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Doing Business in Australia is designed for investors and businesses exploring opportunities for doing business in Australia. It will provide an overview of all the relevant laws and regulations you need to be aware of in order to maximise the chances of making a successful investment into Australia.

Given the changing landscape of laws and business practices, this publication should be used as a guide only and professional advice should be sought prior to making specific investment decisions. If such advice is required, Clayton Utz is happy to provide you with support, assistance and guidance in relation to many areas of business.

We hope you find this publication informative. If you would like more detailed information or advice on doing business in Australia, please contact us.

Doing Business in Australia is designed for investors and businesses exploring opportunities for doing business in Australia. It is my pleasure to be able to provide this document to you on behalf of the Clayton Utz Partnership.

Australia's attractiveness as a location for investors and business operators is the result of its strong economy, its sophisticated and stable business and political environment and its highly skilled and multilingual workforce. Australia's legal system is mature and friendly to business, and its lawyers are known for their commercial approach and experience, much of which has been gained by working on some of the world's largest transactions.

Australia's proximity to many of the world's fastest growing economies in the Asia-Pacific region, and its time-zone spanning the close of business in the United States and the opening of Europe's trading day, make it a prime location for doing global business.

Australia has a booming resources sector, and is a major exporter of minerals and raw materials to the world. This resources boom is largely responsible for driving the Australian economy and market analysts anticipate this to continue for years to come. Other significant sectors in the Australian economy include Financial Services, Infrastructure, Information and Communication Technology, Agribusiness and Biotechnology.

Significant growth has also occurred in tourism over the past decade. Australia is now one of the most popular tourist destinations within the Asia-Pacific region, attracting millions of international visitors every year with its unique natural beauty and relaxed lifestyle.

Australia's sophisticated financial services sector, which operates in an efficient and transparent marketplace, is supported by a state-of-the-art market infrastructure and regulatory regime. Australia has liquid markets in equities, debt, foreign exchange and derivatives and is one of the key centres for capital markets activity in the Asia-Pacific.

In addition, the flow of business activity between Australia and other nations in the Asia-Pacific region has been building for many decades. Our relationships with the United States, Japan, Indonesia and China are particularly positive and strong.

With relatively low cost rentals, services, education, salaries and expatriate cost of living, Australia is a highly desirable base for businesses operating through the region. As a result, it has become common practice for international businesses to locate their regional headquarters in Australia.

Like Australia, Clayton Utz has a long and proud tradition. Clayton Utz was originally founded in 1833 and today is one of the largest and most successful commercial law firms in Australia. We have over 190 partners and 1,500 legal and support staff based in Sydney, Melbourne, Brisbane, Canberra (the Federal Capital), Darwin, Perth and Hong Kong. If you would like more detailed information or advice on doing business in Australia, please contact us.

Stuart Clark
Chief Operating Officer
Managing Partner, International

FOREWORD BY AUSTRADE

Australia offers excellent and diverse opportunities for foreign investors and *Doing Business in Australia* provides sound practical advice on establishing a business here.

Australia's attractiveness as an investment destination is based on its longstanding economic resilience, its sound regulatory framework for business, and a stable political system.

Our A\$1 trillion national economy offers investors invaluable security, especially after the recent turmoil in the global economy and financial system.

Australia welcomes foreign investment in all sectors of its diverse, knowledge-based economy.

While our energy and mineral resources are world renowned, services comprise about 70 per cent of Australia's GDP.

Australia's advanced services sector offers great opportunities, especially in financial and professional services, clean energy technologies and infrastructure.

New Government programs to promote the knowledge economy now target investment in these sectors.

The skill base of Australia's highly educated and multicultural workforce represents another major asset, one that is being developed with new funding to promote innovation and research and development.

English is Australia's national language, but the nation itself is multilingual.

Out of a population of 21.5 million, there are over one million Australians who are fluent in a major European language other than English and more than 1.5 million who are also fluent in a major Asian language.

As the centre of global economic growth shifts to the Asia Pacific, Australia's location on the edge of Asia, once considered a disadvantage, is now considered a plus.

That location brings with it a unique time-zone advantage for global businesses which have to function around the clock.

The Australian Government's trade and investment development agency, Austrade, provides a range of services to investors, including about local market conditions and regulations.

I encourage you to find out more about how we can assist you to invest in Australia.

Peter Grey
CEO, Austrade

A BRIEF LOOK AT AUSTRALIA

Quality of life

Australia is an island continent of approximately 7.7 million square kilometres in the Asia-Pacific region. The climate is generally mild, ranging from temperate in the South to tropical in the North. Average temperatures range between 4 – 28° Celsius.

Australia has a fast-growing population of nearly 22 million, based mostly in coastal areas. It is a culturally diverse country, with approximately one in five Australians born overseas, drawn from over 200 countries. The national language is English.

With one of the highest standards of living in the world, Australia offers international business people a superb climate, a unique and beautiful environment, top international schools, excellent flight linkages, and a quality social and cultural infrastructure.

Investment landscape

Australia offers international investors a cost-effective and innovative place in which to do business and an attractive, low-risk destination.

Australia has pursued Free Trade Agreements with many of its regional partners and has agreements in place with the ASEAN group of countries, Chile, New Zealand, Singapore, Thailand and the United States.

Australia is also in negotiation with China, the Gulf Co-operation Council, Japan, Malaysia and the Trans Pacific Partnership and discussions are underway with India, Indonesia, and PACER Plus (the Pacific Agreement on Closer Economic Relations).

These bilateral trade agreements can offer companies who set up in Australia a competitive advantage in servicing these markets.

Government

Australia is a stable democracy which maintains strong links with the United Kingdom. Queen Elizabeth II is the Head of State.

Australia is a federation comprising six States and two self-governing Territories. Each has a legislature, an executive and judicial arm of Government.

The Federal Government has primary responsibility for defence, finance and taxation, post and telecommunications, administration of the national health system, immigration, tertiary education, aviation, and foreign affairs and trade. The general areas of responsibility of the six State Governments and two Territory Governments are primary and secondary education, roads and transport, police and health care.

A third, Local, tier of Government generally has responsibility for planning and development and the provision of local services to communities.

Legal system

Australia has a common law system, which is based on the English system.

The States and Territories have their own judicial systems and courts. Federal Courts deal with Federal matters and the High Court of Australia hears appeals in relation to Federal, State and Territory matters.

Currency

The currency in Australia is decimal, with the dollar (A\$) as the basic unit and 100 cents to the dollar. The exchange rate for one Australian dollar with major international currencies on 10 June 2011 was as follows:

USD:	1.06
Euro:	0.73
Pound Sterling:	0.65
Yen:	84.92

REGULATION OF BUSINESS

The Australian Competition and Consumer Commission (ACCC)

The ACCC administers the Competition and Consumer Act 2010 (Cth). In broad terms, the objectives of the Act are to promote competition and, together with similar provisions in State and Territory legislation, fair trading, and provide for consumer protection. It covers anti-competitive and unfair market practices, company mergers or acquisitions, product safety and product liability, and third party access to facilities of national significance.

The Australian Prudential Regulation Authority (APRA)

APRA is a statutory authority which was formed in 1998 to promote the prudent management of financial institutions. Its regulatory function extends to the supervision of banks, life insurers, building societies, credit unions, friendly societies and superannuation funds. APRA has the power to require financial organisations to observe prudential standards, and may intervene, where necessary, to protect the interests of depositors, policy-holders or members. In addition, APRA has far-reaching powers of investigation, intervention and administration.

Australian Securities and Investments Commission (ASIC)

ASIC is the sole regulator of Australian registered companies and one of three Federal Government bodies that regulate financial services.

ASIC administers the Corporations Act 2001 (Cth), the law regulating the incorporation, operations and management of companies. ASIC is therefore primarily responsible for regulating the conduct of corporations in Australia, and is also responsible for supporting the integrity of and fairness in company affairs and in financial markets. ASIC's consumer protection function extends to the financial system by regulating the advising, selling and disclosure of financial products and financial services to consumers.

Australia Securities Exchange Limited (ASX)

The ASX was formed in 1987 and is the second largest securities exchange in the Asia-Pacific region. The ASX has markets trading in equities, derivatives, futures and fixed interest securities. There are branches of the ASX in Sydney, Melbourne, Brisbane, Adelaide, Perth and Hobart.

The ASX Listing Rules ensure that the constitutions of listed companies include provisions regarding shareholder rights, such as the necessity of consulting shareholders over major transactions, and also ensure that listed companies observe certain standards with respect to market awareness and the provision of information.

Australian Taxation Office (ATO)

The ATO, under the Commissioner of Taxation, is the statutory authority responsible for administering Australia's Federal taxation system. Australia's income tax law consists primarily of the Income Tax Assessment Act 1936 (Cth), the Income Tax Assessment Act 1997 (Cth) and the Taxation Administration Act 1953 (Cth), as well as ATO administrative taxation rulings and court decisions. Fringe benefits provided to employees are subject to a separate regime under the Fringe Benefits Tax Assessment Act 1986 (Cth). Australia's goods and services taxation law consists primarily of A New Tax System (Goods and Services Tax) Act 1999 (Cth). The current income tax system involves taxation of income and capital gains of individuals and businesses.

The ATO administers the process of annual taxation self-assessment and

conducts random audits to verify individual and company assessments. The ATO also collects excise on tobacco, petrol and alcohol, administers the Higher Education Contribution Scheme and the Private Health Insurance Rebate, and has responsibility for the fiscal regulation of Australia's superannuation system.

Foreign Investment Review Board (FIRB)

The FIRB is a non-statutory organisation formed in 1976 within the Federal Treasury to provide foreign investment policy advice to the Australian Federal Government. The FIRB's function is to assess direct investment proposals submitted by foreign interests and to make recommendations to the Government on the compatibility of those proposals with Government policy and the Foreign Acquisitions and Takeovers Act 1975 (Cth). FIRB also provides information on the Government's policies to prospective foreign investors and potential investors alike.

Reserve Bank of Australia (RBA)

The RBA is a statutory authority performing the country's central banking functions.

The Bank is wholly owned by the Australian Federal Government and maintained assets of more than A\$100 billion as at August 2009. The RBA has two broad areas of responsibility: monetary policy and financial stability.

The RBA's monetary policy is primarily directed at maintaining inflation rates at the level most conducive to sustainable growth. The RBA's financial stability policy aims to prevent excessive risks in the financial system and to limit the effects of financial disturbances when they occur. Within this role, the RBA

has a particular responsibility for maintaining the efficiency of the payments system. The RBA is governed by the Reserve Bank Board and the Payments System Board.

The RBA plays an active role in financial markets and the payments system and is responsible for issuing Australian currency notes. The Banking (Foreign Exchange) Regulations confer upon the RBA responsibility for foreign exchange control.

