Doing business in Australia

An introductory guide

2008 Edition

PRICEWATERHOUSECOOPERS LEGAL

A business unit of

PRICEWATERHOUSECOOPERS

Contents

Introducing Australia

Size and population

Australia is the world's sixth largest country, comprising an area of approximately 7.7 million square kilometres. It is a vast continent covering a distance of approximately 3,700 kilometres from its most northerly point to its most southerly point and is almost 4,000 kilometres wide from east to west.

Australia is comprised of six states and two territories:

- the Australian Capital Territory, which includes Canberra, the political capital of Australia;
- New South Wales in which Australia's largest city Sydney, is located;
- Northern Territory;
- Queensland;
- South Australia;
- Tasmania;
- Victoria; and
- Western Australia.

In 2007 Australia's total population exceeded 20 million people.

The Australian lifestyle

Australia has one of the world's best lifestyles with life expectancy at 83.5 years for females and 78.5 years for males. With the low cost of living, affordable quality housing, extensive healthcare benefits and one of the best education and social systems in the world, Australia has much to offer expatriates and their families. Surveys of world cities consistently rate Sydney as offering a great lifestyle.[1]

Resources and climate

An industrialised continent, Australia is blessed with an abundance of mineral and agricultural resources and arguably the best climate in the world. Australia is located in the southern hemisphere, therefore summer is in the months of December to February while winter is in the months of June to August. In Australia's north, summer is hot with rain from November to March. Elsewhere, the average temperature is 28°C in January and dry. In the southern states, winter is mild with an average temperature in July of 16°C.

A multicultural community

Occupied by indigenous Australians and later settled as a British penal colony in the 18th century, Australia is an increasingly diverse, multicultural nation. Collectively over 200 different languages and dialects are spoken in Australia, including over 50 indigenous languages. Australia is home to people from more than 200 countries and has an enviable international reputation for diversity.

Certainty and security

The Australian legal system is a mixture of common law and statute, similar to the legal systems in the United Kingdom, other Commonwealth countries and some European countries. The common law tradition which applies in Australia expects and values judicial independence. Decisions of the courts conform to due process and are made in the context of prevailing law. Contractual arrangements are therefore protected by the rule of law and the independence of the judiciary. Domestic companies, foreign companies and individuals have the same standing before the law.

Regulatory framework

The Australian government (Government) recognises the need for a regulatory framework to keep pace with financial market developments. In 2001 the Government completed a major reform of Australia's corporate law aimed at streamlining regulation while maintaining market integrity and investor protection.

The Reserve Bank of Australia (Reserve Bank) has effectively suspended most of the provisions of the *Banking (Foreign Exchange) Regulations* 1959 (Regulations) (in force under the Banking Act 1959) through granting general authority and exemptions. While the terms of the Regulations ought to still be considered on a case by case basis to avoid potential exposure, the Reserve Bank generally regards exchange control as having been effectively abolished.

The Australian economy

Australia has one of the strongest, most competitive, open and flexible economies in the world.

1 *2007 Worldwide Quality of Living Survey* by Mercer Human Resource Consulting
2 *2006 Economic Survey by the Organisation for Economic Cooperation and Development*

Over the past 15 years, the standard of living in Australia has risen significantly, surpassing that of Canada, France, Germany, Italy, Japan, Russia and the United Kingdom.[2]

Australia's economy has grown(on average) by approximately 3.3% annually since 1990. In 2006, the Gross Domestic Product of Australia was approximately $1 trillion in value terms.

Australia's strong economic growth has been coupled with low inflation. Over the last 15 years, the inflation rate has been stable, at an average of 2.5% over the period.

The unemployment rate in Australia has fallen substantially from almost 11% in 1992 to less than 5% in 2007, its lowest level since the 1970s.[3]

Affluent domestic markets

Australia is one of the largest economies in the Asia Pacific region after Japan, China and Korea. China is Australia's largest trading partner.

Australia's time zone spans the close of business in the USA and the opening of business in Europe.[4]

A good place to do business

Multinational companies view Australia as presenting the best business case for regional headquarters to target the dynamic Asia Pacific region.

Key business centres in Australia include Sydney (New South Wales), Melbourne (Victoria), Brisbane (Queensland) and Perth (Western Australia). Prime office space in Australia is the lowest-priced in the developed region and amongst the most competitively priced in the world.[5] Australia's telecommunications costs are among the lowest in the region.

The Government has recognised the benefits of open markets by more than halving tariff rates on imports over the past decade. For business, this has meant lower input costs and increased productivity and efficiency. Changes to the tax system have also led to major reductions in business costs, especially for exporters. For example, the corporate tax rate has been cut from 36 to 30%, one of the lowest rates in the Organisation for Economic and Co-operation Development countries. Australia's corporate tax rate of 30% is very competitive when compared with other major economies, with higher company income tax rates applying in the United States, China, Japan, Germany, France and India.

Australia is a leading financial centre in the Asia Pacific region. Its stock exchange is the third largest in the region after Japan (with respect to market capitalisation) and it is the second largest equity market in the region. Sydney's Futures Exchange is the largest financial futures and options exchange in the region. Australia's alliance with markets throughout the region is increasingly providing business people with a comprehensive range of financial services in the Asia Pacific region.[6]

Australia offers real cost advantages for every category of business needs from prime central business district office space, metropolitan factory space and industrial land, to transport infrastructure and low-cost utilities.

There is a strong and enduring tradition of democracy in Australia where rule of law and regulatory frameworks prevail.

The work force

Australia continues to offer a multilingual, highly educated and skilled workforce. Australia has a comprehensive education and training system with around 50% of Australia's work force having some form of tertiary qualification. Australians also possess a diversity of language skills with approximately 15% of the population speaking a language other than English.[7]

Education in Australia

Australia offers one of the best education systems in the world. With a 99% literacy rate, Australia is able to provide a highly educated, skilled and computer literate labour force to investors.

Australia is a harmonious community which has benefited from an active program of immigration over the last 50 years. As at June 2005, nearly 1 in every 4 residents was born overseas. Of those born overseas, 30.8% were born in North West Europe, 17.3% in Southern and Eastern Europe and 12.7% in South East Asia.[8]

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3 For details refer to *www.dfat.gov.au*
4 Axiss Australia, *Australia: The new centre of global finance*
5 *The Global Office Occupancy Costs Survey 2004*
6 Axiss Australia, *Australia: The new centre of global finance and www. asx.com.au*
7 Axiss Australia, *Australia: The new centre of global finance*
8 *www.immi.gov.au*

Foreign investment in Australia

Foreign investment – an introduction

The government welcomes and encourages foreign investment consistent with community interests. Australia's screening process for foreign investment is transparent and very liberal. The Government has the power to block proposals that are required to be notified and which are determined to be contrary to the national interest.

The Foreign Investment Review Board (FIRB) is a non-statutory body that examines proposals by foreign interests to undertake direct investment in Australia and makes recommendations to the government on whether those proposals are suitable for approval under the government's Foreign Investment Policy and whether they are in compliance with the *Foreign Acquisitions and Takeovers Act 1975 (*Cth*)* (FATA).

FIRB also provides information on Australia's foreign investment policy guidelines and, where necessary, provides guidance to foreign investors to ensure compliance with the Government's policy.

Foreign interests

Australia's foreign investment legislation and policy applies to investment proposals by foreign interests. A foreign interest is defined as:

- a natural person, not ordinarily resident in Australia;
- a corporation in which a natural person not ordinarily resident in Australia or a foreign corporation holds a controlling interest;
- a corporation in which two or more persons, each of whom is either a natural person not ordinarily resident in Australia or a foreign corporation, holds an aggregate controlling interest;
- the trustee of a trust estate in which a natural person not ordinarily resident in Australia or a foreign corporation holds a substantial interest; or
- the trustee of a trust estate in which two or more persons, each of whom is either a natural person not ordinarily resident in Australia or a foreign corporation, hold an aggregate substantial interest.

Substantial foreign interest

A substantial foreign interest exists where a single foreign person (and any associates) holds 15% or more of the ownership of any corporation's business or trust or where several foreign persons (and any associates) hold 40% or more in aggregate of the ownership of any corporation, business or trust.

Investments requiring prior approval

Types of investment proposals which are subject to the FATA or the Foreign Investment Policy and which require FIRB approval are:

- the acquisition of shares in an existing Australian business with total assets over $100 million or where the proposal values the business at more than $100 million. For US investors, different exemption thresholds apply, namely $100 million for investments in prescribed sensitive sectors or by entities controlled by the US government, or $871 million in any other case;
- the acquisition of assets of an Australian business valued at more than $100 million. The thresholds for US investors are the same as for the acquisition of shares referred to above;
- proposals to establish new businesses involving a total investment of $10 million or more. Proposals by US investors, except an entity controlled by the US government, do not require notification but remain subject to other policy requirements;
- offshore takeovers of foreign companies whose Australian subsidiaries or assets exceed $200 million and account for less than 50% of global assets. For US investors, the $871 million threshold referred to above applies except for offshore takeovers involving prescribed sensitive sectors or an entity controlled by a US government, where a $200 million threshold applies; or
- direct investments by foreign governments or their agencies irrespective of size.

The acquisition of interests in urban land (including interests that arise via leases, financing and profit sharing arrangements) that involve:

- developed non-residential commercial real estate, where the property is subject to heritage listing, is valued at $5 million or more and the acquirer is not a US investor;
- developed non-residential commercial real estate, where the property is not subject to heritage listing and is valued at $50 million or more ($87 million for US investors);
- accommodation facilities (irrespective of value);
- vacant urban real estate (irrespective of value);
- residential real estate (irrespective of value); or
- shares or units in Australian urban land corporations or trust estates (irrespective of value) or
- proposals where any doubt exists as to whether they are notifiable. (Funding arrangements that include debt instruments having quasi-equity characteristics will be treated as direct foreign investment).

Sensitive sectors

Restrictions apply in more sensitive industry sectors which reflect community concerns and matters which are contrary to the national interest. Specific restrictions on foreign investment apply in sectors such as residential real estate, banking, media, telecommunications, shipping, civil aviation and airports. Normally, these categories include sectors where other government departments or interested parties would be involved in the screening process or have major carriage of the assessment of the application.

Australia – United States Free Trade Agreement (AUSFTA)

AUSFTA came into force on 1 January 2005, and is seen as the most important bilateral economic agreement ever undertaken by Australia. For the purposes of foreign investment in Australia, a US investor is a:

- national or permanent resident of the US;
- US enterprise; or
- branch of an entity located in the US and carrying on business there.

As stated above, different monetary thresholds apply to US investors in respect of investment proposals in Australia.

For US investors subject to AUSFTA, there are certain prescribed sensitive sectors in which special government guidelines and scrutiny apply to proposed investments. These sensitive sectors are:

- media;
- telecommunications;
- transport (including airports, port facilities, rail infrastructure, international and domestic aviation and shipping services provided within, or to and from, Australia);
- the supply of training or human resources, or the manufacture or supply of military goods, equipment or technology to the Australian Defence Force or other defence forces;
- the manufacture or supply of goods, equipment or technology able to be used for a military purpose;
- the development, manufacture or supply of, or the provision of services relating to, encryption and security technologies and communication systems; and
- the extraction of (or holding rights to extract) uranium or plutonium or the operation of nuclear facilities.

