental legislation can be significant. An offence by a corporation can expose directors and staff to personal liability. It is important that organisations have policies and procedures in place to avoid exposure to penalties or personal liability. An organisation's operational and management procedures should include:

- identifying potential environmental impacts
- measures which are to be taken to monitor and address environmental impacts
- appropriate resource allocation to address environmental issues
- a reporting structure to senior managers
- appropriate document management and retention policies to ensure the organisation is in a position to demonstrate compliance with its environmental obligations.

### Environmental assessments

Property transactions are increasingly involving issues relating to the environment, such as site contamination and the effects the proposed use of the property will have on the environment and surrounding properties. In order to gain an understanding of the level of contamination of a site and the suitability of a site for a particular purpose, an environmental consultant can be engaged. Environmental consultants gather information to provide an independent opinion on the environmental condition of a piece of property.

Examples where an environmental consultant will conduct an assessment include when:

- state legislation requires that a certificate or statement of environmental audit be issued by an accredited environmental auditor before the rezoning or development of potentially contaminated land can take place
- parties to a Contract of Sale wish to have an independent party provide an opinion on the state and suitability of the land before it can be transferred
- parties to a lease wish to establish a benchmark for the level of contamination present on leased premises at the commencement of a lease.

## Planning and development

### The regulation of development

Planning law is where the private interests of property owners intersect with the public interest of regulating development.

The principal legislation governing planning:

- in Victoria is the *Planning & Environment Act 1987 (Vic)*, which is administered by the Department of Sustainability and Environment
- in New South Wales is the *Environmental Planning & Assessment Act 1979 (NSW)* (NSW EP&A Act), which is administered by the Department of Planning
- in Western Australia is the *Planning and Development Act 2005 (WA)* which is administered by the Western Australian Planning Commission.

While state-based legislation and regulations govern planning law, it is at the local council level where this law is generally implemented, administered and enforced.

### The planning framework

New South Wales, Victorian and Western Australian legislation provides for a similar planning framework. These states adopt the approach where land is classified into certain zones which dictate the type of development that the local authority considers appropriate in that area. Examples of zones include residential, commercial and industrial.

Planning instruments will stipulate what type of development is:

- permissible in the zone without consent
- permissible in the zone with consent
- prohibited in the zone.

Planning law is primarily enforced through the relevant local instruments which have the force of law being the local planning schemes in Victoria, the local environmental plans in New South Wales and the local planning schemes in Western Australia.

Also relevant to Victorian planning law are overlays which are established in the Victorian Planning Provisions. Overlays relating to environment, landscaping, heritage and land management can all affect planning considerations of property. In New South Wales, consideration will also need to be given to any applicable State Environmental Planning Policies, development control plans, directions under section 117(2) of the NSW EP&A Act and NSW Department of Planning circulars, strategies and policies. In Western Australia consideration will also need to be given to any applicable region schemes (for example the Perth Metropolitan Region Scheme), district structure plans and state planning policies.

### The application process

Most development will require formal approval from the relevant authority in order to be lawfully undertaken. Ministerial approval is also reserved in instances where development applications are of significance to the state due to their size, type of development, amount of investment involved or number of people the proposal will employ.

Generally speaking, applying for approval to develop or use land is similar in all states. The common procedure is as follows:

- the application is made by the owner of the land or with the owners' consent
- the appropriate forms are completed and lodged with the relevant authority
- the appropriate fee is paid
- the parties, normally through their planning and/or legal representation, will begin liaising with the determining authority during the consideration for the application
- the relevant local authority will advertise that a development application or permit application has been lodged.

In New South Wales it will also be necessary to lodge information relating to the environmental impacts of the proposed development with the relevant consent authority. For smaller developments, this might take the form of a Statement of Environmental Effects. However, for more significant developments, an Environmental Impact Statement might be required. There are special approval procedures in Part 3A of the NSW EP&A Act which apply to major or state significant projects in New South Wales.

In Victoria, the local authority is obligated to provide notice to any person or entity it considers may suffer material detriment in the granting of a permit. Similar notification procedures apply in New South Wales.