IP Australia

IP Australia is the Federal Government agency that grants rights in patents, trade marks and designs in Australia. IP Australia is a division of the Department of Industry Tourism and Resources but operates independently. It incorporates the Patent, Designs and Trade Marks Offices. The Plant Breeders Rights Act system is administered by the Plant Breeders Rights Office, which is part of the Department of Agriculture, Fisheries and Forestry.

.au Domain Administration (auDA)

The .au Domain Administration is an Australian non-profit company formed in 1999 as the industry self-regulatory body for the .au namespace.

BUSINESS STRUCTURES

A person may carry on business in Australia as a sole trader, a partnership, a joint venture, a trust or a company.

Sole trader: An individual may carry on a business on his or her own behalf as a sole trader. A sole trader is personally liable for all obligations incurred in the course of the business.

Partnership: Two or more individuals or companies may carry on a business as a partnership. Partnerships (other than certain professional partnerships) are limited in size to 20 partners. A partnership is not a separate legal entity. The partners share profits and are jointly and separately liable for the obligations of the partnership. However, in some Australian States, a limited partnership may be established under which some (but not all) partners have liability limited to the extent of their capital contribution. However, limited liability partners must take no part in the management of the partnership. Partnerships are governed by Australian State laws, common law and contract law.

Joint venture: Two or more individuals or companies may also carry on a business as a joint venture. A joint venture is often formed for a particular project or product, or where the contributions of the venturers are different in type, amount or timing.

Joint ventures may be incorporated (as a separate legal entity) or unincorporated. The rights and liabilities of the respective venturers will depend upon the terms of the joint venture. Joint ventures are governed by the common law and contract law.

Trust: A business may be carried on by a trust. The trustee owns the trust property and carries on the business on behalf of the beneficiaries of the trust. The trustee will be liable for the obligations of the trust, but will typically have rights of recourse against the trust property in respect of those obligations. The rights of beneficiaries will depend upon the terms of trust. The beneficiaries' entitlements may be in a fixed proportion or variable at the discretion of the trustee. Trusts are governed by common law and contract law.

Australian company: A business may be conducted through an Australian company. An Australian company will be either a proprietary company or a public company. A public company may also be listed on the Australian Securities Exchange. A proprietary company is limited to 50 non-employee shareholders and cannot engage in fundraising activities in Australia. A proprietary company can, however, be simpler and cheaper to administer from an Australian regulatory point of view.

An Australian company must have a registered office within Australia, have Australian resident directors (two for public companies, one for proprietary companies) and an Australian resident company secretary (optional for proprietary companies). There are no residency restrictions on shareholders/members and no general minimum capital requirements for an Australian company.

A company is managed by the directors of the company, but is owned by its shareholders/members. A company is a separate legal entity and is liable for its own obligations. The liability of the shareholders/members will generally be limited to the unpaid amount on any shares held or as specified amount. A company's directors and its holding company can be personally liable for company obligations incurred at a time when the company is insolvent or there are reasonable grounds for suspecting it is insolvent or would become insolvent by incurring a particular obligation. Australian companies are governed by the Corporations Act, their constituent documents and common law.

Foreign company: A foreign company may carry on business in Australia either as an Australian branch or through an Australian subsidiary company. To carry on business in Australia as a branch, the foreign

company must register as a foreign company with ASIC. A foreign company does not carry on business in Australia merely because it engages in certain activities in Australia such as becoming a party to legal proceedings, holding director or shareholder meetings, maintaining a bank account, or holding any property.

A foreign company wishing to apply for registration should reserve the company's name to ensure that it is available in Australia and must lodge with ASIC an application form, together with a certified copy of the company's certificate of registration and constituent documents. The foreign company must also have a registered office in Australia and appoint a local agent to represent the company in Australia. Once registered, the foreign company is required to lodge copies of its financial statements and comply with various notification obligations under the Corporations Act.

A foreign company can establish an Australian subsidiary by registering the new company.

Business names: If a person carries on business in an Australian State (other than under their own individual or a company name), that person is required to register the business name with the relevant Australian State Government department.

FOREIGN INVESTMENT

In Australia, foreign investment is generally encouraged but approval is required for certain types of investments. Foreign investment in Australia is regulated by the Foreign Acquisitions and Takeovers Act 1975 (Cth) (FATA) and the Federal Government's Foreign Investment Policy. The Foreign Investment Review Board (FIRB) examines foreign investments proposals and makes recommendations to the Federal Government on those proposals. The Federal Government minister responsible for foreign investment decisions is the Australian Treasurer.

Australia's foreign investment legislation applies to investment proposals by foreign interests. A foreign interest means an individual who is not ordinarily resident in Australia and any corporation or trust in which there is a substantial (15 percent or more) foreign interest (even if it is not actually foreign controlled) or where several foreigners have a 40 percent or more interest in aggregate.

Notification of Transactions to FIRB

Whether notification is required is determined by reference to the type of investor, the type of investment, the industry sector in which the investment will be made and the value of the proposed investment. Notifications involve lodging a statutory form and certain additional information.

Nature of Investment ¹	US Investors ²	Non-US Investors
Business Investments		
Direct investments or new businesses by foreign governments or their agencies ⁹	All investments must be notified	All investments must be notified
Acquiring a substantial interest ⁴ in an Australian corporation or assets of Australian business Offshore takeover of a company with assets or business in Australia	Private investors (sensitive sector³) A\$244 million (indexed annually) Private investors (other sectors) A\$1,062 million (indexed annually) Government investors A\$244 million (indexed annually)	A\$244 million (indexed annually)
Real Estate Investments		
Acquiring vacant non-residential land	All acquisitions must be notified	All acquisitions must be notified
Acquiring residential real estate	All acquisitions must be notified ⁵	All acquisitions must be notified ⁵
Acquiring shares or units in Australian "land-rich" corporations or trusts ⁶	All acquisitions must be notified	All acquisitions must be notified ⁷
Acquiring developed non-residential commercial real estate subject to heritage listing	A\$1062 million	A\$5 million
Acquiring developed non-residential commercial real estate ⁸ not subject to heritage listing	A\$1062 million	A\$53 million (indexed annually)

¹ The FATA applies to all foreign investments irrespective of the way they are structured (for example, quasi debt (such as convertible notes) are treated as equity for foreign investment law purposes.

² US investors are certain US nationals, US enterprises and US branches of non-US enterprises.

³ Sensitive sectors are media, telecommunications, transport, military, encryption / security technology and communications, uranium / plutonium extraction, nuclear facilities.

⁴ A substantial interest exists when a single foreigner (and any associates) has 15% or more of the ownership or several foreigners (and any associates) have 40% or more in aggregate of the ownership of any corporation or trust or where such a foreigner, or in the case of a business the foreigner or several foreigners (and any associates) are in a position to determine the policy of the business.

⁵ Some (non-monetary) exemptions apply.

⁶ "Land-rich" corporations and trusts are those whose Australian non-rural land is >50% of its total assets by value. The 15% individual / 40% aggregate foreign interest threshold (as described in note 4) applies to most acquisitions of shares and units in such "land rich" corporations and trusts.

⁷ There are certain exceptions for acquisitions of less than substantial interests in ASX listed companies and trusts which raise funds from the public, where those companies and trusts have less than 10% of its real estate assets in the form of developed residential real estate.

⁸ Commercial real estate includes vacant and developed property such as offices, factories, warehouses, hotels, shops, and certain mining tenements and operations.

⁹ CDirect investments comprise 10% or more of the target investment or which provide the investor with influence or

control over the target investment. Related entities are entities in which there is 15% foreign government investment or foreign government control.

National Interest considerations:

The Federal Government determines national interest concerns on a case-by-case basis and typically considers the following factors when assessing foreign investment proposals:

(i) national security: whether the investment affects Australia's ability to protect its strategic and security interests;

(ii) competition: whether the investment may result in an investor gaining control over market pricing and production of a good or service in Australia or allow an investor to control the global supply of a product or service;

(iii) Australian Government policies: whether the investment may impact on Australian Government tax revenue or other policies

(iv) Economy / Community: whether the investment (including any proposed post-investment restructure) may impact on the Australian general economy and ensure a fair return for the Australian people; and

(v) Character of the investor: whether the investor operates on a transparent commercial basis and is subject to adequate and transparent regulation and supervision.

Foreign government investment:

The Federal Government considers the following additional factors when considering investments by foreign governments and related agencies:

(i) whether the investment is commercial in nature or is the investor potentially pursuing broader political or strategic objectives that may be contrary to Australia's national interest; and

(ii) the size, importance and potential impact of the investment.

Special industry sectors:

Specific additional restrictions on foreign investment apply to the industry sectors of banking, telecommunications, shipping, civil aviation and airports.

Foreign custodians: Foreign custodians are exempt from the Australian foreign investment laws in relation to proposed acquisitions of interests in shares of an Australian corporation and Australian real estate investments where the custodian exercises the voting rights attaching to the shares or the rights associated with the interest in land in accordance with the directions of another custodian or the beneficial owners of the shares or interest.

FIRB examination of proposals

The formal notification activates a time clock so that if the Australian Treasurer does not take action against the proposal within 30 days, the Australian Treasurer loses the ability to block or impose conditions on the transaction under the foreign investment law. In most cases, a decision is made within 30 days of lodgement of a notification and a decision to not object to the transaction is normally granted unless the proposal is judged to be contrary to the national interest.

In some cases, approval of the transaction may be made subject to certain conditions and, in these cases, compliance with the conditions imposed is compulsory.

Foreign investment decisions

A foreign investment decision under the FATA is normally only given for a specific transaction. If an approved transaction does not proceed at that time and/or the parties enter into new agreements at that time and/or at a later date, or if a transaction is not substantially completed within 12 months, further notification will need to be made for the transaction.

FOREIGN INVESTMENT IN AUSTRALIA – AUSTRALIAN GOVERNMENT SUPPORT

Austrade

The Australian Government is keen to attract and deepen productive foreign direct investment in Australia. The Australian Trade Commission (Austrade) is the Australian Government's trade and investment development agency and it provides international businesses with a single, integrated point-of-contact for all investment and trade inquiries.

Working in partnership with business and Government, Austrade provides overseas companies with information to develop the business case for establishing or expanding a business in Australia.

Austrade can help offshore investors by connecting them with the right industry and Government contacts, and by providing information on investment regulation and Government assistance programs.

Austrade can also assist to identify investment potential in particular sectors and strategic alliance partners, provide

detailed cost information and help to establish research collaborations.

Importantly, Austrade's services to international investors are free, confidential and tailored to the needs of the individual business.

Specific services include making introductions to potential partners and customers and organising site visits.

Austrade has offices in more than 100 locations in over 55 countries around the world, and has a team of highly professional investment specialists who understand the particular requirements of international investors.