Acquisitions in these sectors are subject to different thresholds under the FATA.

Urban land

The government has a specific policy in relation to urban land and unless a proposed acquisition of urban land falls within an exempt class, a foreign interest is required to notify FIRB of any such investment proposal.

Urban land is defined as all land situated in Australia other than rural land. Rural land is land that is used wholly and exclusively for carrying on a substantial business of primary production. An interest in Australian urban land means:

- a legal or equitable interest in Australian urban land, other than an interest under a lease or licence or in a unit in a unit trust estate;

- an interest in a share in a company that owns Australian urban land, being a share that entitles the holder to a right to occupy a dwelling of a kind known as a flat or home unit situated on the land;
- an interest as lessee or licensee in a lease or licence giving rights to occupy Australian urban land where the term of the lease or licence (including any extension) is reasonably likely, at the time the interest is acquired, to exceed 5 years;
- an interest in an arrangement involving the sharing of profits or income from the use of, or dealings in, Australian urban land;
- an interest in a share in an Australian urban land corporation;
- an interest in a unit in an Australian urban land trust estate; or
- if the trustee of an Australian urban land trust estate is a corporation, an interest in a share in that corporation.

Approval process

The Australian Treasurer authorises FIRB to make determinations on foreign investment proposals which are consistent with the Foreign Investment Policy and do not involve any sensitive issues (mostly proposals involving real estate).

Proposals are examined to see whether they conform with the requirements of the Foreign Investment Policy and the FATA. Whilst the majority of proposals are approved, the Treasurer has the power under the FATA to prohibit proposals that are contrary to the national interest or to impose conditions on the approval.[9]

In most cases, approval is granted within 30 days of receiving a statutory notice (with FIRB having a further 10 days to advise the parties of the decision). FIRB may extend the period by a further 90 days if necessary.[10]

The national interest

In the majority of industry sectors, smaller investment proposals are exempt from the FATA or notification under the Foreign Investment Policy and larger proposals are approved unless it is determined that they are contrary to Australia's national interest. The screening process undertaken by FIRB allows comments to be gathered from relevant interested parties and other government departments in determining whether larger or more sensitive foreign investment proposals are contrary to the national interest.

FATA does not provide a definition of national interest. Therefore, the government determines what is contrary to Australia's national interest by reference to widely held community concerns.

The following factors may be considered when assessing whether a foreign investment proposal is contrary to the national interest:

- whether the investment proposal meets the requirements outlined in the Foreign Investment Policy;
- existing government policy and law;
- national security interests; and
- economic development.[11]

The screening process undertaken by FIRB in assessing applications provides a clear and simple process for reviewing the operations of foreign investors in Australia. The Government is therefore able to encourage foreign investors to operate in Australia as good corporate citizens when extending their activities to Australia.[12]

Following approval

Approval under the Government's Foreign Investment Policy is usually only given for a specific transaction and where it is expected that the transaction will be completed in a timely manner.

If an approved transaction:

- does not proceed at the time it is approved; and/or
- the parties enter into new agreements at a later date; or
- if a transaction is not completed within 12 months, further approval must be sought from FIRB for the transaction.

9 FIRB Annual Report 2005-2006
10 *www.firb.gov.au* and FIRB Annual Report 2005-2006
11 FIRB Annual Report 2005-2006
12 *"Summary of Australia's Foreign Investment Policy"* dated April 2007 at *http://www.firb.gov.au*

Where a proposal involves option agreements for the purchase of shares, assets or property, prior approval is required to acquire the options. Normally approvals for options will also extend to the exercise of those options, provided that such options are exercised within 12 months of the approval. Subsequent approval for the exercise of the options may be sought annually.

As stated above, the time period for an approval may be varied where it can be shown that an extended period is fundamental to the success of a proposal and that extending the timing of the proposal does not involve an activity (for example, real estate speculation) that would be contrary to the national interest. In such circumstances, the extended period will be stated in the approval.

Government incentives to industry

The government offers a number of incentives to promote foreign investment in Australia. These incentives range from taxable grants and tax relief to the provision of infrastructure services at discounted rates.

There are a number of government bodies established to promote and encourage foreign investment in Australia, such as Austrade and Invest Australia.

Austrade

Austrade's mission is to increase the wealth of the Australian public by assisting Australians to succeed in export and international business.

Austrade is a government agency dedicated to providing export and investment services to Australian companies, international buyers and investors engaging in business outside Australia. They:

- provide advice, market intelligence and support to Australian companies to reduce the time, cost and risk involved in choosing, entering and establishing international markets; and
- offer advice and guidance in respect of international investment and joint venture opportunities.[13]

Invest Australia

Invest Australia was established in 1997 and it is the government's national investment promotion agency that assists international corporations in growing their business in Australia.[14]

Invest Australia works closely with the other government agencies (including Austrade) and private sector service providers to offer a free, comprehensive and confidential service for potential foreign investors. Invest Australia provides services and assistance in the following areas:

- identifying and promoting investment opportunities in Australia;
- providing contacts within the relevant industry and government sectors;
- providing information on business opportunities in Australia, the business environment, investment regulations and government programs;
- offering expert advice from a range of industry specialists on Australia's industry capabilities and strengths;
- providing information on business costs, availability of skills, taxation and research and development opportunities;
- providing grants, tax relief or infrastructure;
- streamlining project approvals processes;
- providing prospective investors with contacts within the government; and
- facilitating major projects through the Major Projects Facilitation Project (MPF).[15]

Invest Australia provides MPF services to assist companies in their dealings with all levels of government. Applications for MPF status may be made to the Minister for Industry, Tourism and Resources if a project:

- is of strategic significance to Australia;
- needs government approval(s) or other involvement; and
- is commercially ready to proceed through government approval processes.

13 For further information refer to *www.austrade.gov.au*
14 Invest Australia's website is located at *www.investaustralia.gov.au*
15 *Australia. Your competitive edge (2006-07 edition)* – Invest Australia

Structure of business entities

Business entities – an introduction

A person can conduct business in Australia as a sole trader, in partnership, through a trust, through a joint venture or as a corporation.

Companies that are incorporated outside of Australia that wish to carry on business in Australia[16] must either incorporate a wholly owned or partly owned subsidiary company in Australia or register a branch office in Australia.

Most foreign companies conduct business in Australia through a wholly or partly owned subsidiary or through an Australian branch.

Incorporation

Foreign companies may establish an Australian subsidiary by registering a new company or by acquiring a recently incorporated shelf company which has not yet engaged in trade.

The *Corporations Act 2001* (Cth)(the Act) provides that a company may be:

- unlimited with share capital;
- limited by shares;
- limited by guarantee; or
- no liability (although this only applies if the company's sole objects are mining or mining related objects).

The most common form of business entity in Australia is a company limited by shares. Companies limited by shares are either proprietary companies or public companies. Only public companies may be listed on the Australian Stock Exchange Limited (ASX).

Proprietary companies

Proprietary companies are often used for private ventures or as subsidiaries of public companies.

A proprietary company:

- may either be classified as a large proprietary company or a small proprietary company depending on certain criteria (see below for details);
- results in the liability of the shareholders upon winding up of the company being limited to the amount unpaid on their shares (if any);
- is limited to 50 non-employee shareholders;
- cannot engage in fundraising activities in Australia that would require the lodgement of a prospectus or other disclosure document, except in limited circumstances;
- must have at least one Australian resident director; and
- must have the words "Proprietary Limited" or "Pty Ltd" in its name if it is a limited proprietary company.

A proprietary company is considered to be a large proprietary company if it satisfies two out of the three following criteria:

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

If a proprietary company does not satisfy two out of the above three criteria it is regarded as a small proprietary company.

Public companies

Public companies:

- are often used for larger public ventures;
- may have an unlimited number of members/ shareholders;
- must have at least three directors, at least two of whom must ordinarily reside in Australia;
- subject to applicable laws, may issue a prospectus for the offer of securities;
- can list on the ASX; and
- must have the word "Limited" or "Ltd" at the end of its name if it is a limited public company.

16 Whether a company is "carrying on business in Australia" is to be determined according to the facts and activities (or proposed activities) of the company

Australian branch

The establishment of an Australian branch may be preferable to incorporating a subsidiary if one of the objectives is to consolidate the financial results of the company in the place of residence of the overseas company. If a foreign company chooses to establish a branch office in Australia, it must be registered as a foreign company under the Act.

The foreign company must lodge an application form with the Australian Securities and Investments Commission (ASIC), with certified copies of the current certificate of incorporation and other prescribed documents. A registered office also needs to be established in Australia and a local agent must also be appointed.

Upon registration, an Australian Registered Body Number (ARBN) will be allocated to the foreign company.

Once registered, the branch must file the foreign company's annual accounts and comply with other reporting requirements.

Representative offices

Where a foreign company does not intend to carry on business in Australia it may seek to establish a representative office. Such an office must however only engage in activities which will not amount to carrying on business (for example, undertaking promotional activities). If the representative office engages in activities other than those which would not amount to carrying on business, an Australian branch must be registered.

Company and business names

A formal register of company and business names registered in Australia is maintained by ASIC.

The only restraints on the adoption of a name are that it must:

- be unique;
- be acceptable for registration; and
- not breach the legal principles codified in the Trade Practices Act in the area of "misleading and deceptive conduct", "misrepresentation" and "passing off".

Companies incorporated in Australia will be issued with a unique nine-digit Australian Company Number (ACN).

All companies registered under the Act are entitled to an Australian Business Number (ABN) which a company will need to register for the purposes of the Goods and Services Tax (GST).

If a company wishes to trade using another name (that is, other than its registered company name) then the trading name must be registered as a business name. Business name registration is obtained under individual Australian State or Territory legislation, and must be registered in each Australian State and/or Territory in which the company intends conducting business under the business name.

Constitution of a company

The activities of a company are carried out by the persons responsible for the management and control of the activities of the company. Such powers are normally divided between the directors and the shareholders. The way in which the power is shared between these two groups is determined by the terms of the company's constituent documents, namely its constitution.

The constitution of a company sets out the:

- company's name;
- terms of the liability of its members; and
- rules by which the company is to be internally regulated.

Process of incorporation

Incorporation is generally done by attending the ASIC office and the legal costs and registration fee are approximately $1,500 exclusive of GST.

In summary, the process involved in incorporating a proprietary company is:

Step 1: The foreign company must choose a company name for the Australian subsidiary and ensure that the name is available and acceptable for registration.

Step 2: The foreign company must complete the relevant application form and lodge the form with ASIC. ASIC will only register the company if the name is available. The form asks for details about the corporation. In addition, the form requires details of:

- the proposed directors/secretaries of the Australian subsidiary (the details required include the names, residential addresses, date and place of birth). At

least one director must be an Australian resident and companies cannot be directors;

- a registered office and principal place of business in Australia;
- the share structure; and
- shareholders.