### The assessment and decision process

The process for making a decision about an application for development or use is similar in each state. In New South Wales and Victoria if the assessing officer does not believe the application satisfies the objectives of the planning scheme or does not comply with particular provisions of the scheme, the application will be refused. The assessing officer can also choose to impose various conditions on any approval granted. Such conditions must be relevant and reasonably arise out of the development which is the subject of the application. In New South Wales, special assessment and decision making procedures apply to major or state significant projects. In Western Australia the assessing officer will often have the delegated authority from the local shire or council to grant or refuse an application. However in Western Australia it is also common for an assessing officer to instead refer an application for decision by the local shire or council accompanied by the officer's recommendation against the grant if approval would require an exercise of a discretionary power which the officer does not support.

# Property, planning & environment

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Generally, the responsible authority must consider:

- matters set out in the principal legislation, including the objections from local residents or local interest groups, submissions and comments from referral authorities and any significant effects the responsible authority considers the proposal may have on the environment
- the contents of the relevant planning scheme and State, local and regional planning policies
- any comments from referral authorities
- whether it should use its statutory power to formally seek further information.

## Modification of approvals

An approval can be affected by changing circumstances or a change in law (i.e. the relevant planning scheme). In New South Wales and Victoria legislation allows for:

- the modification of an approval, so long as the modification does not effectively amount to an approval for a new development
- the upholding of existing use rights, which allow previously lawful activities on land which would no longer be permitted after the introduction of changes to a local planning scheme
- the revocation of an approval.

In Western Australia, a local government may permit an amendment to a planning approval if the amendment does not effectively amount to an approval for a new use or development and it is sought prior to the commencement of the use or development the subject of the planning approval. Existing use rights are generally maintained as permitted "non-complying uses" after the introduction of changes to a local planning scheme which would otherwise prevent the same previously lawful activity on the land.

## Investigation and enforcement of approval conditions

All states grant powers to authorised officers (usually local council employees) to investigate breaches of planning legislation and take enforcement action.

Common enforcement mechanisms available to councils in all states include on-the-spot fines, notices of intention to issue an order, the issuing of an order and ultimately court proceedings.

Matters that attract enforcement orders from local authorities include:

- commencing development without approval
- failure to comply with local planning schemes
- failure to comply with a condition of an approval
- conducting activities on the land that amount to unlawful use.

## Review of council decisions

All jurisdictions also have appellate bodies which hear disputes under local planning legislation being the Victorian Civil & Administrative Tribunal in Victoria, the Land & Environment Court in New South Wales and the State Administrative Tribunal in Western Australia.

These bodies hear appeals regarding matters such as:

- a refusal to grant an approval
- the suitability of conditions upon which an approval is granted
- the exercise of enforcement options by council officers.

## Taxation

Tax is imposed in Australia at both a federal and a state (or territory) level. The main taxes imposed by the Federal Government are:

- Income tax (which includes Capital Gains Tax (CGT)) and the Medicare levy
- Goods and Services Tax (GST)
- Fringe Benefits Tax (FBT).

The Federal Government also imposes a Superannuation Guarantee Charge if an employer has not paid the required amount of superannuation contributions for their employees.

The main taxes imposed by the states are:

- stamp duty
- payroll tax
- land tax.

Australia does not impose death or gift duties.

## Income tax

Generally Australia runs a self assessment income tax system where taxpayers are required to lodge annual income tax returns for the 12 months to 30 June each year and pay tax in accordance with those returns. Returns may be subject to a subsequent audit by the Australian Taxation Office, generally for a period of four years subsequent to lodgment of the returns. Subsidiaries of non-resident companies often obtain permission from the Commissioner of Taxation to use a Substituted Accounting Period corresponding with the accounting and tax year end in their home jurisdiction.

A distinction is drawn between residents and non-residents with residents being liable to tax on their worldwide income and non-residents only on their Australian sourced income. Rather than impose a separate tax on capital gains, Australia's CGT legislation is incorporated in the income tax legislation and net capital gains are included in a taxpayer's assessable income.