There are strong opportunities for direct investment in financial services, clean energy and environment, advanced manufacturing, business services and infrastructure, as well as more broadly in R&D and innovation centres. In addition, Austrade offers support to investors in sectors where Australia has well recognised strengths such as ICT, biotech, resources, agribusiness and food processing.

Whole of Government approach

There are a range of Australian Government policies and programs in place to support foreign direct investment into Australia and which enhance Australia's attractiveness as a destination for investment. In addition, the State and Territory Governments have a range of programs relevant to investors. Austrade can assist investors to access this information.

Major Project Facilitation

The Major Project Facilitation (MPF) program provides suitable applicants with a single contact point within the Australian Government and a range of services to assist with a streamlined and co-ordinated investment process.

Administered by the Department of Infrastructure, Transport, Regional Development and Local Government, the program demonstrates the Australian Government's support for major and/or strategic new investment.

It is open to all industry sectors, not just the infrastructure sector.

Projects currently holding Major Project Facilitation status include those in oil and gas and minerals, agribusiness and advanced manufacturing.

Investors can apply to the Minister for MPF status if their project:

- is of strategic significance to Australia;
- needs Australian Government approvals or other involvement; and
- is commercially ready to proceed through Government approvals processes.

Further information is available from www.majorprojectfacilitation.gov.au

R&D programs and tax credits

The Australian Government places a premium on world-class innovation and actively promotes research and development (R&D).

A new R&D Tax Credit was announced in the 2009-10 Budget. It adopts the international practice of using a well-understood tax credit to support business R&D and will increase the base rate of Government assistance for R&D conducted by business – without prejudice to the nationality of the company involved.

The new R&D concession will provide:

- a 45 percent refundable tax credit (equivalent to a 150 percent concession) to firms with a turnover of less than A\$20 million per annum; and
- a 40 percent tax credit (equivalent to a 133 percent concession) to firms with a turnover of A\$20 million or more per annum.

It will replace the current R&D Tax concession from 2010-11.

Further information, and updates on the progress of the legislation will be available from www.innovation.gov.au

Priority sectors and industry-specific programs

Investment opportunities in financial services, clean energy and environment, advanced manufacturing, business services and infrastructure are enhanced by some of the programs and policies in place to support these industries.

Financial services

The Australian Government is committed to elevating Australia's position as a leading financial services hub in the Asia-Pacific region. To this end, it has announced a range of taxation measures, including more competitive tax rates for foreign investors, which increase the industry's competitiveness and are of benefit both to Australian managed funds and foreign investors.

Further information about these tax reforms are available in the Investor Updates section of www.austrade.gov.au/invest

Clean energy and the environment

The Australian law requiring 20 percent of all electricity to come from renewable sources by the year 2020 was passed in August 2009. It is expected that there will be more than A\$20 billion worth of investment in new generation capacity over the next 10 years.

The legislation requires that electricity companies purchase part of their power from renewable sources such as hydro, geothermal, solar and wind.

The 20 percent renewable energy target is complemented by the Australian Government's A\$4.5 billion clean energy initiatives which support investment in large scale solar and carbon, capture and storage projects.

Infrastructure

The Government's Nation Building Program is a six year investment program, providing A\$26.4 billion for more than 120 major road and 26 major rail projects or packages of work.

The National Broadband Network will see the establishment of a new company to build and operate a new super-fast National Broadband Network to be built in partnership with the private sector and involves an investment of up to A\$43 billion over eight years.

Advanced manufacturing

The A\$1.3 billion Green Car Innovation Fund provides assistance on a co-investment basis, over 10 years, to design, develop and manufacture low-emission, fuel-efficient cars and components in Australia.

This fund provides opportunities for foreign companies with innovative technologies to establish an Australian presence, partner with Australian entities, or further develop their existing Australian operations or subsidiaries.

Applications can be lodged at any time – so applicants have the flexibility to meet their individual investment and decision-making cycles – and funds are available from 1 July 2009.

Further information about the fund is available from www.ausindustry.gov.au/Manufacturing/GreenCarInnovationFund/

Contact and further information

To learn more about what Austrade can do to help you or to contact an investment specialist, call: 13 28 78 (in Australia), email invest@austrade.gov.au or visit www.austrade.gov.au/invest

CONTRACT LAW

Australian contract law is based on the English common law, rather than on any codified or statute law. The basic principle of Australian contract law is freedom of contract, under which parties are at liberty to strike whatever bargain they choose.

It is good practice to record the terms of a contract in writing – no special forms or procedures are required – and Australian courts will give considerable weight to the expression of the parties' intentions evidenced in documentary form. These broad statements of principle are affected by some important legislation, notably, the Competition and Consumer Act 2010 (Cth), which cannot be contracted out of and may result in legislative rights which override contractual rights in certain circumstances. See page 35 for more information on the Competition and Consumer Act 2010 (Cth).

Parties

Under Australian contract law, with certain limited exceptions, those who are not parties to a contract cannot be bound by it. This is known as the privity rule. If a corporation which is registered under the Corporations Act is a party, its registered number – an Australian Company Number (ACN), Australian Registered Business Number (ARBN) or Australian Business Number (ABN) – must also be cited for that party in all public documents.

Security over, or title to, assets

If a security interest is proposed in respect of any assets of a company having corporate status under the Corporations Act, the security interest must, in order to preserve the priority position of the supplier, be registered with the Australian Securities and Investments Commission.

The subject matter of the security interest may also call for registration under specific statutes, such as the Instruments Act 1958 (Vic) or bill of sale legislation. A contractual retention of title in respect of goods supplied will be effective, but the retention of title clause must be carefully drafted, especially as it concerns the proceeds of any sale of the goods.

Restrictions on penalties in contracts

Under the general law of contract, it is permissible for parties to agree upon a sum of liquidated damages, or the method of calculation of such a sum, payable by one party to the other in the event of defined breaches of contract. This may be useful where monetary damages may be difficult to calculate, and the parties wish to avoid the cost of dispute resolution or litigation.

Such an agreement on liquidated damages must represent a genuine

attempt to estimate the likely damages which may be suffered. If it is imposed by one party merely as a threat to enforce compliance, is excessive, or is specified to arise in circumstances which are vague, or may be triggered arbitrarily, then the provision may be regarded as a mere penalty and not enforced by a court.

Restrictions on restraints of trade

Any restriction upon the dealing by a party to a contract (or deed) with third parties, including employment by a third party, directly or indirectly, whether during or after the term of a contract:

- may constitute exclusive dealing, conduct regulated by the anti-trust provisions of the Competition and Consumer Act 2010 (Cth), discussed on page 35; or
- may be a restraint of trade at common law, which if unnecessarily broad in the conduct restrained, the time period of the restraint or the area over which the restraint operates, will be void, and unenforceable by a court. In the State of New South Wales (only), the Restraint of Trade Act 1976 (NSW) permits the Supreme Court of New South Wales to limit the operation of a restraint to the extent that the court considers reasonable.

Limitations and exclusions of liability

Subject to the operation of the Competition and Consumer Act 2010 (Cth) and the equivalent sale of goods and fair trading legislation of the States and Territories, parties to a contract are free to limit or exclude liability for breaches of contract, or in other circumstances. The party seeking to rely on an exclusion or limitation of liability clause will, however, need to convince the court that the clause in question, properly construed, is as that party contends.

Resolution of disputes

Australia is a party to the New York Convention on the Recognition and enforcement of Foreign Arbitral Awards. Accordingly, the award of an arbitrator (which can usually give any legal, equitable and statutory remedies) will be recognised and enforced in the Federal Court or any of Australia's State or Territory Courts as if it were a judgement of that Court.

International contracts for the sale of goods

Australia is a signatory to the Vienna Convention on Contracts for the International Sale of Goods. This provides for uniform rules which govern the formation and performance of contracts for the international sale of goods and sets up a framework of rules specifying the obligations of parties to them.

The parties to a contract for the international sale of goods may agree that the Convention is not to apply, and may select the laws of one of the parties' home jurisdictions as the governing law of their contract. If they do not do so, however, then the Convention will apply, and incorporate into the contract the rules set out in the Convention.

PROTECTION OF TECHNOLOGY & INTELLECTUAL PROPERTY

Australia provides a comprehensive legal framework for the protection of technology and intellectual property rights. Australia is a signatory to the Agreement on Trade-Related Aspects of Intellectual Property Rights and all major intellectual property treaties.

Australians are notoriously early adopters of new technologies and the Australian courts strongly support intellectual property rights.

Patents

The Patents Act 1990 (Cth) provides for two forms of patents, a *standard patent* which has a term of up to 20 years from the date of filing of the complete specification (depending on renewals) and, since 2001, the *innovation patent*, for inventions that are not sufficiently inventive to meet the inventiveness threshold required for standard patents, and which have a duration of up to eight years. Patent terms, other than in relation to standard patents for pharmaceutical substances, may not be extended.

An application for a standard patent is subject to a full examination as a condition of grant. An application for an innovation patent is not subject to substantive examination prior to grant but will only be examined for compliance with formal requirements, and will then be registered. The innovation patent may not, however, be enforced against an alleged infringer unless it has been substantively examined and certified. An examination can therefore be requested (and paid for) at any time by the patentee, or by any third party (who might be concerned regarding infringement), or directed by the Commissioner.

Both standard and innovation patents may be challenged on various bases including lack of novelty, lack of inventive (or innovative) step, inutility and various other technical grounds. An alleged infringer is entitled to assert by way of defence to an infringement claim that a patent is invalid.

Australia is a party to both the Paris Convention, under which a foreign

applicant has a certain time period from the date of an original application in a member country within which to file in Australia an application fairly based upon the original, and the Patent Co-operation Treaty, under which a single application in a member country may be treated as an application in another member country. Australia is also a party to the 1977 Treaty on the International Recognition of the Deposit of Micro-Organisms for the Purposes of Patent Procedure.

Confidential information

The protection of confidential information (which includes trade secrets) is governed by the general law, and not by statute. This means that in Australia there is no written code, such as the uniform statement of law now adopted in many American States.

The general law imposes duties upon a person who receives confidential information in circumstances where he or she knew, or should have known, that the information was confidential.

That duty not only requires the recipient not to disclose the information contrary to the requirements of the discloser, but also prohibits any use, even secret use, of the information otherwise than as the discloser has permitted. In some cases, a recipient of confidential information may be restrained from use and/or dissemination even if he or she did not know that the information was, in fact, confidential.

The law protects only identifiable information which has been kept genuinely secret, or has been disseminated only to those who have been brought under a duty to maintain confidentiality.

In the case of trade secrets, the information subject to this duty must be sufficiently developed to be commercially useful and identifiable – mere speculation or industry experience cannot be the subject of the legal duties.