After the company has been incorporated, the company will need to comply with the following post-incorporation matters which require the company to:

- apply for an ABN and Tax File Number (TFN);
- keep an up to date company register. This register will contain company records and will need to record minutes of all directors and shareholders meetings. The company will also be required to make an annual solvency declaration (that is, the directors must resolve that the company can pay its debts as and when they fall due for payment);
- keep and lodge financial statements each year. There is currently no fee for lodgement of financial statements with ASIC as long as they are lodged within the required time period. Late fees will apply if they are lodged out of time.

ASIC must be notified of changes to the following:

- company name, such notifications are to be made within 14 days of the change;
- company details (for example registered office or principal place of business), such notifications are to be made within 28 days of the change;
- company constitution, such notifications are to be made within 28 days of the change;
- directors details (for example name, address, new appointment or resignations), such notifications are to be made within 28 days of the change; or
- share structure or shareholder details, such notifications are to be made within 28 days of the change.

Share capital

The minimum number of shareholders for both a proprietary and a public company limited by shares is one shareholder.

The number of shares which can be issued by a company is unlimited.

The manner in which a company deals with its share capital is strictly regulated by the Act.

Directors and secretary

The directors of a company are responsible for the day to day management of its affairs. A public company must have at least three directors and a proprietary company, at least one director.

In the case of a public company at least 2 of the directors must be Australian residents and a proprietary company must have at least one director who ordinarily resides in Australia.

In order to qualify as an “Australian resident” or satisfy the requirement that the individual “ordinarily resides in Australia” it is not necessary for the person to be an Australian citizen. Whether the individual is to be regarded as an Australian resident/ordinarily residing in Australia is a question of fact and a number of criteria must be considered and satisfied.

Under the Act, a proprietary company is not required to have a secretary. If the company chooses to have one or more secretaries, at least one secretary must ordinarily reside in Australia.

A public company must have at least one secretary, and at least one secretary must be ordinarily resident in Australia.

Every company carrying on business or deriving property income in Australia must also appoint a public officer. The public officer appointed must be a resident of Australia. The public officer is responsible for undertaking or ensuring compliance with all things which are required of a company under Australian income tax legislation.

Registered office

An Australian company must have a registered office in Australia. The registered office must be a street address situated in Australia. A postal address will not satisfy the requirement that the company maintains a registered office.

Auditors and financial reporting

All public companies must appoint an auditor within one month of the date of their incorporation.

The following entities are required to prepare an annual financial report which must be audited:

- all public companies;
- all large proprietary companies; and
- small proprietary companies which are controlled by foreign entities.

ASIC will, in certain cases, grant relief from the requirement to prepare and audit financial reports for:

- large proprietary companies in which a foreign company has an interest; or
- small proprietary companies controlled by foreign companies.

Under the Act auditors have obligations with respect to independence, disclosure and financial reporting. Auditors are obliged to attend a company's annual general meeting and all shareholders are entitled to ask questions beyond the audit report regarding issues of independence. Also with respect to independence, an individual who plays a "significant role" in the audit of a listed company, such as an audit partner, must rotate off that audit after five successive years and not return for a further two years. The rotation requirement applies only to individual auditors and not audit firms.

Books, accounts, registers and filing requirements

The Act requires companies to maintain various records and registers of their accounting and administrative transactions. It is usually the company secretary (if one is appointed) who carries out such tasks.

The Act also requires certain documents to be filed with ASIC from time to time so that an up-to-date record of the company's affairs is available for inspection by the public. A public company must prepare and lodge with ASIC annual financial reports. Every company must lodge an annual return in which a director or secretary of the company confirms relevant details of the company for the public register including names and addresses of all directors, address of principle place of business and details of shareholders and their shareholdings.

Australian Securities Exchange (ASX)

Australian Securities Exchange – an introduction

Australia's national stock exchange is the Australian Securities Exchange (ASX) registered under the name ASX Limited.

Smaller stock exchanges exist, however do not have the depth and breadth of the ASX. The ASX was formed in 1987 through the amalgamation of six independent stock exchanges and became a listed company on 13 October 1998. On 25 July 2006, the ASX merged with SFE Corporation Limited, making the combined entity the 9th largest listed exchange in the world.

The stated objectives of the ASX are to provide a fair, well-informed market for financial securities and an internationally competitive market. To this end the ASX issues listing rules which all listed entities must observe. The ASX Listing Rules (Listing Rules) govern:

- listing;
- quotation;
- market information;
- reporting;
- disclosure;
- trading and settlement;
- administration;
- general supervisory matters; and
- various other aspects of a listed entity's conduct.

The Listing Rules aim to protect the interests of listed entities, maintain investor protection and regulate the operation of the market. The Listing Rules are enforceable against listed entities and their associates under the Act.

Admission categories

An Australian incorporated company wishing to list on the ASX must fall within one of the following categories:

- *general admission* – a company seeking admission under this category must satisfy either the "Asset test" or the "Profit test";
- *exempt foreign* – a company seeking admission under this category must be listed on an overseas exchange which is a member of the International Federation of Stock Exchanges; or
- *debt issuer* – a company seeking admission under this category will issue debt securities only.

General admission

For an Australian registered company to be generally admitted to the official list, the following conditions must be met to the ASX's satisfaction:

- profit/asset test;
- shareholders spread; and
- prospectus/information memorandum.

Profit/Asset Test

A company seeking admission to the official list must satisfy either the "Profit test" or the "Asset test".

To seek admission under the "Profit test", the company's:

- aggregated gross profit from continuing operations for the last three full financial years must have been at least $1 million; and
- consolidated gross profit from continuing operations for the last 12 months (to a date no more than two months before the company applies for admission) must be more than $400,000.

To seek admission under the "Asset test":

- the entity must have either net tangible assets at the time of admission of at least $2 million after deducting the costs of fund raising, or a market capitalisation of at least $10 million (based on the offer price under the prospectus) and either
  - less than half of the company's total tangible assets (after raising any funds) must be cash or in a form readily convertible to cash; or
  - half or more of the company's total tangible assets (after raising any funds) are cash or in a form readily convertible to cash, and the company has commitments consistent with its business objectives to spend at least half of its cash and assets in a form readily convertible to cash; and
- the company must have working capital of at least $1.5 million, or an amount that would be $1.5 million if the company's budgeted revenue for the first full financial year that ends after listing was included in the working capital.

Shareholders spread

The ASX requires a company seeking general admission to have a satisfactory spread of shareholders. The company will meet this requirement if it has:

- at least 500 shareholders who each hold shares with a value (based on the prospectus issue price) of at least $2,000; or
- at least 400 shareholders who each hold shares with a value (based on the prospectus issue price) of at least $2,000 provided that at least 25% of the company's shares are held by ordinary members of the "public", that is, unrelated parties of the company.

Restricted securities, being shares that are required to be subject to "escrow" by the ASX will not count towards satisfying the shareholder spread requirements.

Prospectus/information memorandum

Generally, an entity seeking to list on the ASX in conjunction with fundraising will need to issue a prospectus.

This will require the company to:

- prepare a prospectus;
- lodge the prospectus with ASIC; and
- issue the prospectus to the public.

If the company:

- does not need to raise funds in conjunction with its application to list on the ASX; and
- has not raised funds in the three months prior to its application to the ASX; and
- will not raise funds in the three months after its application to the ASX,

an information memorandum (rather than prospectus) may be acceptable to the ASX.

Foreign exempt entity

Under the Foreign Exempt Entity provisions of the Listing Rules, a foreign entity that is listed on a reputable overseas exchange may apply to be listed on the ASX in the Foreign Exempt Entity category. The rationale behind this rule is to give Australian investors access to a wider range of securities.

An entity admitted to this category has the considerable advantage of not having to comply with the ASX's continuous disclosure requirements and timetable requirements for corporate actions. As such, entities will still be governed by similar requirements in the jurisdiction of their principle listing.

The threshold for admission to this category requires the entity to have either net tangible assets of A$2 billion or operating profit for each of the past three years of at least A$200 million.

Visa & immigration for business

Business visitors

There are a number of visa categories available to businesses and business people wishing to come to Australia. Visa requirements vary and they allow the permanent and temporary entry of business people and highly skilled individuals into Australia. Business people planning to enter Australia for a business visit are able to apply for the Business (Short Stay) visa which usually allows a stay of up to three months in Australia on each visit.

The Electronic Travel Authority (ETA), which is similar to the Short Stay visa referred to above, is available to nationals of certain countries. Care should be taken to obtain the Business ETA and not the Tourist ETA if coming on business.

Sponsoring staff to Australia

Companies operating in Australia, or those in other countries wishing to establish an entity in Australia, are able to sponsor individuals to come on a Business (Long Stay) visa, which allows a stay in Australia of up to four years. Individuals sponsored on these visas are able to work in a specified position within the company.

Sponsors of a Business (Long Stay) visa must demonstrate that:

- their business is reputable;
- they are in good financial standing to meet the sponsorship obligations;
- they recruit and develop Australian staff; and
- there will be benefits to Australia resulting from the sponsorship.

Companies operating in Australia may sponsor staff for permanent residence if they are in a highly skilled position, subject to meeting relevant criteria.

Business owners and investors

Business people can apply to come to Australia to start their own business, without the need for a sponsor, subject to having a suitable business background and assets. These visas are available to:

- business owners;
- senior executives of major companies with a turnover of greater than $50 million per annum; and
- those people wishing to invest in Australia for at least four years.

In most cases people will enter Australia on a provisional or temporary visa and must qualify after entry through a business in Australia or via meeting investor requirements. Sponsorship by State governments may be obtained to assist applications.

There are also other opportunities for business people to migrate to Australia if they are able to satisfy requirements in one of the skilled visa categories, which will look at the applicant's:

- age;
- English language ability;
- qualifications; and
- work experience.

In addition, those people may be sponsored by relatives. In some cases, those in rural or regional areas will gain additional benefits to assist them to qualify for a permanent entry visa.

Temporary entrants will need to consider medical insurance and costs associated with the education of children. Permanent residents are free to purchase property whereas there are restrictions placed upon the ability of temporary residents to purchase property.

Employers sponsoring staff to Australia should also examine possible exemptions for the Superannuation Guarantee Charge and obtain relevant taxation advice in this regard.

All businesses sponsoring temporary residents are subject to monitoring by officials regarding their compliance with certain undertakings. Compliance with immigration law in general is taken seriously and employees should have regard to ensure that people they employ have the correct authorisation.

Corporate tax

Corporate tax issues

The following summary provides a brief outline of the tax issues that may be applicable to a foreign entity doing business in Australia and originating from a country which participates in the international double-tax arrangements to which Australia is a party.

Direct tax

Income tax

A company is a resident of Australia for income tax purposes if it is:

- incorporated in Australia; or
- not incorporated in Australia, however, it carries on business in Australia and either its:
  - central management and control are in Australia; or
  - voting power is controlled by shareholders who are residents of Australia.

An Australian company is liable to pay Australian tax on all of its worldwide assessable income at the general corporate tax rate of 30%.