A distinction is also drawn between different types of taxpayers and there are different rules for the following:

- individuals
- companies
- trusts
- partnerships
- superannuation funds.

The government commissioned a review of Australia's tax system (the Australia's Future Tax System Review Panel) which has undertaken a fundamental review of Australia's tax system.

The Panel delivered its report to the government in December 2009 and the report together with the government's implementation program for its recommendations was released to the public on 2 May 2010. The key recommendations included the following:

- increase superannuation contributions to 12% by 2020
- impose a new Resource Super Profits Tax of 40% on big miners
- reduce the company tax rate to 28%
- increase the tax-free threshold for individuals to A\$25,000.

As at January 2011, none of the Panel's recommendations have been implemented.

# Taxation

## 9.2

### Individuals

An individual is a tax resident if he or she resides in Australia. This is extended to include, amongst others, a person who does not ordinarily reside in Australia but who:

- is in Australia for at least 183 days (whether continuously or not) in a year of income unless the Commissioner is satisfied that his or her usual place of abode is outside Australia and that he or she does not intend to take up residence in Australia, or
- is domiciled (a legal concept) in Australia unless the Commissioner is satisfied that his or her permanent place of abode is outside Australia.

The tax rates for individuals from 1 July 2010 are:

#### Residents

Taxable Income A\$	Tax payable A\$
0 – 6,000	Nil
6,001 – 35,000	15c for each \$1 over 6,000
35,001 – 80,000	4,650 plus 30c for each \$1 over 37,000
80,001 – 180,000	17,550 plus 37c for each \$1 over 80,000
180,001 +	54,550 plus 45c for each \$1 over 180,000

#### Non-Residents

Taxable Income A\$	Tax payable A\$
0 – 35,000	29c for each \$1
35,001 – 80,000	10,730 plus 30c for each \$1 over 37,000
80,001 – 180,000	23,630 plus 37c for each \$1 over 80,000
180,001 +	60,630 plus 45c for each \$1 over 180,000

Residents are also liable to pay a Medicare Levy equal to 1.5% of taxable income. A surcharge of 1% applies to high income earners who do not have private health insurance. Non-residents are not required to pay the Medicare Levy.

The liability of a non-resident to Australian tax may be affected by any applicable double tax agreement.

### Business entities

#### Companies

Companies, including non-resident companies, carrying on business in Australia or deriving Australian sourced income that is not subject to withholding tax or otherwise exempt, are taxed at 30%.

All companies incorporated in Australia as well as those incorporated outside Australia but which are centrally managed and controlled in Australia are tax resident in Australia.

Under Australian law, it is possible for companies to be regarded as being tax resident in more than one country.

Special rules have been introduced to limit the tax advantages that can arise in such circumstances.

#### Trusts

Generally, trusts are not subject to tax provided that the beneficiaries are presently entitled to the net income of the trust at the end of the trust's year of income. That income is taxed in the hands of the beneficiaries. Losses are carried forward in the trust for offset against future assessable income. Trusts are commonly used for small and medium sized businesses, property investments and for estate planning purposes.

#### Partnerships

The tax law differentiates between limited and general partnerships. A limited partnership is taxed as if it is a company and distributions are treated as dividends. A general partnership is not taxed. Profits and losses of a general partnership flow through to the partners and are taxed in the hands of the partners.

#### Superannuation funds

The income of most superannuation funds, known as complying superannuation funds, is taxed at 15%. Income includes superannuation contributions for which the contributor has received a tax deduction. Capital gains made on assets held by complying superannuation funds for more than 12 months are taxed at 10%. The income of non-complying superannuation funds is taxed at 45%.

#### Capital Gains Tax (CGT)

As has been mentioned, capital gains are taxed as part of the income tax regime. The CGT rules bring into the tax net gains from the disposal of assets acquired on or after 20 September 1985. Certain deeming provisions may also result in a taxable capital gain arising in respect of an asset acquired before 20 September 1985. Net capital gains are included in a taxpayer's overall assessable income.