No contract, or even writing, is required, as the duty results from the operation of law alone, but a written acknowledgement of confidentiality assists in proving that the requirement of secrecy has been communicated to the recipient. If however an obligation is to be imposed upon the discloser (eg. where the recipient has paid for exclusivity), it is necessary for a binding legal arrangement to such effect to be entered into by the discloser, which is in the nature of a restraint of trade and subject to the law relevant to this type of contract (discussed above).

Copyright

Copyright in Australia is governed by the Copyright Act 1968 (Cth). The types of material which may be subject to copyright are:

- literary works (which include computer programs);

- musical works (ie. musical compositions);
- artistic works (which include photographs, engineering drawings, plans, buildings and works of artistic craftsmanship, irrespective of whether the artistic content is regarded to be high);
- dramatic works; and
- cinematograph films, sound recordings, sound and television broadcasts and published editions (ie. the typeset arrangement of printed material).

If the criteria for copyright subsistence exist, copyright arises automatically on creation, with all attendant rights, without the need for registration or any other formality, including any form of copyright notice. Such criteria include the creation of the copyright material by a citizen, national or resident of, or first publication in, Australia or one of the many countries with which Australia has multilateral or bilateral treaty arrangements.

Australia is a member of both the Berne Union and a party to the Universal Copyright Convention, as well as a number of other treaties for the protection of individual rights. Australian copyright lasts for the life of the human author plus 70 years, in the case of works, and (broadly speaking) 70 years from the date of publication in the case of subject matter other than works. This is so, however, only in the case of all works and other subject matter in which copyright subsisted on 1 January 2005 when the amending legislation came into effect. In all other cases the earlier term of 50 years in each case remains applicable so that no “revival” of copyright can occur.

Designs

The Designs Act 2003 (Cth), which replaced the Designs Act 1906 (Cth), came into effect on 17 June 2004. It creates a system for registration of designs with IP Australia, the Australian organisation responsible for the registration of patents, designs and trade marks. Under the legislation, a design is “the overall appearance of a product resulting from one or more visual features” and will be registrable if it is “new” and “distinctive”, assessed against designs publicly used in Australia or published within or outside Australia. An application for registration will not however initially be subject to substantive examination, but will be registered on compliance with formalities only. The registered design will only be examined upon request of any person, by order of a court, or at the initiative of the Registrar. It will be a condition of infringement proceedings that a registered design has been examined and, if compliant with the requirements of novelty and distinctiveness, a certificate of examination issued.

The duration of the monopoly in the design gained by registration has been reduced to a maximum of 10 years. As a party to the Paris Convention, Australia allows foreign applicants a 12 month period of grace from the date of an original application in a member country in which to file an application for the same design in Australia.

Trade marks

Australia’s law of registered trade marks is governed by the Trade Marks Act 1995 (Cth). Under that Act, applications for registration may be made whether or not the subject mark has been used in respect of both goods and services. Australia is a party to the Paris Convention which permits a period of grace within which an

application by a foreign party may be filed in Australia for the same mark in respect of the same goods or services, while retaining the priority date of an earlier application in the convention country. Australia is also a party to the Madrid Protocol, under which a single application may be made in any member country for subsequent processing by each of the Registrars of Trade Marks in other member countries nominated in the application.

Australia operates a system of classes for goods and services, in accordance with the Nice classification system.

Since the commencement of operation of the 1995 Act, there is no requirement for the registration of user licences in order to protect the registration of a trade mark. For use under a licence to be deemed use of the registered owner, however, a licence must comply with certain standards, including a requirement for reasonable control to be exercised over the licensee by the registered owner. It is still possible to record any interest in a registered trade mark, and such recordable interests now include the interests of a mortgagee or a beneficiary under a trust, as well as that of a licensee.

Circuit layouts and mask works

Australia is a signatory to the Washington Treaty on Intellectual Property in Respect of Integrated Circuits, and in anticipation of that treaty coming into force enacted the Circuit Layouts Act 1989 (Cth). Unlike the United States' Semiconductor Chip Protection Act, however, the Australian legislation does not extend protection to a mask work, but to a circuit layout defined as a representation, fixed in any material form, of the three dimensional location of the active and passive elements and inter-connections making up an integrated circuit.

Eligible layout rights under the Australian legislation last for a period of 10 years from the date of making or first commercial exploitation. There are no registration requirements, or facilities, but the Australian legislation is unusual in providing for marking of eligible layouts or integrated circuits. In addition, it is arguable that mask works, as such, may be registered as designs under the Designs Act, and also enjoy copyright under the Copyright Act.

Plant breeders rights

Under the Plant Breeders Rights Act 1994 (Cth), new plant varieties may be registered, with the result that the registered proprietor gains the exclusive right to sell and produce for sale the registered variety, and its reproductive material, and to use the name registered for the plant. Such rights subsist for 20 years from the date of application.

ELECTRONIC COMMERCE

Electronic transactions legislation

Electronic commerce in Australia is principally regulated by Federal, State and Territory Electronic Transaction Acts. The Federal Act applies only to transactions to which a Federal law applies. The State and Territory Acts are similar to the Federal Act and apply in their respective jurisdictions.

The main impacts of the Electronic Transaction Acts are:

- transactions are not invalid simply because they rely on electronic communications or electronic signatures;
- the establishment of guidelines for determining the time and place of despatch and receipt of an electronic communication;
- allowing for the electronic recording of information and retention of electronic documents where legislation requires information to be recorded or retained in writing;
- provision for the use of electronic forms of authentication instead of a handwritten signature; and
- subject to certain restrictions.

The Electronic Transactions Acts do not apply to all legislation or transactions. Each Electronic Transactions Act lists legislation or types of transactions which are exempt from the rules set down in that Act.

The Electronic Transaction Acts are based on the UNCITRAL Model Law on Electronic Commerce 1996 (Model Law). In 2005, the United Nations adopted the Convention on the use of Electronic Communications in International Contracts, as a means of updating some of the concepts contained in the Model Law. In April 2009, all Australian jurisdictions agreed to make changes to their Electronic Transactions Acts in order for Australia to accede to the Convention.

The Convention applies to international business contracts only. However, the Federal Government has signalled its intention to apply the Convention rules more broadly to all transactions, included consumer transactions.

Draft legislation to amend the Federal Act is expected to be introduced into Federal Parliament in late 2009. It is unclear at this time when similar legislation will be introduced in the States and Territories.

Contract law

There is no fundamental principle of contract law that prevents contracts being formed electronically. Consequently, the laws applicable to contracts online are the same as those applicable to non-virtual transactions.

One issue that arises for online contracts is the validity of “click-through” agreements, being agreements where the customer clicks on an on-screen icon to accept the standard terms and conditions. There is little case law specifically in relation to click-through agreements. There is no reason in principle however why contracts cannot be formed in this manner.

Another issue that arises is whether the terms and conditions of an online contract have been adequately incorporated into the agreement. For effective incorporation of terms and conditions under Australian law, the offerer must do all that is reasonably necessary to bring the terms to the attention of the customer in time to give the customer a reasonable opportunity to consider them and decide whether to enter into the contract on those terms.

Privacy

The main legislative scheme in Australia in regards to privacy is the Federal Privacy Act 1988 which covers:

- private sector and non-profit organisations with an annual turnover of more than A\$3 million;
- all health service providers and Federal Government contractors regardless of their turnovers;
- Federal Government agencies; and
- businesses with an annual turnover of A\$3 million or less (small businesses) that:
 - trade in personal information;
 - are related to a larger business; or
 - are reporting entities (with the meaning of the Federal Anti-Money Laundering and Counter-Terrorism Financing Act 2006), but only in relation to the activities carried on by the small business for the purpose of that Act or rules or regulations made under that Act, such as the reporting of suspicious transactions and cross-border movements of cash over A\$10,000.

Small businesses that are not automatically covered by the Federal Privacy Act have the option to opt in to the Act. The Federal Privacy Act contains 10 National Privacy Principles which set down broad principles on how organisations must deal with personal information.

These principles cover the life cycle of personal information and include:

- restrictions on the collection of personal information (ie. any information that can identify a person – such as name and address) and sensitive personal information (such as information related to a person's racial or ethnic origin, or religious or philosophical beliefs);

- restrictions on the use and disclosure of personal information so collected;
- requirements designed to ensure that personal information collected, used or disclosed is kept securely and is accurate, complete and up to date;
- obligations on organisations to ensure that individuals are provided with access to their personal information and given the opportunity to correct that information;
- restrictions on the use of Government-issued identifiers (such as tax file numbers);
- restrictions on the transfer of personal information to other individuals and organisations both within and outside Australia; and
- obligations to ensure that individuals are able to access an organisation's privacy policy.

A number of activities by organisations are exempt in certain circumstances from the obligations imposed under the Federal Privacy Act. These include the handling of current and former employee records by employers where the handling is directly related to the employment relationship, the collection and use of personal information by media organisations in the course of journalism and the collection and use of personal information by contractors working for registered Australian political parties or political representatives.

The collection, use and disclosure of personal information by State and Territory Government agencies and contractors are regulated by relevant State and Territory legislation. Health information is also regulated in some cases on a State and Territory basis.

Organisations may apply to the Privacy Commissioner to be bound by a specific Privacy Code. If approved, the organisation will be required to comply with that Privacy Code instead of the National Privacy Principles. Examples of approved Privacy Codes include the Market and Social Research Privacy Code and the Biometrics Institute Privacy Code.

In 2008 the Australian Law Reform Commission delivered a comprehensive report on the state of Australia's privacy laws. The report recommended substantial changes to Australia's privacy laws, including mandatory notification for certain data protection breaches, the removal of exemptions in relation to employee records and small business and the introduction of a single set of privacy principles – to be known as the "Uniform National Privacy Principles" – applicable to all public and private sector organisations. The Federal Government is currently consulting with State and Territory Governments and interested stakeholders on these recommendations.

Communications interception

The interception of telecommunications (including email, Short Message Services (SMS), Multimedia Message Services (MMS), instant messages (sent using programs such as MSN Messenger and Yahoo Messenger), amongst other forms of communications) is regulated by the Federal Telecommunications Act 1997.

Under the Telecommunications Act and the Telecommunications (Interception and Access) Act 1979, telecommunication carriers (owners and operators of telecommunications networks) and carriage service providers (those who provide services over those networks, such as internet service providers) must ensure that their system permits interception.

The Telecommunications Act prohibits carriers and carriage service providers from disclosing certain information, including information relating to the substance of a communication carried over their networks. Carriers and carriage service providers have an obligation under the Telecommunications Act to provide assistance to law enforcement authorities and to do their best to prevent their network and facilities from being used to commit criminal offences. The Telecommunications (Interception and Access) Act prohibits the interception of communications, in most circumstances, apart from interception carried out under a warrant obtained by law enforcement and intelligence authorities. State and Territory listening devices legislation prohibits the recording of private conversations by third parties without the consent of the parties to that conversation or without an appropriate warrant. In some States and Territories this prohibition also extends to parties to the conversation.