Capital gains tax

Capital assets held by an Australian resident company will generally incur tax payable on any capital gain on their disposal at the corporate tax rate.

Disposal of shares in an Australian subsidiary by a non-resident shareholder should be exempt from Australian capital gains tax if these shares have been held on capital account and the Australian subsidiary does not qualify as a land rich company (that is broadly, when the market value of the subsidiary's land assets does not exceed the market value of its non-land assets).

Dividends paid by an Australian company

If fully franked dividends (that is, dividends derived from profits on which Australian corporate tax has been paid) are paid by an Australian subsidiary to its foreign parent, no dividend withholding tax is payable. To the extent that dividends are unfranked, dividend withholding tax of 30% (or as reduced under the relevant double tax treaty) is payable on the gross unfranked amount.

Debt funding of an Australian company

Interest withholding tax of 10% is imposed on interest paid by an Australian company to a foreign non-resident lender entity. If, however, the beneficial owner of the interest has a permanent establishment in Australia and the interest is effectively connected with the permanent establishment, such interest is taxable by assessment in Australia.

Under debt and equity classification rules applying from 1 July 2001 there may be situations where interest payable is treated as if it were a dividend. Similarly, dividends paid on shares that are classified as debt interests will not be frankable.

Legislation also limits the amount of interest that can be deductible under the "Thin Capitalisation" rules, where very broadly, debt exceeds 75% of net assets (excluding debt).

Royalties payable to a foreign company

If an Australian company pays royalties to a foreign resident, the royalties will be subject to royalty withholding tax at the rate of 30% (or as reduced under the relevant double tax treaty) and may give rise to transfer pricing issues.

Transfer pricing

Australian transfer pricing rules are quite stringent and are a major issue with the Australian Taxation Office ("ATO"). In most cases related party cross-border transactions are required to be disclosed to the ATO on filing of a tax return. Australia adopts the arm's length concept as promulgated by the OECD. Consequently all such related party transactions should be considered with care.

Group taxation

A tax consolidation regime applies for income tax and capital gains tax purposes for ultimately 100% owned group companies, partnerships and trusts for such entities that are resident in Australia. Australian subsidiaries that are 100% owned by a foreign company and that have no common Australian head company between the non-resident parent and the Australian resident subsidiaries are also allowed to consolidate.

Groups that choose to consolidate must include all 100%-owned entities and the choice is irrevocable. Transactions between group companies are then ignored for income tax purposes.

Tax incentives

Inward investment

Depending on the nature and size of the investment project, the relevant Australian State governments may give rebates from payroll, stamp and land taxes on an ad hoc basis and for limited periods.

Capital investment

The incentives for capital investment that may apply are listed below:

- Accelerated deductions are available for capital expenditures on the exploration for and extraction of petroleum and other minerals. Certain capital expenditures incurred after 16 August 1989 in respect of quarrying operations also qualify for concessional treatment.
- Deductions apply to eligible Research and Development (R&D) expenditure of up to 125%. Expenditure in acquiring or gaining access to technology, known as core technology expenditure, is deductible at 100% if the purpose is to carry on eligible R&D. There is a 175% premium rate deduction for certain expenditure subject to certain conditions. For small companies, a cash rebate may also be available.
- Non-resident pension funds that are tax-exempt in their home jurisdiction; are residents of Canada, France, Germany, Japan, United Kingdom, United States or some other prescribed country; and satisfy certain Australian registration requirements, are exempt from income tax on the disposal of investments in certain Australian venture capital equity held at risk for at least 12 months. From 1 July 2002, this exemption was extended to certain other tax-exempt non-resident investors.
- Until 31 December 2006, eligible investment companies could be registered as pooled development funds (PDFs). PDFs are investment companies established to provide equity capital to small and medium-size enterprises. PDFs are taxed on their net income at 25%, except for income from small and medium-size enterprises, which is taxed at 15%. PDFs are entitled to imputation credits on the receipt of franked dividend income. Dividends from PDFs are tax exempt. Gains on the sale of shares in a PDF are exempt from tax, and losses are not deductible. The government has announced that it will replace the PDF program with an "early stage venture capital limited partnership"(EVSCLP) investment vehicle. The PDF program is closed to new registrations from 1 January 2007.

The ESVCLP program is aimed at stimulating Australia's early stage venture capital sector by allowing generous tax concessions for funds meeting the registration and investment criteria.

An ESVCLP is a venture capital fund, legally structured as a limited partnership and registered with Innovation Australia in accordance with the Act. An ESVCLP is a tax flow-through vehicle - that is, the ESVCLP will not be taxed at the partnership level. In addition, income and capital gains earned as a result of investment in an ESVCLP will be exempt from tax in Australia in the hands of the partners. Tax losses by ESVCLPs, however, will not flow through to nor be deductible by partners.

ESVCLPs must have their investment plan and partnership deed approved by Innovation Australia before they commence their investment activities. There are also a number of legislative requirements which restrict both the financial structure of ESVCLP investments and the nature of the investee entities. Among those requirements are:

- ESVCLPs must not invest in entities whose value exceeds $50 million;
- ESVCLPs must divest an investment once its value exceeds $250 million;
- ESVCLPs may only invest in entities whose predominant activities are eligible activities. Activities which are not eligible include property development, land ownership, banking, providing capital to others, leasing, factoring, securitisation, insurance, construction or acquisition of infrastructure or related facilities and making investments directed at deriving income in the nature of interest, rents, dividends, royalties or lease payments;
- the size of the ESVCLP fund must be at least $10 million (and not greater than $100 million); and
- no single partner's interest in an ESVCLP may exceed 30% of the total committed capital.

In addition, ESVCLPs are required to lodge quarterly and annual reports with Innovation Australia.

The total amount a partnership invests in interests (including debt & equity interests) of a company/unit trust and any associate or other member of the same wholly owned group of that company/unit trust must not exceed 30% of its committed capital. There are exceptions to this rule, which include superannuation funds, authorised deposit taking institutions and life insurance companies.

The taxable income derived from pure offshore banking transactions by an authorised offshore banking unit in Australia is taxed at the rate of 10%.

Indirect tax

Stamp duty

The various States and Territories of Australia impose stamp duty at various rates on transactions including mortgages, securities, insurance policies, non-marketable share transfers, lease documents and contracts regarding the transfer of assets, businesses or real estate. In certain States and Territories, some of the above transactions are stamp duty exempt.

Land tax

The government of each State of Australia and the Australian Capital Territory levies land tax (which is a tax levied on the owners of land) based on the unimproved capital value of land. Varying rates of land tax apply across Australia and the rate payable generally increases according to the value of the property. Usually the land tax liability arises for land owned at a particular date, which in New South Wales, is at midnight on 31 December in each year.

Payroll tax

Payroll tax is levied on employers. This is a State based tax and the rates payable vary between the States, as do the rules regarding exactly what income is liable to payroll tax. For example, the current New South Wales rate of payroll tax is 6%. This applies whether or not an individual is paid from a foreign or from a local payroll.

There are exemptions for small pay rolls. Currently in New South Wales the exemption level is $600,000.

Customs duty

Customs duty is generally levied on the “customs value” of goods. The customs value is determined in accordance with Australian law and may not necessarily be the same as the sale price of the goods. Customs duty is payable at the time the goods enter into Australia.

The payment of customs duty is generally handled by an Australian customs broker who will be familiar with the Australian customs duty applicable to the relevant products, and who will deal with the Australian Customs Service for the release of the goods once duty is paid.

Goods and services tax (GST)

For information regarding GST, refer to the following section of this guide – Goods and services tax.

Goods and Services Tax (GST)

An overview of GST

A broad based goods and services tax (GST) has applied in Australia since 1 July 2000. The GST is based on the value added tax (VAT) model adopted in many countries around the world. Its effect is a tax of 10% on the consumption of most goods, services and property in Australia, including those that are imported, but will generally not apply to exports of goods or services consumed outside Australia.

Some key points in relation to GST are listed below:

- GST is payable at the rate of 10% on the GST exclusive price of the supply of most goods, services or anything else (such as the granting of a right i.e. a taxable supply) made by an entity which is registered for GST, except to the extent that the supply is input taxed or GST-free. An "entity" may include an individual, a corporation, a partnership, another unincorporated association or body of persons, and a superannuation fund.
- The supplier of the goods or services is legally liable for the GST on the supply. The supplier must remit the GST to the Australian Tax Office (ATO) within a specified period. Typically, the amount of GST will be recovered by the supplier by including the amount of GST in the price of the goods or services, which is then paid by the recipient.
- Subject to certain exemptions, GST is payable on the importation of goods at the rate of 10% of the value of the goods. The value of the goods includes the customs value, customs duty, the cost of transporting the goods to their place of consignment in Australia and insuring such transport, and any wine equalisation tax payable, if it is not included in the customs value.
- If an entity is carrying on an enterprise, and its annual turnover equals or exceeds the registration turnover threshold, then it must register for GST. This threshhold is currently $75,000 except in relation to non-profit bodies carrying on an enterprise where the threshold is $150,000.
- Some types of supplies are not subject to GST. As mentioned above, these are GST-free and input taxed supplies.
- Some goods and services will be GST-free, which in other GST or VAT regimes is referred to as "zero-rated". Where goods or services are GST-free, the supplier is not liable to pay GST on the supply. Although no GST is charged on the supply, the supplier may obtain an input tax credit from the ATO for GST paid by the supplier in respect of other goods and services acquired or imported for use in carrying on the supplier's enterprise.
- There is no input tax credit for anything acquired or imported for private consumption.
- The following supplies may be GST-free, subject to other conditions being satisfied:
  - exports;
  - international travel;
  - domestic air travel if purchased overseas by non-residents;
  - most health, education and child care services;
  - food; and
  - water, sewerage and drainage.
- Other GST-free supplies include, but are not limited to:
  - the sale of an existing business (what is called in the legislation "the supply of a going concern");
  - the first supply of precious metals;
  - supplies through inwards duty-free shops;
  - grants of freehold and similar interests by government; and
  - certain supplies of farm land.
- Some supplies are input-taxed, which in other GST or VAT regimes is referred to as exempt. In this instance, the supplier does not pay GST on the supply and is not entitled to claim input tax credits from the ATO on things acquired or imported to make the supply, except in certain circumstances where a partial input tax credit may be available for acquisitions of a specified kind that relate to making financial supplies.
- The following are some examples of input-taxed supplies:
  - certain types of financial services;
  - residential rents and the supply of residential premises other than the sale of new residential premises (which are taxable); and
  - the subsequent supply of precious metals after the first GST-free supply of the precious metal.