CGT applies to most assets owned by residents wherever the assets are located. Exceptions include:

- the main residence of an individual
- cars
- trading stock
- depreciating assets to the extent they are used for a taxable purpose.

For non-residents, CGT applies if there is a disposal of an asset that is taxable Australian property. This includes:

- taxable Australian real property
- shares, units or other interests in entities whose principal assets are taxable Australian real property

- an asset used in carrying on a business in Australia at or through a permanent establishment
- options to acquire any of the above mentioned assets.

Where assets are held for more than 12 months, individuals and trusts may make use of the discount capital gains regime which enables those taxpayers to only include 50% of any capital gain in their assessable income.

Capital losses can only be offset against capital gains and to the extent that capital losses exceed capital gains, the excess can be carried forward to offset capital gains made in future years. They cannot be offset against revenue gains.

When a non-resident becomes a resident for tax purposes, the law deems the former non-resident to have acquired those assets that were not already subject to CGT and which were actually acquired on or after 20 September 1985 to have been acquired at the time of the change of residence for their then market value.

When a resident taxpayer becomes a non-resident for tax purposes, the taxpayer is deemed to have disposed of all assets that are not taxable Australian property or that were acquired before 20 September 1985, for their current market value.

### Foreign source income

There are special rules for the taxation of foreign source income of residents. In addition to a system of foreign tax offsets, Australia operates a controlled foreign companies (CFC) system, a controlled foreign trusts (CFT) system and a foreign investment fund (FIF) system. The aim of the CFC, CFT and FIF systems is to prevent foreign source income being accumulated offshore at low rates of tax. These systems allow Australia to tax certain income and gains that have not been received in Australia.

### Imputation

Australian tax paid by resident companies gives rise to franking credits that attach to franked dividends paid to shareholders. Shareholders are eligible to claim franking credits against their tax liability on dividends and other income. Individuals and superannuation funds are eligible to claim refunds of franking credits where their franking credits exceed the tax otherwise payable on their income.

### Withholding tax

Unfranked dividends, interest and royalties paid to non-residents are subject to withholding tax. If withholding tax is paid, then no further tax is payable in Australia on that income.

The rates of withholding tax are:

- interest – 10%
- unfranked dividends – 30%, reduced in many cases because of an applicable double tax treaty to 15%
- royalties – 30%, reduced in many cases because of an applicable double tax treaty to 10% or 15%.

### Losses

Losses can be carried forward indefinitely by individuals.

Losses can be carried forward indefinitely by corporate taxpayers subject to the taxpayer satisfying one of two tests. The tests are, first, the continuity of ownership test which requires that taxpayers maintain majority underlying ownership of the company in the same hands in the loss recoupment year as was the case in the year the losses were incurred. The alternate test is the same business test which requires that the identical business be conducted in the loss recoupment year as was conducted immediately prior to the failure of the continuity of ownership test.

Different and more complex tests apply for the recoupment of losses by trusts.

Revenue losses can be offset against assessable income, which may include both income and capital gains. Capital losses can only be utilised against capital gains.

### Thin capitalisation

Broadly, Australia's thin capitalisation rules permit a debt to equity ratio of 3:1 for both foreign controlled Australian corporates and for Australian corporates with offshore operations. An "arm's length" test may be applied where these limits are breached. A higher debt to equity ratio applies for financial institutions. Legislation provides a brightline test to distinguish debt and equity for tax purposes.

### Transfer pricing

Australia's transfer pricing rules are broadly in accordance with the OECD model. These rules require that related party cross border transactions are conducted on arm's length terms. Taxpayers undertaking related party cross border transactions are required to lodge a Schedule 25A with their annual income tax return. This schedule is, in part, used to monitor the taxpayer's compliance with the transfer pricing rules. The Australian Taxation Office has issued a number of lengthy rulings on the operation of the transfer pricing rules and has undertaken a number of audits or other reviews that have resulted in substantial adjustment to the taxable income of taxpayers where it is has been found that the rules have not been complied with.