Spam

The Federal Spam Act 2003 prohibits the sending of unsolicited commercial electronic messages such as emails, SMS, MMS and instant messages which have an "Australian link". The meaning of Australian link is very broad and includes those messages sent:

- from within Australia;
- by an individual or organisation whose central management and control is in Australia (whether or not the message is actually sent from Australia);
- where the computer, server or device that is used to access that message is located in Australia; and

- where the account holder or organisation receiving that message is present in Australia.

The Spam Act does not cover messages sent by way of a voice call or faxes.

Whether or not a message is deemed to be commercial depends on the way in which the message is presented and the content (including any links, telephone numbers or contact information) contained in that message.

Commercial electronic messages can only be sent with the recipient's consent, must include information which accurately identifies the sender and must contain a functional unsubscribe facility.

Consent can either be express or implied. Information which accurately identifies the sender must also include how the sender can be contacted and must be valid for 30 days after the message is sent. The unsubscribe facility must permit the recipient to opt out of emails from that sender in future and must be presented in a clear and conspicuous manner.

The Spam Act also prohibits individuals in Australia and organisations that carry on business in Australia from supplying, acquiring or using address harvesting software and harvested address lists.

Government agencies, registered Australian political parties, charities, religious organisations and educational institutions are exempt from the provisions of the Spam Act in certain circumstances.

There are significant financial penalties for breach of the Spam Act including fines of up to A\$1.1 million a day.

EMPLOYMENT & INDUSTRIAL RELATIONS

The industrial relations landscape in Australia is currently in a state of transition following the commencement of the Federal Government's Fair Work reform package in July 2009. The reforms have introduced a number of significant changes and contain a number of laws as to how the transition is to take place. As a result of the Fair Work reform package, many matters previously governed by State laws are now governed by Federal law.

When the transition is complete, all employees who are subject to the Federal laws will have their employment relationship governed by an award set by an industrial body or collective agreement negotiated between an employer and an employee group. The new legislation therefore moves away from the individual agreement focus of the previous laws. All employees will be entitled to the minimum conditions of the new National Employment Standards. Consequently all employees will, *at the very least*, be entitled to:

- basic rates of pay and casual loadings;
- that a maximum of 38 ordinary hours per week be worked (although an agreement may provide for this figure to be averaged out. "Reasonable additional hours" may also be included in the agreement);
- four weeks paid annual leave per year;
- 10 days' paid personal/carer's leave (including sick leave) per year (which accrues on a pro rata basis), together with an additional two days of unpaid carer's leave and a further two days of paid compassionate leave;
- 52 weeks of unpaid parental leave for both parents at the time of birth or adoption of a child with the option for one parent to request an additional 52 weeks. A request for flexible working arrangements by employees who are parents or carers of children under school age or under 18 with a disability. The employee must have at least 12 months' continuous service and the request may be refused on reasonable business grounds;
- long service leave pursuant to Federal instrument, State law or in the future, an expected national law;
- unpaid community service leave of a reasonable period for an employee engaged in an "eligible community service activity" such as jury service or voluntary emergency management, and
- severance pay where termination of employment is for redundancy and the employee has at least 12 months' service. The amount of payment is on a scale depending upon the length of the employee's service.

Prior to the Fair Work reform package, earlier legal reform had decreased the number of employees protected by unfair dismissal laws. The Fair Work changes reintroduce this protection for many employees. Unfair dismissal claims cannot be brought, however, if the dismissal was due to a "genuine redundancy". Small businesses which employ 15 or fewer employees and comply with a Code for dismissals also are exempt from unfair dismissal laws. Equally, employees engaged on a fixed term contract or for a specified task,

short term casual employees, trainees engaged for a specified time period, seasonal employees and employees who earn more than a specified salary (currently A\$108,300) are not protected.

The Fair Work reform package has also slightly altered laws prohibiting discrimination in the workplace, by expanding the protection from discrimination to include any detriment to the employee's conditions of work. Australian employees have the benefit of Federal legislation which requires the payment of statutory superannuation contributions by employers on behalf of their employees.

Occupational health and safety legislation imposes quite strict obligations on all employers to ensure the safety of their employees while at work.

Employee-related taxes

From 1 July 2000, a new withholding tax regime was introduced – the pay-as-you-go (PAYG) withholding system. The PAYG withholding system requires employers to withhold tax from the remuneration paid to employees and to remit the tax to the Australian Taxation Office on a regular basis. The amount withheld is calculated according to scales prescribed by the Commissioner of Taxation.

Fringe benefits tax is payable by employers on the value of certain fringe benefits provided to employees in connection with employment. Fringe benefits are widely defined to include a range of privileges, services or facilities including the private use of motor vehicles, interest-free or low interest loans or accommodation.

Payroll tax is a State tax levied monthly by each State on the payroll of employers who pay wages in excess of a prescribed threshold.

The rate of tax imposed varies from State to State.

Generally, States will require employers to register when monthly wage payments reach certain levels.

Federal legislation requires employers to provide a prescribed minimum level of superannuation contribution for each of their employees. Where employers provide less than the required minimum level of support, they will be liable to pay a non-deductible charge called the Superannuation Guarantee Charge.

The prescribed minimum level of superannuation support that employers must provide for each of their employees is currently nine percent of an employee's notional earnings base, which, for most employees, is the remuneration earned in their normal working hours.

There are also limits on the maximum amount of superannuation contributions made for the benefit of an employee that an employer can claim as a tax deduction. The maximum limits differ depending upon the age group to which each employee belongs.

Executive employment contract

In Australia, an executive employment contract is typically entered into with senior employees. This form of contract is quite simple. Its principal purpose is to record an agreement between the employer and employee as to the period of notice of termination without cause, as well as any fringe benefits other than salary.

BUSINESS MIGRATION

International business people have, over the years, considerably boosted the skills base of the Australian economy, expanded local business and export activity, and maximised employment opportunities for Australians. Although there are a number of ways that international business people can enter Australia, all are required to have a visa.

The Australian Government has developed a number of reforms in legislation, immigration policy and procedure in recent years to encourage business migration and make it easier to enter Australia for business purposes. This has particularly been the case for business visitors and for those entering for business purposes temporarily.

All visa applicants are required to meet public interest criteria concerning health, character, national security and foreign relations. The longer the period of stay, the more rigorous the criteria.

While our firm presently does not undertake business immigration law work, we have a close affiliation with specialists in the area to whom we can refer clients if they have any immigration law issues.

FUNDRAISING LAWS

Australia is generally regarded as having an issuer-friendly legal regime in respect of fundraising which over the years has been conducive to primary and secondary equity capital raisings when market conditions have permitted.

The Corporations Act regulates all fundraising activity within Australia. It applies to all financial products offered within Australia whether or not the financial products are issued by an Australian or a foreign issuer. "Financial products" is defined to include shares, units in a trust, partnership interests, debentures and many other financial instruments. The rules apply to offers of, or invitations to subscribe for, financial products that are received in Australia, regardless of where any resulting issue, sale or transfer occurs.

No offers without disclosure to investors

Subject to a number of exemptions, a person must not make an offer of financial products unless a disclosure document is prepared and in certain circumstances lodged with ASIC. The disclosure document must comply with the content requirements set out in the Corporations Act, and a number of procedural steps must be followed.

Unless an exception applies, disclosure to investors is required for an off-market offer of new or existing financial products.

Disclosure is not generally required for an offer for sale of existing financial products, but in the cases of sales within 12 months of the issue of securities and sales by controllers, disclosure may be required.

There are two types of disclosure documents for securities (ie. shares or debentures) in Australia, a prospectus and an offer information statement (OIS). An OIS can only be used to raise up to A\$5 million and has fewer information content requirements. A disclosure document for financial products other than securities is called a Product Disclosure Statement (PDS).

There are also restrictions on unsolicited offers of financial products and advertisements regarding offers of financial products.

Exceptions

An offer of financial products does not require disclosure if the offer is excluded under the Corporations Act or ASIC grants general or specific relief for certain offers (eg. in relation to employee incentive schemes).

These exceptions include:

- where the amount payable on acceptance of the offer for the financial product exceeds A\$500,000 or when added to amounts previously

paid by a person for the same class of financial product that is held by that person adds up to at least A\$500,000;

- an offer to an investor whose gross income for each of the previous two financial years was at least A\$250,000 or who has net assets of at least A\$2.5 million, certified by a qualified accountant; and
- offers to other specified sophisticated or institutional investors (including stockbrokers, certain pension and life insurance funds, and persons who control at least A\$10 million for the purpose of investment in securities).

There are also a range of exceptions potentially open to foreign issuers and for issues under takeovers or schemes of arrangements. In eligible cases rights issues and entitlement offers can be conducted without formal disclosure documents. Similarly, security purchase plan offers are able to be conducted without formal disclosure documents in eligible cases.

The combination of these exceptions means that the legal regime in Australia is more favourable to equity capital raising activity compared to many overseas jurisdictions and facilitates offers to be conducted relatively quickly and in the case of secondary offerings (placements, rights issues, entitlement offers) often without a formal prospectus or PDS.

TAKEOVER LAWS

The Australian takeover rules under the Corporations Act regulate acquisitions of interests in Australian companies or trusts listed on the ASX and unlisted Australian companies with more than 50 members (regulated entities). While the rules are at times technical, the acquisition process is usually quite certain and fundamentally the same methods of acquisition have been used in the last 20 or so years.

A person is prohibited from acquiring (except pursuant to a limited number of exceptions) a relevant interest in a regulated entity if, because of the transaction, any person's voting power in the regulated entity increases:

- from 20 percent or below to more than 20 percent; or
- from a starting point that is above 20 percent and below 90 percent.

A person's voting power is broadly their relevant interest plus their associates' relevant interests in voting securities. The "relevant interest" concept is broad. It can be traced through corporate groups and arrangements with third parties.

The takeover rules apply to acquisitions whether by Australian residents or foreign investors. Offshore acquisitions can have downstream Australian takeover consequences, particularly where the overseas target has, directly

or indirectly, voting power of more than 20 percent in an Australian regulated entity.

The rules are designed to ensure that the market for control of regulated entities is efficient, competitive and informed, and that all security holders are afforded reasonable and equal opportunities to participate in proposed acquisitions and are given adequate information and time to consider proposals under which a person may acquire a substantial interest in a regulated entity.

There are a number of exceptions to the takeover prohibition. These include off-market and on-market takeover bids, court approved schemes of arrangement, target shareholder approved acquisitions, selective reductions of capital and three percent acquisition creep every six months. In addition, ASIC has power to exclude or modify the operation of the takeover rules.

If 100 percent control is the objective, there are two types of compulsory acquisition (leaving aside a scheme of arrangement or a selective reduction of capital which are by their nature compulsory), but generally these minority squeeze-outs do not apply until the acquirer has a minimum of a 90 percent relevant interest in relevant classes of the target's shares.