- GST returns are generally lodged in the approved form on a quarterly basis by suppliers with annual turnovers of less than $20 million, unless they elect to lodge returns on a monthly basis. Suppliers with an annual turnover of $20 million or more must lodge GST returns on a monthly basis.
- Payment of the net amount of GST for an entity's one month or three month "tax period" and lodgement of returns, is required 21 days after the end of the entity's tax period. Where monthly returns are required, payment must be made electronically.
- The Australian Customs Service will collect GST from importers of goods at the time of importation unless the Deferred GST Scheme applies. An input tax credit in respect of the GST paid on an importation is only available if the importer is registered for GST. Some importations of services may also be taxable.
- Displayed prices must include the GST amount.
- A registered supplier who acquires second-hand goods from an unregistered entity and re-sells the goods in the course of an enterprise, may be entitled to an input tax credit, subject to some exceptions. The amount of the input tax credit for an applicable acquisition of second-hand goods for which the consideration paid by the supplier is more than $300 is as follows:
  - an amount equal to 1/11th of the consideration for the acquisition; or
  - if that amount is more than the GST payable on the taxable supply of the goods, the amount of the GST payable on the taxable supply.
- The amount of the input tax credit for an applicable acquisition of second-hand goods for which the consideration paid is $300 or less is an amount equal to 1/11th of the consideration paid by the supplier for the acquisition.
- The sale of a freehold interest or other interests in land by a registered entity will be subject to GST either under the general GST rules or under the margin scheme provisions, provided the supplier and the recipient agree in writing that the margin scheme is to apply, and provided other conditions are met. Where the general GST rules apply, GST is calculated on the full value of the property. Where the margin scheme is applied, the amount of GST payable is 1/11th of the margin for the supply. Special rules also apply to a supply of a freehold interest, strata unit or long-term lease made on or after 17 March 2005.
- A sale of residential premises by a private individual(s) to another private individual(s) is outside the scope of the GST.
- The supply of an insurance policy by an insurer is generally taxable. However, life insurance is an input taxed financial supply and insurance supplies that qualify as exports and private health insurance policies, are generally GST-free supplies.

Personal tax

Australian tax implications of resident status

For individuals, the tax implications of resident status may be summarised as follows.

- Residents are subject to tax on worldwide income and taxable capital gains (although a foreign tax credit is generally available within limits).
- The top marginal tax rate is 45% and this applies to income over $150,000 (tax on the first $150,000 is $47,100 for the year ending 30 June 2008).
- Medicare is Australia's universal health insurance scheme. Contributions to the health care system are generally made through the tax return via the Medicare Levy. The levy is 1.5% of taxable income and reportable fringe benefits. A Medicare Levy Surcharge of an additional 1% of taxable income and reportable fringe benefits is payable for higher income earners who do not have appropriate private hospital insurance. An exemption from the Medicare levy is available to expatriates from certain countries, low income earners, and some other taxpayers meeting certain requirements.
- Inbound expatriates who are temporary residents will be exempt from tax in Australia on any foreign sourced investment income. They are also subject to capital gains tax on a narrower range of assets;
- Residents may be subject to an accruals taxation system in respect of investments in certain foreign trusts, controlled offshore companies and interests in certain foreign investment funds and foreign life assurance policies. Temporary residents are exempt from this regime.
- There is a requirement for each employer to make a compulsory contribution into an Australian approved retirement fund on behalf of each employee (excluding certain senior expatriate executives). The amount is currently 9% of salary up to a specified salary cap, $36,470 per quarter for the year ending 30 June 2008. However, certain exemptions may apply for inbound expatriates.

Taxation of employment income

A resident individual's worldwide employment income will generally be subject to Australian tax, regardless of whether or not the income is remitted to Australia.

Employment income subject to tax includes base salary, wages, allowances (other than exempt living-away-from-home allowances), commissions, director's fees and other cash remuneration such as bonuses and profit sharing payments including employee share/option schemes.

Any contract of employment should be reviewed by an Australian employment lawyer and/or taxation adviser prior to finalisation. This is important for purposes of identifying possible questions of residency and putting in place tax effective remuneration packages, particularly living-away-from-home benefits.

Fringe Benefit tax

Fringe Benefit tax (FBT) applies to most non-cash benefits provided by an employer to an employee or an associate of an employee, previous employee or future employee.

The main areas generally affected by this tax are motor vehicles provided to employees, low or no interest loans, and payment or reimbursement of private expenses.

Fringe benefits are not taxable in the employee's hands. Instead, a separate tax collection procedure applies to fringe benefits, which is levied on the employer at the highest marginal tax rate. However, it is not uncommon for the employer to pass on the FBT costs as part of a total remuneration package for the employee.

FBT is levied on the employer and is payable with respect to benefits paid by both an Australian company and an overseas company where the employee is working in Australia. However, there are numerous FBT exemptions and concessions for benefits which relate to employment assignments and re-locations.

Net capital gains

Capital gains that have been derived on the disposal by sale, or otherwise, of assets acquired after 19 September 1985 are generally included in assessable income. Effective 21 September 1999, where the asset is held for more than 12 months (subject to certain exemptions) only 50% of the net capital gain is assessable. Foreign residents and temporary residents are only subject to capital gains tax on a limited range of assets. There are also special rules that apply to valuation of assets for capital gains tax, where an individual becomes a tax resident for the first time. The disposal of a main residence is generally not subject to capital gains tax.

Planning for investments

As previously indicated, residents of Australia who are not considered temporary residents are subject to Australian tax on their worldwide income, less a foreign tax credit where applicable. It is essential therefore to review personal investments and other related matters prior to becoming a resident of Australia to determine tax exposure and planning opportunities.

Taxation of Foreign Arrangements (TOFA)

These measures prescribe the way in which foreign exchange gains and losses are identified and calculated and provide strict timing rules for ascertaining when foreign exchange (forex) gains and losses are recognised for tax purposes.

The TOFA legislation may apply to bank accounts and loans denominated in foreign currency if the accounts and loans were established, entered into, re-financed or varied on or after 1 July 2003. Certain exemptions may apply where specific conditions are met. Individuals who are considered temporary residents however, are not subject to these rules.

Before becoming a resident

Anyone contemplating becoming a resident of Australia should always seek specific advice regarding the application of Australia's tax rules and planning opportunities.

Overview of Australian employment law

Australian employment law – an introduction

Broadly speaking, Australian employment law is derived from the following sources:

- the common law, notably the employment contract and implied duties imposed on employers and employees;
- the statutory and regulatory framework; and
- industrial instruments, such as industrial awards and workplace agreements.

The common law

The common law is a primary source of obligations in employment in Australia. The most obvious source of obligations at common law arises from the contract of employment. A contract of employment (whether written or oral) governs every employment relationship.

The employment contract involves the employer offering and the employee accepting employment with the rights and duties associated with that relationship. The following four things must exist before there is an established employment contract:

(a) offer;

(b) acceptance;

(c) consideration; and

(d) an intention to create legal relations.

An employment contract need not be in writing, though it is recommended.

A written employment contract ought to address a range of issues which will vary depending on a range of factors, including but not limited to the:

- nature of the employment relationship;
- employee's role and seniority; and
- employer's requirements, including confidentiality, intellectual property and restraints on the activities of the employee both during and after employment.

If used effectively, a written employment contract provides a mechanism by which the parties' relationship may be effectively set down, governed and measured.

The importance of having a written and up-to-date employment contract has become more significant over the past few years, following several recent developments in the way courts approach cases concerning disputes over parties' obligations, rights and entitlements in an employment context.

The statutory and regulatory framework

Australia has a two-tiered Federal and State industrial relations framework. There are many Federal and State laws which affect the terms of an employee's employment.

On 27 March 2006, the Australian statutory framework changed dramatically, with the commencement of the Federal Government's *Workplace Relations Amendment (Work Choices) Act* 2005 (Cth), known commonly as "WorkChoices". WorkChoices greatly extended the coverage of the Federal industrial relations system.

On 24 November 2007, a new Labor Federal Government was elected to Federal Parliament. The new Labor Federal Government has indicated that it intends on making substantial changes to the Federal industrial relations system. As a result, on 28 March 2008 the *Workplace Relations Amendment (Transition to Forward with Fairness) Act* 2008 (Cth) commenced. The Federal Government is expected to release a further bill containing its more substantial reforms later in 2008, which it intends to be operational by 1 January 2010.

An employer will be subject to predominantly either the Federal or State industrial relations system, depending on whether they fall within the coverage provisions of the Federal or relevant State legislation.

Since the introduction of WorkChoices, the majority of employees in Australia are covered by the Federal system where they are employed by a trading, financial or financial corporation (that is, a constitutional corporation) operating in Australia.

State legislation will continue to regulate employers who are not a constitutional corporation (such as a partnership or sole trader), and will cover all employers in relation to certain areas of their employees' employment, such as long service leave, occupational health and safety and workers compensation.

The Federal statutory framework

The *Workplace Relations Act* 1996 (Cth) (WR Act) was substantially amended by WorkChoices, the majority of which commenced on 27 March 2006.

WorkChoices, amongst other things:

- established a new body known as the Australian Fair Pay Commission (Fair Pay Commission) (which replaces the Australian Industrial Relations Commission (AIRC) in its minimum wage setting function);
- restructured industrial instrument making, including generally increasing the maximum workplace agreement life from three years to five years;
- established different types of collective and individual registered workplace agreements and set conditions regarding the content, notification to employees, and requirements for the lodgement of such workplace agreements;
- established a new statutory set of minimum employment conditions known as the Australian Fair Pay and Conditions Standard (Standard), which prescribes minimum entitlements of employees including minimum wages, maximum ordinary hours of work, and annual, personal/carer's, compassionate, and parental leave entitlements;
- imposed conditions for the cashing out of annual leave and personal/carer's leave;
- exempted companies with 100 or fewer employees from statutory unfair dismissal claims, subject to grouping provisions under which related bodies corporate of an employer are taken to be one corporate entity for the purposes of calculating the number of employees;
- exempted companies from unfair dismissal laws where a dismissal is for a genuine operational reason;
- increased restrictions on employees and trade unions taking protected industrial action and mandated secret ballots as a prerequisite for employees taking protected industrial action;
- imposed requirements in relation to employees where there has been a transmission of business; and
- implemented complex transitional arrangements to assist the transition of employers and employees from one system to the other.

The transitional arrangements imposed by WorkChoices apply to employers who are constitutional corporations entering the Federal system from their respective State system. Those employers have a three year transitional period (which commenced on 27 March 2006).

Employers who are currently in the Federal system and who are not constitutional corporations and do not otherwise fall within the Federal coverage provisions, have five years to move from the Federal system to their respective State system.

The State statutory framework

Employers who are not covered by WorkChoices will continue to be covered by their respective State industrial relations legislation, for example, the *Industrial Relations Act* 1996 (NSW), and other applicable State legislation regulating their employees' terms and conditions of employment.

Industrial instruments

The terms of conditions of employment of a large percentage of Australian employees are governed by industrial instruments, known as awards or workplace agreements.

An award is an instrument made by an industrial tribunal, for example, the AIRC or a State industrial tribunal such as the Industrial Relations Commission of New South Wales. Awards are binding legal documents. Typically, they specify certain minimum terms and conditions of employment, such as wage levels and leave benefits.

Before WorkChoices commenced, Federal awards normally only bound those employers listed in the award, those who were members of an employer association which was a respondent to the award, or those employers who became subject to the award through a transmission of business. For employees in Victoria, Federal awards could also be extended to cover all employees performing work in that state which was covered by the terms of the Federal award.