### Double tax treaties

Australia is a party to many bilateral double tax treaties dealing with income and, in most cases, capital gains. These treaties set out to regulate the taxing rights between the countries involved. The treaties generally follow the OECD model.

## Goods and Services Tax (GST)

A 10% GST applies to most supplies connected with Australia, at each step along the production chain. It also applies to most importations. Registered suppliers are obliged to remit GST on supplies they make. For the most part registered recipients will be entitled to a credit for any GST included in the price of acquisitions they make. Non-residents may be entitled to register, thereby making available input tax credits in relation to expenses incurred in Australia.

GST does not apply to limited categories of goods and services, including:

- exports
- financial supplies
- residential accommodation
- basic food
- supplies of a going concern.

From an administrative perspective, the GST system relies on registration of businesses and the issuance of tax invoices by the suppliers of taxable goods and services.

### Australian Business Number (ABN)

The Australian Business Number (ABN) is a unique identifying number used by all businesses in their dealings with the Australian Taxation Office and other government departments. All enterprises registered for GST must have an ABN. It follows that non-residents which register for GST must also apply for an ABN. Non-residents which are not registered for GST but carry on an enterprise in Australia should also consider applying for an ABN. Business customers of non-residents which make supplies in the course or furtherance of an enterprise carried on in Australia must withhold 46.5% of amounts payable to the non-resident unless they are provided with an ABN.

## Fringe Benefits Tax (FBT)

FBT is imposed at 46.5% on the grossed up value of benefits provided to employees in respect of employment. The effect of taxing fringe benefits in this way is that employers pay FBT equivalent to the income tax that an employee on the top marginal rate of tax receiving the benefit would have paid had they purchased the benefit themselves from their after tax income. FBT is deductible to the employer for income tax purposes. Certain benefits, such as superannuation, are exempt from FBT while other benefits, such as motor vehicles, are concessional tax

## State taxes

As mentioned earlier, the states and territories also impose taxes. These include stamp duty, payroll tax, and land tax.

### Stamp duty

Stamp duty is generally a tax payable on transactions, including the transfer or conveyance of property or assets situated in, or attributable to, that state or territory and on loan security documents. Generally, the amount of the consideration or the unencumbered value of the property transferred (whichever is the greater) is the duty base. Stamp duty is usually payable by the purchaser or transferee. The stamp duty rates vary between each state and territory. Stamp duty is an important factor in any purchase of a business, being assessed upon the value of most of the assets, including goodwill (except in Victoria) acquired. Some states specifically exempt trading stock. The value of any liabilities assumed by a purchaser may also be treated as part of the purchase consideration.

### Payroll tax

Payroll tax is a tax levied in each state and territory on the gross salaries and wages paid by an employer for services rendered by employees in the state or territory. Certain payments to contractors may also be deemed to be wages. It is payable on a monthly basis with a final reckoning at the end of the year. The rates vary across the states and territories as do the thresholds from which point the tax becomes payable.

### Land tax

Land tax is a tax levied annually on the unimproved value of freehold land held within a state. The rate of land tax varies from state to state. Generally, land tax is calculated using a progressive tax scale, however, the threshold level for the imposition of the tax also varies from state to state. An owner's principal place of residence is generally exempt from land tax, as is land used for primary production.

## Superannuation guarantee

Employers are required to provide the prescribed minimum level of superannuation contributions in respect of an employee during a contribution period (a quarter) to a complying superannuation fund. In order to meet their superannuation guarantee obligations, employers are required to contribute a minimum of 9% of each employee's earning base for each quarter. There is a cap on the maximum contributions payable in respect of any particular employee.

If an employer fails to provide the prescribed minimum level of superannuation contributions in respect of an employee during a contribution period (a quarter) to a complying superannuation fund, it will be liable for a charge equivalent to the amount of the shortfall plus an interest component and an administrative charge.

Unlike the employer's payment of superannuation contributions, the payment of the superannuation guarantee charge is not deductible for income tax purposes.