Acquisitions of voting power in a listed regulated entity of, or beyond, five percent also require disclosure to the ASX and the relevant entity. The Takeovers Panel also generally expects disclosure of cash settled swaps where the combined swap long position and physical position exceeds five percent.

A number of regulatory bodies are involved in the takeover process:

- **ASIC** which regulates compliance with the Corporations Act and has power to modify and grant exemption from compliance with provisions of the Corporations Act. ASIC can post vet bidders' and targets' statements and reviews scheme documents and statements made in the conduct of a takeover under its Truth in Takeovers policy.
- The **Takeovers Panel** (based on the UK Takeover Panel) which is responsible for reviewing conduct during takeovers both in terms of whether the conduct complies with the letter of the law or is otherwise unacceptable (ie. offends the spirit of the takeover rules). It has power to make a broad range of orders if it determines that unacceptable circumstances exist.
- The **ASX** which, in part, regulates what listed entities are permitted to do.

- The **Foreign Investment Review Board/Treasury** which considers applications for foreign investment approval.
- The **Australian Competition and Consumer Commission (ACCC)** which regulates our anti-trust laws.

ASIC and the ASX also monitor compliance by listed entities with their continuous disclosure obligations.

Tax – scrip relief

In relation to Australian income tax, target security holders who would otherwise be subject to Australian capital gains tax on selling their shares may qualify for CGT roll-over relief (scrip for scrip relief) where they receive equivalent securities in the purchasing entity in exchange for their target securities.

This scrip relief effectively means that the target security holders will defer any capital gains tax liability until they dispose of their securities in the purchasing entity. One of the key requirements for scrip for scrip relief to apply is that the purchasing entity must, as a result of the arrangement, acquire 80 percent or more of the voting securities in the target entity.

GENERAL TAX ISSUES

Income tax represents approximately 72 percent of the total tax revenue of the Australian Federal Government. Of that, personal income taxes account for 46 percent, with a further three percent from taxes levied on superannuation and one percent from taxes on employee fringe benefits. Company income taxes account for 22 percent of total taxation revenue. The remaining 28 percent comes mainly from excise and customs duties. Although Goods and Services Tax (GST) is imposed by the Federal Government and is collected by the Australian Tax Office, most GST receipts go to State and Territory Governments.

This summary touches on some of the main tax issues which may be relevant to a foreign entity that invests in Australia, either directly through a branch or indirectly through an interest in, or ownership of, an Australian incorporated company. Australia is a party to international double tax agreements which may impact on the applicable taxation treatment.

It is likely that there will be many other taxation issues affecting a particular investment in Australia that are not referred to in this summary.

Taxes

Different forms of direct and indirect taxes are levied by both the Federal

and State Governments which include the following:

Australian Federal Government

- Income tax;
- Fringe benefits tax;
- Superannuation tax;
- Indirect taxes (on petrol, oil, tobacco and alcohol, customs duty); and
- GST.

State Governments

- Employers' payroll tax;
- Land tax;
- Stamp duties;
- Gambling taxes; and
- Motor vehicle taxes.

Taxation of income and gains

The general rule for Australian residents (excluding temporary residents) is that they are taxed on their foreign and domestically-earned income and capital gains. Particular capital gains tax rules apply if the individuals cease to be resident (which can result in the taxation of capital gains) and where individuals or entities become permanent residents of Australia.

Non-residents who do not become Australian residents (temporary or permanent) are generally not taxed on their foreign income or on any capital gains from their assets that are not taxable Australian property.

Similar treatment may apply to individuals who are or who become "temporary residents" of Australia for tax purposes (regardless of the time spent in Australia). Individuals who hold a temporary visa and fall within the definition of temporary resident may be exempt from Australian tax on income from sources outside Australia, but will be taxed in respect of employment or services income earned while a temporary resident.

In addition, capital gains made and losses incurred by eligible temporary residents from their assets (assets that are not taxable Australian property) are not recognised for Australian tax purposes. An exception applies to gains from employee shares or options attributable to employment or services in Australia. Where all or part of a relevant employment is performed in Australia, employee share or option discounts may be partially taxable or exempt, depending on the nature and timing of the discount benefits, and of any gains from the shares or options (and other factors). From 2006, only certain capital assets are taxable Australian property (discussed on the following page).

Interest payments by temporary residents to non-resident lenders are not subject to interest withholding tax obligations.

Taxation periods and scales

A company is an Australian resident if it is incorporated in Australia or has its central management and control in Australia and either carries on business in Australia or has its voting power controlled by Australian resident shareholders.

The standard income year for the taxation of income and gains is the 12 month period ending 30 June, but approval may be obtained to adopt a different accounting period ending on another date. Typically, approval is given where a foreign parent company has a tax year ending on another date.

A graduated income tax scale applies to individuals. Resident individuals are entitled to a tax-free threshold in the rates scales. Non-resident individuals are subject to the graduated income tax scale, but without the tax-free first step. The top personal marginal rate (from 1 July 2006) is 45 percent but, with the addition of the Medicare Levy, effectively becomes 46.5 percent for most residents. Companies (resident and non-resident) are taxed at a single specified flat rate, for both ordinary income and capital gains. Since 2001 the corporate rate has been 30 percent.

Where a foreign enterprise has a branch office (permanent establishment) in Australia, and a double taxation agreement applies, profits are attributed to the permanent establishment as they would be if the permanent establishment were a separate enterprise dealing independently with its head office and other parties. The foreign enterprise is taxed, in relation to the profits of its permanent establishment, at the general corporate rate.

If a foreign enterprise has no Australian permanent establishment and earns business profits sourced in Australia, where a double tax treaty applies its effect will generally be that the business profits will not be subject to Australian tax.

Business deductions

Taxable income for both residents and non-resident individuals and companies is calculated by deducting allowable deductions from assessable income. Partnerships and trusts calculate net income in a similar manner. Typically, an accruals basis of taxation will apply to business taxpayers, but in accordance with particular taxation principles, rather than the financial accounts of the enterprise.

Allowable deductions include deductions for expenses incurred in carrying on a business, capital allowances for depreciating assets, and tax losses from previous years, which may be carried forward to be offset in later years (indefinitely, until absorbed). However, a distinction is drawn between revenue losses and net capital losses. Revenue losses may be carried forward for offset against later assessable income and gains. A net capital loss carried forward may be offset only against later year capital gains. Special restrictions apply to the prior year tax losses of companies and trusts to prevent trafficking in losses.

As part of certain incentives for the establishment of regional headquarters (RHQs) in Australia, special deductions are available for particular categories of RHQ setup costs. For example, expenditure incurred in setting up facilities in Australia that are intended to provide RHQ support may qualify. Special concessions have been introduced to encourage venture capital investment.

Capital gains tax

Capital assets (CGT assets) are subject to capital gains tax where a taxable event (a CGT event) occurs and a capital gain or loss is recognised. A wide definition of "CGT asset" applies but capital gains or losses are not recognised for CGT assets acquired before 20 September 1985. Certain exemptions apply and there are various categories of CGT rollovers (tax deferrals). Duplication is prevented by a rule that gives priority to ordinary income taxation if a transaction would otherwise be taxed under both regimes.

Capital gains (and losses) of foreign residents are only recognised in relation to certain Australian assets. Before 2006, a list of asset categories identified those connected with Australia in respect of which capital gains and losses were recognised. From 2006, a significantly reduced list of categories of taxable Australian property applies. The only categories of CGT assets relevant to foreign residents now are: taxable Australian real property, indirect interests in Australian real property, the business assets of an Australian permanent establishment, and any options or rights to acquire such assets. Indirect interests in real property are non-portfolio interests (10 percent or greater) in interposed entities whose assets are wholly or principally Australian real property, held directly or through other entities.

Capital gains are offset against any capital losses (current or prior year) and the net capital gain for the year is included in assessable income. A net capital loss may be carried forward to a later tax year, but may be offset only against a capital gain in a later year.

The net capital gain of a corporate taxpayer is taxed at the general corporate tax rate. Individuals may qualify for a 50 percent discount in the assessable capital gain for assets held

for more than 12 months, but that discount does not apply to corporate taxpayers. The indexation of capital gains for inflation, and an averaging calculation system for individuals, have been discontinued.

Various forms of capital gains tax rollover relief are provided. These have the effect of deferring or disregarding a capital gain or loss with respect to a particular asset or replacement asset. Certain rollovers facilitate corporate restructures that satisfy prescribed conditions, generally based on the economic continuity of the ownership interests held. Share for share and unit for unit exchanges, and demerger relief, are often important elements of corporate reorganisations.

The measures regarding taxable Australian property apply to foreign residents and the trustees of foreign trusts. Foreign investors in trusts will need to determine whether or not their trust interest constitutes an indirect interest in Australian real property. A specific exclusion applies in respect of interests of foreign residents in a fixed trust if a gain made in respect of the interest is attributable to CGT assets of the fixed trust that are not taxable Australian property. The trustee of the fixed trust is also not taxed in respect of the relevant taxable event. Further requirements apply where the asset of the fixed trust is itself an interest in an underlying fixed trust.

From 1 April 2004 Australian multinational companies and their controlled foreign companies are entitled to capital gains tax relief in connection with the sale or disposal of non-portfolio (10 percent or more) share interests held in a foreign company with an active business. The change, along with related amendments, is intended to assist Australian companies in restructuring their offshore interests and provide flexibility in their use of capital.

Taxation of business entities

Companies

Companies (resident and non-resident) are treated as separate taxpayers. Before the introduction of the tax consolidation regime, on 1 July 2002, companies that were 100 percent-owned subsidiaries benefited from various forms of group relief. With the introduction of the tax consolidation regime, those forms of group relief were phased out, with the result that tax consolidation is now the only form of group relief for groups of wholly owned entities.

The tax consolidation regime, for 100 percent-owned Australian companies and trusts that have a single Australian head entity, was phased in with effect from 1 July 2002, with significant transitional dates on 1 July 2003 and 1 July 2004. Tax consolidation is also available for groups wholly owned by foreign parents where there is no single Australian resident holding company – “multiple entry consolidated” (MEC) groups.

Wholly-owned groups of qualifying entities may elect to consolidate for tax purposes, with the result that the group is treated as a single entity, as though subsidiary members were merely divisions of the head company. Where an election is made, all wholly-owned entities must be included in the consolidated group. Complex rules deal with the formation of consolidated groups and the entry of new members, as well as the exit of members from the group. Tax losses in relation to a consolidated group are also governed by an elaborate regulatory regime.

The head company of a consolidated group is liable, in the first instance, for all group tax liabilities. In the event of default, however, subsidiary members may have a joint and several liability, but this may be prevented by the operation of a valid tax sharing agreement between group members

that deals with the allocation of liabilities between group members.