After WorkChoices commenced, employers and employees who were bound by a Federal award immediately before WorkChoices commenced, continue to be bound by that award and employers, organisations and employees who were not covered by an award on the commencement of WorkChoices will not become bound

to an award other than by order of the AIRC. The AIRC is currently conducting an award rationalisation process, as part of which it will decide who is bound by awards made or varied during the award rationalisation process.

State awards, by contrast, generally apply to all employees in a particular industry or occupation in the relevant State jurisdiction. Since the introduction of WorkChoices, as part of the transitional arrangements, all State industrial instruments insofar as they apply to employers covered by the Federal system, are deemed to be Federal instruments and are subject to its rules. Pre-WorkChoices State awards became known as Notional Agreements Preserving State Awards (NAPSAs), while pre-WorkChoices State enterprise agreements become Preserved State Agreements (PSAs). Those instruments continue to operate subject to complex transitional provisions in the WR Act.

New Federal workplace agreements can be made collectively, either as agreements between the employer and a group of employees (employee collective agreements) or between an employer and a trade union representing employees in a workplace (union collective agreements), or on an individual basis (known as an Australian Workplace Agreement (AWA)). In State jurisdictions there are also enterprise agreements approved by the respective industrial tribunals.

Changes to the Federal statutory framework

The major changes made by the new Labor Federal Government in its *Workplace Relations Amendment (Transition to Forward with Fairness) Act* 2008 (Cth) include:

- abolishing AWAs – AWAs in force at the time the bill becomes law will continue to operate for their term until terminated in accordance with the WR Act. AWAs that have passed their nominal expiry date will be terminated by either party on 90 days' notice. An employee would then be covered by the collective agreement or industrial award that otherwise applied in the workplace;
- establishing a new type of individual agreement – Individual Transitional Employment Agreements (ITEAs). ITEAs are only available to employers that on 1 December 2007 employed an employee under an AWA, a preserved individual State agreement, or an individual Victorian employment agreement. ITEAs must have a nominal expiry date of no later than 31 December 2009;
- removing the right to unilaterally terminate collective agreements on 90 days' written notice after their nominal expiry date. Instead, a party wishing to terminate an expired collective agreement will have to apply to the AIRC and the AIRC will have the power to terminate the agreement if it is satisfied that to do so is not contrary to the public interest;
- collective workplace agreements made prior to WorkChoices amendments may be extended or varied for a maximum of three years on application to the AIRC, which can only approve of the extension/variation if the parties genuinely agree, and they cannot do so, if industrial action is threatened or organised by either party;
- when an employer wishes to enter into a new collective agreement or ITEA it must pass the new "no disadvantage test". A new collective agreement must not result, on balance, in a reduction in the overall terms and conditions of employment compared to a relevant award. An ITEA must not disadvantage an employee against an applicable collective agreement and the current Standard, or in the absence of a collective agreement, the current Standard and a relevant award. The new test will be conducted by the Workplace Authority, which will be required to ensure that an employee's overall terms and conditions are not reduced in comparison with the applicable "reference instrument";
- ITEAs for existing employees and new collective agreements will commence operation when the Workplace Authority approves them (after applying the no-disadvantage test);
- the AIRC will be required to undertake award modernisation having regard to the bill's 10 award matters which include minimum wages, types of employment (i.e. full-time, part-time, casual and shift work), arrangements for when work is performed (i.e. hours of work), overtime rates, penalty rates, annualised wage or salary arrangements, leave, leave loadings and arrangements for taking leave, and superannuation. These award matters will supplement the 10 national employment standards (NES) which are to be introduced at a later date. The planned completion of award modernisation is 31 December 2009; and

- extending the operation of NAPSAs to 31 December 2009 (currently NAPSAs cease on 27 March 2009) and enabling the operation of PSAs to be extended and varied in certain circumstances.

The bill will have a significant impact on employers using AWAs and employers seeking to enter into collective workplace agreements or ITEAs.

The exposure draft of the NES was released on 14 February 2008, following the introduction of the bill. It is proposed that the NES will contain minimum legislative employment entitlements effective from 1 January 2010. It is intended that the NES be in addition to the 10 award matters to be used in the award modernisation process. The NES would, in effect, replace the Standard. The 10 NES include:

- hours of work – a standard 38 hour week for full-time employees plus reasonable additional hours;
- an employee who has a child or child caring responsibilities for a child under school age will have a right to request flexible working arrangements. An employer would only be able to refuse on reasonable business grounds;
- parents will each be entitled to separate periods of 12 months unpaid leave up to a total of 24 months. If one parent wants to take a further 12 months after they have taken the first 12 months, they must make a request to their employer who can only refuse on reasonable business grounds;
- employees will have a right to be absent from work to engage in prescribed community activities (e.g. jury service and emergency relief service);
- the NES will transition existing State-based long service leave laws to a national legislative standard. Existing long service leave entitlements will be preserved until a national uniform long service leave standard is achieved;
- a minimum period of notice of termination or payment in lieu of notice will be prescribed for employees based on their continuous service with an employer, as is currently the case. A new national redundancy entitlement will, however, come into being under the NES. It will apply to employers who employ more than 15 employees (excluding seasonal and casual employees) and they will be obliged to make redundancy payments to employees terminated on the ground of redundancy. The amount of redundancy payment payable will be by reference to a scale reflecting the Federal award standard; and
- a Fair Work information statement (Statement) will be required to be given to all new employees as soon as practicable after they commence employment. The Statement will contain information about the NES, modernised awards, agreement making, the right to freedom of association and the role of Fair Work Australia, a new authority to be established to administer the new Federal Government's reforms.

Specific causes of action

Unfair Dismissal

In Australia, an employer generally must dismiss an employee in accordance with relevant laws, including:

- the WR Act which provides minimum notice of termination provisions (except where the employee is guilty of serious misconduct);
- an employment contract if the notice period is longer than that specified in the WR Act; or
- an applicable industrial award or workplace agreement.

Under the WR Act certain employees have statutory rights to claim relief for unfair dismissal (in circumstances which that termination is considered to be "harsh, unjust or unreasonable") subject to certain conditions and exemptions contained in the WR Act. Exemptions under the WR Act include an exemption of:

- all employers where a dismissal is for "genuine operational reasons"; and
- employers with 100 or less employees, subject to the grouping provisions outlined above.

An employee who is not employed under award conditions and whose remuneration exceeds $101,300 per year (indexed annually) for the year commencing 1 July 2007 is also excluded from making an application for unfair dismissal.

If the AIRC finds that an employee has been unfairly dismissed it may order reinstatement to employment of the employee and/or compensation to the employee. The maximum compensation an employee can be awarded is the greater of up to six months pay if her or she is employed under award derived conditions or $50,650 (indexed from time to time).

Significant changes to the Federal unfair dismissal laws are expected to be introduced by the new Labor Federal Government. These changes are expected to commence on 1 January 2010. At the time of publication, no draft or exposure bill had been released by the new Labor Federal Government outlining the proposed changes.

Unlawful termination

The WR Act also provides redress for an employee who believes they have been terminated unlawfully (as opposed to unfairly dismissed). An employee can apply to the AIRC if they believe their employment was terminated for an unlawful reason, including trade union membership or participation in trade union activities, temporary absence from work due to illness or injury, race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin.

Similar provisions apply to those employers covered by the respective State system. However, caution must be exercised as Federal legislation dealing with termination of employment differs significantly from State laws in certain respects.

Breach of contract/wrongful dismissal claims

There are other causes of action for dismissal such as under the common law for breach of contract, which may provide an employee with redress if the employment contract is terminated other than in accordance with its terms. Such actions are however costly and time consuming. Commonly, they are limited in practice to senior executives, managers or highly remunerated employees (for example those working in the financial services industry).

Discrimination/equal opportunity claims

An employee who believes they have suffered discrimination may make a complaint to the Federal Human Rights and Equal Opportunity Commission or the employee's respective State or Territory tribunal, such as the New South Wales Anti-Discrimination Board, under the respective Federal, State or Territory discrimination legislation.

Specific areas of regulation

Leave entitlements

Employees are entitled to various types of leave in accordance with Federal or State legislation or industrial instruments, such as industrial awards or workplace agreements. The various types of leave to which employees are entitled include annual leave, personal leave (including sick, carer's and compassionate leave), long service leave and parental leave.

Superannuation

Superannuation is a form of compulsory savings which a person may only access when retiring from the workforce and subject to other restrictions, such as age.

The *Superannuation Guarantee (Administration) Act* 1992 (Cth) effectively requires employers throughout Australia to make certain superannuation contributions for their employees based on the employee's ordinary time earnings. Failure to do so means the employer will be liable for a tax charge which is in excess of the applicable superannuation rate. Currently, the applicable rate of superannuation is 9% of an employee's ordinary time earnings, subject to the superannuation guarantee maximum contribution base (currently $36,470 per quarter). Employees generally have the right to choose which superannuation fund or retirement savings account will receive their superannuation guarantee contributions.

Significant changes to the tax treatment of superannuation commenced on 1 July 2007, including tax free benefits for people aged 60 and over, limits on concessional and non-concessional contributions to superannuation, the provision of tax file numbers to superannuation funds, and the inability to roll over employment termination payments into superannuation, subject to certain transitional arrangements.

Occupational health and safety

Australian occupational health and safety legislation is generally State and Territory-based. There are no Federal occupational health and safety laws which apply to private sector employment in Australia.

The occupational health and safety legislation in each State and Territory imposes significant obligations upon employers in respect of their employees and other

persons entering the workplace. These obligations include providing:

- safe premises, machinery and substances;
- safe systems of work;
- appropriate information, training, instruction and supervision; and
- a suitable working environment and facilities.

In addition, employers have obligations to implement and maintain systems for assessing and controlling health and safety risks, mechanisms for consultation with employees in relation to health and safety issues, and appropriate documentation and records.

Failure to comply with these obligations may lead to prosecution and the imposition of significant penalties. Penalties may be imposed on employers, directors and managers of an employer for breach.

Obligations are not confined to employers. Occupiers of premises, manufacturers, suppliers of plant, employees, self-employed persons and the Crown also have specific and separate obligations under occupational health and safety legislation.

Specific legal obligations will vary according to which State or Territory the employer or other person or entity is located.

Workers compensation

All Australian employees (including certain Australian employees based overseas and overseas employees based in Australia) are covered by workers compensation legislation.

Each State and Territory has enacted workers compensation legislation, which imposes significant obligations on employers including:

- required insurance coverage;
- informing the relevant authorities about work injury and diseases;
- ongoing employer responsibilities;
- workers compensation payments to injured employees;
- helping injured employees return to work; and
- establishing a rehabilitation policy and program.

Privacy and surveillance laws

The *Privacy Act* 1998 (Cth) establishes National Privacy Principles (NPPs) which set out various requirements in relation to personal data. The NPPs do not, however, apply to "employee records". An employee record is a record of personal information that concerns a past or current employment relationship and can include medical information. For the employee records exemption to apply, various conditions must be met such as an employer's use of an employee record must be directly related to the employment relationship. The exemption does not apply to contractors or unsuccessful job applicants.