Although certain distinctions are maintained for taxation purposes between private and public companies, the same general corporate rate of taxation applies to both. Generally, a public company is one listed on an official stock exchange (where the company is not directly or indirectly closely held in relation to the paid up capital, voting power and dividend rights throughout the year). Private companies are those that are not public companies.

Trusts

Generally, trusts are not treated as taxpayers and, although a trust income tax return is required, distributions of trust income are taxed at the level of the beneficiaries. The trustee may be taxed where there are no beneficiaries presently entitled to trust income and may be taxed on behalf of certain beneficiaries, including non-resident beneficiaries. To this extent, pass through taxation applies to fixed trusts, discretionary trusts and unit trusts that fully distribute trust income. Certain corporate unit trusts and public trading trusts are, however, taxed as companies.

Superannuation funds

Superannuation funds, approved deposit funds and pooled superannuation trusts are subject to special taxation provisions. These categories are linked to the regulation of resident superannuation funds by the Australian Prudential Regulation Authority.

Partnerships

Partnerships are subject to pass through taxation treatment, (ie. the shares of partnership profit or loss are taxed at the level of the partners), although a partnership is required to file an information tax return.

Capital gains and losses in relation to partnership interests and CGT assets of a partnership are made by the partners individually. Certain categories of foreign hybrid limited partnerships and limited liability companies may qualify for similar partnership treatment. Limited partnerships that are "corporate limited partnerships" are, however, taxed as companies (from 1992).

Joint ventures

Participants in a joint venture who receive income jointly may be subject to taxation as tax partners. In other circumstances, joint venturers who separately derive their individual shares of the joint venture proceeds are, in all respects, treated as separate taxpayers.

Dividends paid by a company

Under the imputation system of taxation, dividends paid by Australian resident companies may be franked with an imputation credit that reflects the tax paid at the corporate level on the profits distributed. Before payment, companies determine whether dividends are wholly or partly franked, depending on the level of franking credits available. Individual shareholders who receive franked dividends are required to include both the cash dividend and the attached franking credits in their assessable income. They are then entitled to a tax offset equal to the franking credit that reduces or eliminates the tax payable by them on the dividend.

Since 1 July 2000 shareholders are entitled to refunds where the franking offset is greater than the tax payable.

In general, different rules apply depending on whether dividends are paid to individuals, trusts, partnerships, superannuation funds and related entities, life assurance companies or corporate shareholders.

From 1 July 2002, companies and other corporate tax entities that receive franked dividends are required to apply the same treatment as that which applies to individuals; ie. the franked distribution must be grossed up by the attached franking credits and included in the company's assessable income and a tax offset is applied to reduce the corporate tax payable. Companies and other corporate tax entities are not, however, entitled to a refund for excess franking offsets (but in certain circumstances, the excess franking offsets may be converted into a carry forward tax loss). Where the recipient company is a franking entity, the franking credits provide a franking credit of an equivalent amount in the franking account of the recipient company, enabling it to similarly frank distributions made by it.

Special rules govern the extent to which distributions may be franked. Under a "benchmark" rule, all frankable distributions made by an entity during a franking period must be franked to the same percentage. The object of the rule is to ensure uniformity of the franking of distributions to recipients and to prevent streaming of franking credits in ways that produce taxation advantages. A range of additional protective measures seeks to prevent the manipulation of franking benefits.

Dividend withholding tax is payable in respect of any part of a dividend paid by a resident company to a non-resident shareholder, to the extent that the dividend is not franked. Non-resident shareholders do not qualify for imputation credits or franking rebates, but a dividend paid to a non-resident shareholder is exempt from dividend withholding tax to the extent that the dividend is franked.

Withholding tax is imposed on the gross amount of the unfranked dividend. The general dividend withholding tax rate is 30 percent

but, for dividends paid to residents of double tax treaty countries, the rate provided in the treaty applies (generally 15 percent).

From 26 June 2005 dividends (whether franked or not) paid by an Australian company to an Australian permanent establishment of a foreign resident (ie. are attributable to the branch) are not subject to dividend withholding tax. Instead, they are included in the assessable income of the non-resident and are taxed by assessment. Where the dividend is franked, the non-resident may be entitled to a franking tax offset.

From 1 July 2005 a special "conduit foreign income" regime applies to distributions by an Australian company to a foreign resident shareholder, with the result that the amounts are not assessable income and unfranked distributions are not subject to dividend withholding tax. These measures are broader than previous relief measures based on "foreign dividend accounts". Broadly, conduit foreign income is confined to offshore income and gain amounts that would not ordinarily be taxed in Australia if the company were non-resident; eg. foreign branch income, foreign non-portfolio dividends (on a voting interest of at least 10 percent) and gains from the sale of non-portfolio interests in foreign companies.

Taxation of financial arrangements

In 2009, new rules were introduced which implement reforms to the taxation of financial arrangements (TOFA 3 and 4). In its most basic form, a "financial arrangement" is an arrangement pursuant to which a taxpayer has a right to receive, or an obligation to provide, a financial benefit of a monetary nature.

Broadly, where the new rules apply, the overall gain from a financial

arrangement will be assessable and the overall loss from a financial arrangement will be deductible (subject to certain exceptions). The gain or loss will be spread over the term of the financial arrangement in accordance with one of the methods set out in the provisions.

The new rules apply to financial arrangements a taxpayer starts to hold in an income year commencing on or after 1 July 2010, unless the taxpayer elects to apply the provisions to income years commencing on or after 1 July 2009. The taxpayer can also elect to bring pre-existing arrangements within the new rules on a one in, all in basis. There are a number of exceptions to the application of the new rules.

Debt and equity classification

From 1 July 2001, shares and debt interests in companies, and debt interests in entities, are subject to debt/equity classification rules that apply for various taxation purposes. The provisions include an "equity test", for the purpose of identifying interests that are in-substance equity interests, and a "debt test" for the purpose of identifying interests that are in-substance debt interests. If a particular instrument or interest satisfies both tests, characterisation as a debt interest prevails. An interest in a company that is not a share may nevertheless be treated as equity and an interest that has the legal form of a share may be classified as a debt interest rather than an equity interest.

Classification as a debt interest or an equity interest is material to the treatment of the return on the instrument as an amount that is either interest or a dividend for tax purposes. In turn, this treatment is relevant to the assessability of the return, the portion/percentage of distributions that are frankable, allowable deductions for interest, the thin capitalisation

measures (discussed later) and also the application of the relevant withholding tax.

Debt funding of an Australian company

Interest withholding tax is typically imposed on interest paid by an Australian resident as an expense of an Australian business to a non-resident lender that does not have a permanent establishment in Australia. It also applies to interest paid to such a non-resident lender by a non-resident borrower where it is an expense of an Australian branch of the non-resident borrower.

In addition, the conditions for liability extend to interest incurred by a non-resident borrower as an expense of an Australian business that is derived by a foreign permanent establishment of an Australian resident.

A flat rate of 10 percent applies on the gross amount of the interest paid. In most cases this rate is not affected by double taxation treaties but certain treaties provide exemptions for interest paid to foreign banks and financial institutions. Interest includes amounts in the nature of interest and amounts deemed to be interest. The debt/equity tests also apply when classifying amounts payable.

If, however, the beneficial owner of the interest (the lender) has a permanent establishment in Australia and the interest is effectively connected with the permanent establishment, the interest is taxable by assessment in Australia and is not subject to interest withholding tax. An exemption is available for interest paid on certain publicly offered debentures, global bonds and debt interests.

Thin capitalisation rules impose certain limitations on allowable deductions for interest and other debt expenses, based on acceptable levels of debt and equity

(gearing). The object is to prevent excessive reliance by Australian businesses on the taxation treatment of debt funding, relative to the treatment of equity funding.

The measures apply to foreign entities investing directly in Australia (through a branch), foreign-controlled Australian entities, as well as Australian enterprises with controlled foreign investments. Where applicable, the rules disallow debt deductions that an entity can claim against Australian assessable income where the entity's debt used to fund Australian assets exceeds the limit prescribed.

The rules distinguish between different categories of foreign-controlled Australian entities and Australian-controlled foreign entities, taking account of whether the entities are Authorised Deposit-taking Institutions (ADIs) or non-ADI entities (including non-ADI financial entities). Under a threshold rule, the provisions apply only where the debt deductions of an entity (with associates) are greater than A\$250,000 for the year.

Depending on the type of entity, different rules apply for the calculation of the maximum allowable debt. In a typical case involving an Australian entity controlled by a non-ADI foreign entity, the maximum allowable debt is the greater of either a specified safe harbour debt amount or an arm's length debt amount. Broadly, the safe harbour debt amount is set at a ratio of 3:1 debt-to-equity.

Where the maximum allowable debt is exceeded, the rules limit interest deductions on a proportional basis to the extent that the maximum allowable debt is exceeded. The debt/equity tests apply in characterising interests held and comprehensive rules deal with associated parties. Where a consolidated group is involved, the thin capitalisation rules apply to the head company of the consolidated or MEC group.

From 1 July 2003, a comprehensive regime applies to the taxation of foreign exchange gains and losses on transactions entered into after that date, for most taxpayers. These measures deal with the inclusion in assessable income of gains from "forex realisation events", and allowable deductions for losses arising from a forex realisation event. The regime also provides a general translation rule under which foreign currency denominated amounts are converted into Australian dollars, or an applicable functional currency, for tax purposes.

Royalties payable to a foreign company

If royalties are paid by an Australian company to a foreign resident, the royalties will be subject to royalty withholding tax, at the general rate of 30 percent, but at a reduced rate (generally five to 15 percent) under an applicable double tax treaty. However, where the beneficial owner of the royalties carries on business in Australia through a permanent establishment and the property or right in respect of which the royalties are payable is effectively connected with that permanent establishment, the royalties will be taxed by assessment in Australia.

From 2003, a withholding tax regime applies to certain other categories of foreign resident payments. The object of these measures is to bring particular categories of assessable income of foreign residents outside the existing withholding tax categories, within a withholding regime. The categories of payments to foreign resident entities are prescribed by regulations, which also set the rate of withholding. The first three categories, effective from 1 July 2004, are payments for promoting casino gaming junkets (three percent), payments for entertainment and sports activities

(ordinary tax rates) and payments under contracts for the construction, installation and upgrading of buildings, plant and fixtures (five percent).

Transfer pricing

International transfer pricing (profit shifting) occurs when taxable profits are shifted outside the scope of Australian tax through the use of non-arm's length prices for goods or services passing between foreign entities and Australian entities or branches. Australian tax may be reduced where the prices charged by a foreign parent or entity to an Australian company, or charged between an overseas head office and a local branch, are excessive, or if payments received are inadequate. Low or no-interest loans may also have the effect of redirecting profits.

In certain circumstances, the Commissioner of Taxation may substitute for tax purposes arm's length prices in relation to the supply or acquisition of property or services under an international agreement (defined broadly).