There are no comprehensive Federal laws dealing with workplace privacy or surveillance. There is, however, some State legislation, such as the New South Wales *Workplace Surveillance Act* 2005, which prohibits all forms of camera surveillance, computer surveillance and tracking surveillance at work unless certain notice and other requirements are met. In addition, there are restrictions on blocking emails and internet access in New South Wales workplaces (particularly in relation to emails from union websites).

Discrimination

There are various Federal, State and Territory statutes prohibiting direct or indirect discrimination in specified areas. Relevant Federal legislation includes the:

- *Racial Discrimination Act* 1975 (Cth);
- *Sex Discrimination Act* 1984 (Cth);
- *Disability Discrimination Act* (Cth);
- *Human Rights and Equal Opportunity Commission Act* 1986 (Cth); and
- *Age Discrimination Act* 2004 (Cth).

Each State and Territory also has comprehensive anti-discrimination and equal opportunity legislation.

Direct and indirect discrimination may be defined as follows:

- ***direct discrimination*** is treating one person less favourably than another because of particular attributes, such as age, race, colour, descent, national or ethnic origin, immigrant status, sex, marital status, pregnancy or potential pregnancy, family responsibilities, disability or association (whether as a relative or otherwise) with a person

identified by reference to any of the above attributes; and

- ***indirect discrimination*** is applying a standard, condition or practice to all employees equally, but in a way that ends up being unfair to a specific group of people because of a particular attribute of that group (as listed above), and which is unreasonable.

Discrimination and equal opportunity legislation affects all stages of the employment relationship, including job selection and recruitment of prospective employees, which employees receive training in the workplace and what sort of training is offered, conditions and benefits of employment, which employees are considered and selected for transfer, promotion, retrenchment and termination of employment.

The discrimination laws do not only apply to the employment relationship, but also apply in other areas including the provision of goods and services, education, accommodation, clubs and associations, and superannuation.

All discrimination laws are complaint-based. An applicant may complain to an administrative agency which is required to provide a process of inquiry and conciliation at first instance. Where there is a continuing disagreement, a tribunal or court may hear and determine the issues and may apply penalties against the employer and/or award compensation to the applicant. Significant monetary compensation has been made against employers for such claims.

In addition to the anti-discrimination and equal opportunity legislation outlined above, the *Equal Opportunity for Women in the Workplace Act* 1999 (Cth) requires all higher education institutions and employers with 100 or more employees (other than public sector employers), to develop and implement a workplace program to address issues identified by the employer affecting equal opportunity for women in the employer's workplace and to report on the workplace program annually to the Equal Opportunity for Women in the Workplace Agency (EOWA). The Federal Government has announced that reporting to EOWA will become biennial for most employers in the future. However, at the time of publication, reporting was still required annually.

Intellectual property

Intellectual property – an introduction

Australia's legislation protects intellectual property such as trade marks, copyright, patents and designs. Remedies are also available under Australia's common law for goods or services that are "passed off" as those of another and under the *Trade Practices Act* 1974 (Cth) for conduct of a corporation which is misleading or deceptive or likely to mislead or deceive. Australian common law will also protect confidential information and trade secrets in certain circumstances.

Trade marks

The *Trade Marks Act* 1995 (Cth) provides for the registration of a trade mark which is capable of distinguishing the designated good or service from the goods or services of other persons. The initial registration of a trade mark is for 10 years. Registration may be renewed for additional periods of 10 years upon payment of renewal fees.

Registration of a trade mark gives the owner the exclusive right to use the trade mark in relation to the goods or services covered by the registration and the right to take action for trade mark infringement.

It is not essential that a trade mark is registered in order for the owner to be able to enforce rights in it. However, it is much easier for the owner to do so if registration of the trade mark is held. An application for registration of a trade mark in Australia may be based either on use of the trade mark or on intention to use the trade mark. In the latter case, it is not necessary that the intention have matured into actual use by the date of registration.

Australia is a signatory to the Paris Convention for the Protection of Industrial Property. Therefore, a first application for registration of a trade mark in any other convention country may be used as a basis for an identical application in Australia claiming the priority date of the original application, provided that the Australian application is filed within 6 months of the original application.

Copyright

Copyright in Australia is protected under the *Copyright Act* 1968 (Cth) (Copyright Act). There is no registration system for copyright in Australia. Copyright protection is granted in respect of original literary, artistic, musical and dramatic works. Copyright lasts for the life of the author plus 70 years. There is no requirement that a "work" within the meaning of the Copyright Act be of artistic or literary quality, it is sufficient that it be original.

Apart from protection in works, the Copyright Act also recognises copyright in other types of subject matter such as photographs, sound recordings, cinematographic films and performers' rights.

Australia is a signatory to the Berne Convention for the Protection of Literary and Artistic Works and therefore works created in other countries which are also signatories to the Berne Convention will be entitled to the same protection in Australia as Australia gives to copyright claimed by its own nationals.

Australian copyright law also recognises moral rights and digital rights such as Electronic Rights Management information (ERM) and technological protection measures. Computer programs are generally protected as literary works.

Australia's copyright law deems a work created by an employee during the course of his or her employment to be owned by the employer whereas copyright created by an independent contractor will be owned by that independent contractor.

Patents

In Australia, patents are granted under the *Patents Act* 1990 (Cth) and give the successful applicant the exclusive right to exploit the patented invention and to authorise another to exploit the patented invention for 20 years.

Generally a patent will be granted if, when compared with the prior art base, the invention is novel, involves an inventive step, is useful and was not used secretly.

Australia introduced innovation patents in July 2001 to replace petty patents. An innovation patent is granted after the applicant has satisfied the formalities check. It is assumed that the standard required of an innovation is much lower than that of an invention although the actual standard has not yet been established by the courts. An innovation patent is granted without being examined. However, the registrant must request examination if he wants to take action for infringement of the innovation patent.

Australia is a party to the Patent Co-Operation Treaty for the international registration of patents.

Designs

A registered design is granted for aspects of appearance of an article. It is possible to extend a design registration for up to 10 years. If a design was registered before 17 June 2004 a registrant may chose whether the old *Design Act* 1904 (Cth) or the new *Design Act* 2003 (Cth) applies.

The *Design Act* 2003 (Cth) has raised the level of distinctiveness required for a design registration. The new threshold is a two step test. A design is not a registerable design unless it is both new and distinctive.

Domain names

The ".au" domain is divided into a number of second level domain names such as ".com.au", ".edu.au" and ".org.au".

Registration of a domain name means that the registrant owns the domain name. The initial registration of a domain name is for two years. It may be renewed for additional periods of two years upon payment of a further registration fee.

Confidential information

Under Australia's common law, where information is communicated to another person in confidence or where those parties are in a particular relationship of confidence, the common law may imply an obligation on the receiver of that information not to utilise or disclose that information without the discloser's consent.

It is often prudent for parties to a contractual arrangement to enter into a separate confidentiality agreement or deed or make it a term of that contract that any information disclosed for the purposes of the contract will remain confidential. There are some general exceptions to these obligations of confidentiality including where the information is otherwise publicly available or disclosure is required by law.

There are also statutory rules for the use, disclosure and storage of an individual's personal information under Australia's privacy laws.

Consumer law

Trade Practices Act

The *Trade Practices Act* 1974 (Cth) (Trade Practices Act) is a Federal act which:

- contains a multitude of rights and remedies for consumers who:
  - buy goods or services that are defective; or
  - have been misled as to the quality of such goods or services; and
- protects consumers from being exploited by companies.

The Trade Practices Act prohibits a corporation, in trade or commerce, from engaging in conduct:

- that is misleading or deceptive or likely to mislead or deceive. The Trade Practices Act also identifies specific types of conduct relating to false or misleading representations which give rise to a breach if engaged in by a corporation in trade or commerce and in connection with the supply of goods or services; and
- which is, in all the circumstances, unconscionable. The Courts may take into account a number of factors in deciding whether conduct is unconscionable, for example, the relative bargaining strengths of the parties involved.

In addition, the Trade Practices Act implies a number of conditions and warranties into contracts for the supply of goods and services to consumers (as defined). The warranties include that:

- the supplier has proper title to the goods being sold;
- the goods conform to any description of the goods given by the supplier;
- the goods are of merchantable quality;
- the goods and services are reasonably fit for the purpose which the consumer makes known (either implicitly or expressly) to the supplier; and
- in relation to the sale of goods by sample, that the goods will comply with the sample.

Any attempt to exclude, restrict or modify these warranties will be void. However, where the goods or services supplied are not of a kind ordinarily acquired for personal, domestic or household use or consumption, liability may be limited by the supplier in the manner specified by the Trade Practices Act.

In certain circumstances, the supplier and the consumer may have recourse against the manufacturers and importers of a defective product.

The Trade Practices Act also prescribes certain industry specific standards and product safety and information standards which suppliers of products may need to comply with. The government also has certain powers to safeguard the public against unsafe products, including, warning the public and recalling unsafe products.

Different limitation periods apply in respect of actions commenced under the Trade Practices Act, depending on the cause of action.

The UN Convention on Contracts for the International Sale of Goods adopted at Vienna, Austria on 10 April 1980 prevails over any state legislation and over the provisions of the Trade Practices Act relating to the implied conditions and warranties of any provision of the Trade Practices Act.

Anti-trust and competition law

The Trade Practices Act also regulates and prohibits anticompetitive behaviour in Australia and proscribes the misuse of market power. Penalties apply for breaching the restrictive trade practices provision, including fining corporations up to the higher of $10 million or three times the gain from the contravention or 10% of the Australian corporation's turnover and individuals up to $500,000 for each contravention or other sanctions such as disqualification of directors and/or jail terms of up to five years.

The Trade Practices Act is regulated by the Australian Consumer and Competition Commission (ACCC), a governmental body which has a wide range of powers to obtain information, documents and evidence when investigating possible breaches of the Trade Practices Act.

Certain practices are strictly prohibited under the Trade Practices Act. These practices include the following:

- arrangements between competitors for price fixing or market sharing;
- resale price maintenance; and
- third line forcing (making the supply of goods or services conditional upon the acquisition of another person's goods or services).

A defence is available to joint venture companies in relation to price fixing and exclusionary provisions (boycotts) if the company is able to prove that the price fixing or exclusionary provision is for the purposes of the joint venture, and does not have the effect of substantially lessening competition in the relevant market.

In relation to third line forcing, a company may provide goods or services on condition that a good or service is also purchased from another company, only if the other company from whom the good or service is to be purchased is a body corporate related to the initial supplier.

Certain other practices are only prohibited under the Trade Practices Act if they have the effect (or in certain circumstances, the purpose) of substantially lessening competition in the relevant market. Such practices include:

- supplying or acquiring goods or services on condition that other goods or services will not be acquired or supplied from other persons or particular places; and
- acquisitions of shares or assets.

Generally, any contracts, arrangements or understandings which have the purpose, or likely effect, of substantially lessening competition are also prohibited.

Conduct which may be in breach of the restrictive trade practices provisions of the Trade Practices Act may nevertheless be permitted in certain circumstances if a party undertakes a notification or authorisation process with the ACCC.

Environmental law in Australia

Commonwealth regime

The Australian Constitution gives the Commonwealth discrete powers to regulate environment and planning issues, but most of the responsibility for such issues remains with the States.

The Commonwealth has traditionally taken partial or full control of certain subject matter which is covered by international treaties, such as threatened and migratory species, World Heritage, Ramsar wetlands, nuclear actions and the marine environment. However, the role of the Commonwealth has expanded over time, largely through co-operative agreements with the States, but also through application of the corporations power under the Australian Constitution. For example, new legislative schemes have been developed in water resources to coordinate water allocations between States, set standards for water efficiency and recycling and to allocate Commonwealth funding for improvements to water infrastructure.

The Commonwealth and the States have cooperated to introduce national arrangements for inter-State markets for electricity and natural gas, as well as to create common voluntary standards for lifecycle management of packaging (the National Packaging Covenant).

In the area of climate change, the Commonwealth is funding research and development of low carbon-emitting technologies, and has introduced the *National Greenhouse and Energy Reporting Act 2007 (Cth) (NGER Act)* in order to consolidate the greenhouse gas emissions reporting process for large scale emitters. The Regulations which will accompany the NGER Act will be released in the middle of 2008.

The Commonwealth has legislated to require retailers of electricity to purchase sufficient renewable energy certificates and for businesses to report on measures for improving energy efficiency.

In addition to action at a federal level, various State governments have also undertaken environmentally based initiatives. New South Wales for example, introduced a mandatory greenhouse gas emissions trading scheme, principally for the electricity sector, in 2003. A number of Australian States have also introduced mandatory renewable energy targets, which place obligations on energy suppliers to source certain levels of electricity from renewable sources.

On 3 December 2007, the Australian Prime Minister Kevin Rudd signed the instrument of ratification of the Kyoto Protocol. By ratifying the Kyoto Protocol Australia has committed to meeting its Kyoto Protocol emissions target, being 108% of 1990 emission levels by 2012, and has set a target to reduce greenhouse gas emissions by 60% on 2000 levels by 2050.

State and Territory regime

The States and Territories retain most responsibility for the regulation and management of:

- pollution;
- contaminated land;
- natural resources;
- cultural heritage; and
- land use and development.

Statutory requirements may vary significantly between the State and Territory jurisdictions.

Most industrial emissions into the air, water and land are prohibited by law unless they are regulated by a licensing system.

There are regulatory controls over noise and the transport, storage and use of hazardous chemicals.

State authorities may order the investigation and remediation of contaminated sites.

Severe criminal and civil penalties may be imposed on corporations (as well as holding corporations in some cases), directors, employees and contractors for pollution and contamination offences. Liability normally attaches to the party which caused the breach but land owners may also be convicted, without fault being proved, for certain offences.

There is a system of national parks in each State which preserves public land with high biodiversity.

Destruction of most native fauna and native vegetation is prohibited on private land. There are exceptions for clearing of vegetation for certain agricultural activities, which vary in different States and according to the conservation value of the land.

Disturbance of aboriginal relics is prohibited without a licence. State legislation also controls disturbance of relics of European settlement with high cultural value.

Regulation of subdivisions, rural, commercial, industrial, tourist and residential development, building construction and waste disposal is normally the responsibility of elected local governments, which are established under State legislation. State governments often retain regulatory control of major private and public infrastructure developments, including energy, water, mining, road and rail projects.

Control and ownership of infrastructure

The Commonwealth government provides some funding for national highways but the State and local governments retain primary responsibility for the regulation, maintenance and development of the road network. There are also privately owned or operated toll roads in some State capital cities.

Most Australian rail networks are owned by State governments. Some lines are owned by the Commonwealth or private companies.

Port facilities in each of the States' maritime capitals are regulated by the States.

Airports are controlled by Commonwealth legislation and are largely managed by private corporations.

The States are mostly responsible for the regulation of water resources and creation of infrastructure such as dams, pipelines and canals, although the Commonwealth plays a significant role in the Murray Darling Basin. Licences are usually required to draw water from rivers and aquifers.

Urban water supply and sewerage infrastructure is regulated by State legislation and is mostly owed by State governments. There is increasing private investment in this sector, particularly in water treatment.

Electricity and gas generation and distribution is owned and managed by a mix of State and privately owned corporations. Regulation of this sector is being consolidated under a joint Commonwealth/State body.

About PricewaterhouseCoopers Legal

PricewaterhouseCoopers Legal – an introduction

PricewaterhouseCoopers Legal is a business name of the PricewaterhouseCoopers Australia Partnership, a regulated Multi-Disciplinary Partnership in certain States of Australia.

PricewaterhouseCoopers Legal represents a new approach to the provision of legal services consulting, developed in direct response to the needs of our clients and an increasingly competitive corporate environment. We are dedicated to providing the services that a modern business needs. We are particularly well placed to meet the needs of our international clients, providing assistance on local or cross-border tax and legal issues.

What differentiates us from other professional service providers in Australia is our multi-disciplinary approach to and involvement in the delivery of professional services to clients with practice groups within PricewaterhouseCoopers, including PricewaterhouseCoopers Legal. This context of service delivery gives us a unique perspective into our clients' wider business issues and enables us to deliver legal advice in the context of what works for our clients and their businesses. The PricewaterhouseCoopers Legal team will work in tandem with our colleagues at PricewaterhouseCoopers to provide all encompassing advice and solutions to your business issues – no matter how complex they are.

With offices in Sydney and Melbourne we are strategically placed to provide legal services throughout Australia and the Asia-Pacific region.

We work with you

We believe that best practice legal solutions are developed within a wider business context. Our lawyers speak the language of business, working with you to develop an understanding of your commercial objectives and express advice in commercial terms. We bring together teams of specialists to work alongside clients as trusted business advisers. We structure and project manage transactions from start to finish. Our ultimate aim is to help clients transform their businesses and increase their value.

Our clients come to us from every industry including financial services, information technology, communications, entertainment, energy, mining and consumer and industrial. We offer every client industry-focused legal solutions, tailored to their business requirements.

Managing relationships

Relationships with our clients are managed through a Client Relationship Partner. This partner has sole responsibility for ensuring that high quality, commercial legal solutions are provided to meet client needs on a local and international level. The Client Relationship Partner is supported by a team of lawyers who have an in-depth knowledge of the client and the industry in which the client operates. Our relationships with clients are built on trust, communication and dedicated client service.

Global tax and legal services

Our advice is tailored to meet the needs of our clients' complex business issues.

Legal services are offered in the following areas:

- Corporate & Commercial
- Commercial & Regulatory Litigation
- Employment Law
- Environment and Climate Change Services
- Property
- Tax Controversy

Corporate and Commercial

The Corporate and Commercial team provides commercially-focused expert legal advice and services. Our clients include public and private companies in a wide range of industries and sectors, not-for-profit organisations, and high net worth individuals. We are a results-driven team and our pragmatic and commercial approach and consistent professionalism are highly valued by our clients. Our objective is to provide high quality legal services that exceed our clients' needs and expectations. The Corporate and Commercial team's areas of expertise include:

- acquisitions, divestments and mergers;
- group restructures;
- private equity;

- joint ventures, partnerships and co-ownership structures (establishing and restructuring);
- debt/equity financing;
- corporate governance; and
- Corporations Act and regulatory advice.

Commercial and Regulatory Litigation

The Commercial and Regulatory Litigation team provide advice and representation to large and medium sized corporations, government and statutory authorities. The team's objective is to provide pragmatic, thorough, cost-effective and timely dispute resolution and litigation services for our clients in the following areas:

- contractual disputes;
- Trade Practices compliance, including identifying potential breaches of the Trade Practices Act and liaising with the Australian Competition and Consumer Commission (ACCC) and Trade Practices disputes;
- regulatory issues including obtaining approvals from regulators, advising and acting for clients in relation to penalties and prosecutions, assisting clients under investigation by regulators and advising clients on licensing issues;
- insolvency and bankruptcy proceedings;
- intellectual property and trademarks disputes; and
- alternative dispute resolution, including mediation and arbitration.

Employment

The Employment Law team provides legal and strategic advice on all areas of employment and industrial law to private sector clients across a broad range of industries, government agencies and statutory authorities. Our objective is to provide tailored solutions to help our clients effectively manage all stages of the employment relationship and to comply with legislative requirements. The Employment Law team can provide assistance in managing employment issues, workplace reform and strategy, and industrial disputes as and when they arise. The team has a reputation for handling sensitive issues with the utmost professionalism. Our integrated business solutions means we can work with the specialist human resource consultancy team within PricewaterhouseCoopers, providing a total solution for our clients on human resource related issues.

Environment

The Environment Law team provides industry-focused environmental and development law services for public and private clients. Our people work together to connect their thinking, experience and solutions to build public trust and enhance value for clients and their stakeholders. The business value of our experience in all aspects of planning and environmental laws includes:

- environment protection, pollution control and management, including remediation and restoration of contaminated land;
- waste management, resources recovery and product stewardship;
- land use and land use change, environmental planning and impact assessment;
- infrastructure planning and building development, including land management and natural and cultural heritage;
- natural resource management including biodiversity, water and salinity;
- corporate environmental governance including developing tools for environmental reporting, legal compliance and environmental risk management systems;
- climate change mitigation strategy;
- renewable energy;
- environmental markets creation and implementation; and
- application of legal concepts of ecologically sustainable development.

The Environment Law team's objective is to deliver effective legal services and quality environmental solutions taking into account the commercial needs of our clients. We offer innovative commercial solutions that go beyond the standard legal responses to environmental issues, and encourage our clients to develop a progressive approach to the environment with a view to achieving the competitive benefits of best practice environment management.

Property

The Property team provides legal advice and transactional services in all aspects of property acquisitions and disposals, asset structures, mortgage securities, property development, title structures, land use and property management to investors, developers, government agencies and institutions. This covers the whole range of real property including residential, commercial, industrial and large-scale public and private building and infrastructure projects. Our objective is to deliver efficient and innovative solutions to property law issues affecting our clients, from fast-turnaround high-volume leasing and sales programmes through to acquiring, developing, titling and disposing of complex multi-use developments.

Tax Controversy

The Tax Controversy team is focused on meeting client needs relating to tax audits, tax litigation, and tax law, including strategic legal advice on tax law. We focus predominantly on large national and international corporate clients and high wealth individuals covering all Commonwealth and State taxes as well as customs duties. Based on our team's unique mix of Australian Taxation Office (ATO), Australian Government Solicitor and private sector experience, working in conjunction with our colleagues within PricewaterhouseCoopers, we help clients achieve the best outcomes to resolve issues, manage revenue authority relationships and manage tax risks within corporate governance frameworks.

PricewaterhouseCoopers Legal has the skills and experience needed to assist in all aspects of conducting business in and with Australia.

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PricewaterhouseCoopers (www.pwc.com) provides industry-focused assurance, tax and advisory services to build public trust and enhance value for its clients and their stakeholders. More than 146,000 people in 150 countries across our network share their thinking, experience and solutions to develop fresh perspectives and practical advice.

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