Considerable emphasis is placed on the need for taxpayers to create contemporaneous documentation that supports an acceptable pricing methodology. This means that prices payable by an Australian entity or branch for goods or services acquired from a non-resident should be substantiated with documentation which demonstrates that the prices have been established on an arm's length basis, in accordance with an acceptable pricing methodology.

Tax administration

A uniform instalment withholding regime, the pay-as-you-go (PAYG) regime, applies to a large number of withholding payments, including payments by employers to employees.

Employers who are required to make deductions from the wages and salaries of employees must register with the ATO for PAYG withholding and must report their periodic withholding obligations, either on a Business Activity Statement (BAS), where registered for GST, or an Income Activity Statement (IAS), where not registered for GST.

In addition, all businesses that receive goods or services are required to withhold 46.5 percent from the payment if the supplier does not quote an Australian Business Number (ABN) on its invoice or some other document in connection with the supply. An ABN is a single identifier for use in business dealings with other businesses, the ATO and other Federal Government agencies. Foreign companies that make supplies that are connected with Australia or carry on business in Australia even for a short period of time are generally entitled to apply for an ABN.

A Tax File Number (TFN) regime applies to certain categories of income, including salaries and wages and various types of investment income, for non-business taxpayers who do not have an ABN. Where a valid TFN is quoted, specific rates of withholding tax apply. Where a TFN is not quoted, the rate of withholding is set at the top marginal tax rate.

Most businesses are required to pay PAYG instalments quarterly, but the reporting periods differ depending on whether the enterprise is a small, medium or large withholder. Large withholders are required to make more regular periodic payments.

Provision exists for a branch of a registered entity to be registered as a PAYG withholding branch. Under this system the branch may submit a separate BAS, notifying the PAYG withholding obligations of the branch.

In general, non-residents are required to file annual income tax returns where any income is derived from a source in Australia (other than exempt income or income subject to withholding tax). A system of self-assessment applies.

Fringe benefits tax

Fringe benefits tax (FBT) is a separate Federal taxation regime under which the tax liability is imposed on the employer, not the employee, in relation to a wide range of fringe benefits. FBT is imposed on the designated taxable amounts of the particular benefit, grossed-up under a formula intended to result in a level of tax that equates with the cash equivalent of the fringe benefit. The FBT rate applied to the grossed-up amount is 46.5 percent (from 1 April 2006). Generally, employers are entitled to income tax deductions for the cost of providing fringe benefits and the amount of FBT paid.

Separate rules apply regarding self-assessment by the employer and the quarterly instalments of tax payments required. The fringe benefits tax year ends on 31 March.

Payroll tax

Payroll tax is a State or Territory tax levied at specified rates by reference to annual wages and salaries of employees that exceed prescribed threshold amounts in each State or Territory. Employers are required to register with the relevant State or Territory revenue authority.

Although the taxes are similar in each State or Territory, there are differences in each jurisdiction. Rates range from 4.75 percent to 6.85 percent. Particular areas of difficulty arise in connection with the very broad rules applicable to payments to contractors, and the rules relating to the grouping of employer companies for the purposes of the aggregation of wages and salaries of group employees.

Customs duty

Customs duty is payable at the time goods enter 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.

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.

The precise amount of customs duty which may be payable will turn on a detailed classification of the goods for customs duty purposes by the Australian Customs Service.

Goods and services tax (GST)

The Australian GST commenced on 1 July 2000 and is a broad-based consumption tax similar to GSTs and VATs in many jurisdictions throughout the world. Australian GST is imposed at the standard rate of 10 percent on:

- most supplies by businesses (eg. of goods, services, information, rights and real property) that are made for consideration and which have a relevant connection with Australia; and
- the importation of certain goods.

GST on supplies

GST will only be payable where the entity (defined to include individuals, companies, partnerships and trusts) making the supply is registered or required to be registered for GST purposes. Generally, an entity will be required to be registered for GST purposes if its annual turnover for the previous 12 month period or projected annual turnover for the next 12 month

period in relation to supplies that are "connected with Australia" exceeds A\$75,000.

Where a supply is made by a registered entity for consideration, that supply will generally be a taxable supply (ie. a supply on which GST will be payable). The GST payable on that supply will be calculated as 1/11th of the total consideration that the entity receives for making the supply (including GST). Generally, the GST on a taxable supply must be paid to the ATO by the entity making that supply. There are a number of exceptions, including supplies that are "reverse charged" (including voluntary reverse charging) and supplies made by non-residents through resident agents. These are discussed later.

An entity is not liable to remit GST on supplies it makes that are not connected with Australia. In certain circumstances, however, GST on supplies that are not connected with Australia, but are made to registered recipients in Australia, may be "reverse charged" to the recipient. The test for determining whether an entity's supplies are "connected with Australia" is closely linked to the type of supplies that the entity makes. Different rules apply based on whether the thing being supplied is goods, real property or something else.

In certain cases, an entity that acquires a taxable supply may be entitled to claim an input tax credit for the GST included in the price of that acquisition. An input tax credit will be available where the entity makes its acquisition in the course of carrying on its business and is registered or required to be registered for Australian GST purposes. Where the acquisition relates to making "input taxed" supplies or is of a private or domestic nature, however, the registered entity may be restricted in its ability to claim

input tax credits for that acquisition. A foreign company that is only eligible to be registered (ie. where it carries on a business in Australia but does not meet the registration turnover threshold), will need to elect to be registered in order to claim input tax credits.

Generally speaking, registered entities remit the GST liabilities for their supplies to the ATO on a monthly or quarterly basis. At the same time, registered entities may claim back from the ATO any input tax credits for the GST included in the price of their business purchases.

Input taxed and GST-free supplies

Some supplies are classified as zero-rated or “GST-free” (including certain health, food and education supplies, exports and sales of businesses as going concerns). No GST is payable on GST-free supplies. Most exports of goods or services from Australia will be GST-free. GST-free treatment may also apply to certain supplies relating to international transport (of both people and goods).

Other supplies may be exempt from GST or “input taxed” (including, those relating to financial services, but not general insurance, and the sale or leasing of existing residential property). No GST is payable on “input taxed” supplies. An entity will, however, be precluded from claiming an input tax credit for any acquisition it makes that relates to making “input taxed” supplies.

GST on imports

An entity will make a “taxable importation” and be liable to pay GST where it imports goods into Australia and “enters those goods for home consumptions”; ie. it identifies itself as the “owner” of the goods to

Australian Customs. In most cases, registered importers are entitled to recover an input tax credit for a taxable importation equal to the GST liability. Where a foreign company exports goods to Australia and does not expect to register or be required to be registered for Australian GST purposes, care should be taken to ensure that the person who enters the goods for home consumption is entitled to this input tax credit.

Alternative arrangements for GST

In certain circumstances, various arrangements can be made to significantly reduce the compliance burden of GST on foreign companies. In particular, it may be possible to eliminate the need for a foreign company to:

- register for Australian GST purposes;
- meet the compliance obligations associated with any GST liability; and
- be exposed to an additional creditor risk in respect of GST.

For example, provided certain conditions are met, where a non-resident not carrying on an enterprise in Australia makes a taxable supply, the non-resident supplier and the Australian recipient of that supply may agree that the GST on that taxable supply will be “reverse charged” to the Australian recipient. In these circumstances, the Australian recipient will only need to pay an amount to the ATO if the GST on that supply is greater than the input tax credit to which it is entitled for its acquisition. Such agreements can be very beneficial to non-resident suppliers. Other arrangements relate to the terms on which goods that are imported will be delivered.

ANTI-TRUST & COMPETITION REGULATION

The object of the Competition and Consumer Act 2010 (Cth) is “to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection”. It has a wide range of provisions which are used to achieve this objective. Its scope has made it one of the most frequently litigated pieces of legislation and has made the principal regulator, the Australian Competition and Consumer Commission (ACCC), one of the most active and high-profile regulators in Australia. The principal provisions contained in the CCA include:

- prohibitions on anti-competitive conduct;
- obligations on infrastructure owners to allow others to access that infrastructure;
- prohibitions on misleading and deceptive conduct and on unconscionable conduct;
- country of origin labelling requirements;
- certain statutory guarantees in consumer contracts; and

- a strict liability regime for manufacturers’ liability for defective goods.

The last two categories are almost exclusively the province of product liability law and are dealt with on page 38. This section primarily addresses the competition aspects of the CCA.

Competition provisions

The competition provisions of the CCA seek to regulate conduct in markets and, to a lesser extent, the structure of those markets. The provisions operate by:

- prohibiting certain conduct absolutely, including cartel conduct (for which criminal sanctions apply);
- prohibiting other conduct where it has the purpose or effect of substantially lessening competition in a market in Australia;
- preventing mergers or acquisitions which have the purpose or effect of substantially lessening competition in a market in Australia; and
- requiring infrastructure owners to provide access to certain

infrastructure under a general national access regime or a telecommunications-specific access regime.

Conduct which is prohibited absolutely

The principal forms of conduct which are prohibited absolutely are:

- agreements between competitors on price;
- agreements between competitors to restrict supply to particular people or groups of people (collective boycotts, bid rigging, or market allocation);
- setting the minimum price at which goods or services can be on-sold (resale price maintenance); and
- some tying arrangements (third line forcing).

Any attempt to enter into these types of arrangements will contravene the CCA. These prohibitions are vigorously enforced by the ACCC and fines are substantial. The maximum liability for a corporation is the greater of A\$10 million, three times the gain from the unlawful conduct

or 10 percent of turnover in the relevant market and for an individual, A\$500,000. These amounts apply to each individual instance of a breach, so where there are several instances of breach, penalties can easily exceed these amounts.

Legislation has recently been passed which introduces criminal sanctions for cartel conduct. This means that individuals who engage in cartel conduct now face gaol terms. In general, a cartel provision is a provision in a contract, arrangement or understanding between two or more competitors that:

- sets the prices which some or all of them will charge (price fixing);
- limits or restricts the supply of goods or services some or all of them produce;
- allocates customers, suppliers or territories between competitors; or
- rigs a bid.

It is illegal to make, or give effect to, an agreement that contains a cartel provision. The effect on competition of this cartel provision is not important. The question of whether or not particular conduct is a criminal offence will depend on the person's "knowledge or belief" that cartel conduct was occurring. All that is required to attract a criminal prosecution is proof, beyond reasonable doubt, that:

- the conduct occurred; and
- a person had knowledge or a belief that the alleged cartel conduct was occurring.

An example would be if a person knows or believes that a contract has been made with a competitor and that a provision in the contract has the effect of fixing prices. It does not matter whether

the person understands that the conduct was wrong or illegal.

Conduct which has an anti-competitive purpose or effect

There is a broad range of conduct which is prohibited if it has the purpose or effect of substantially lessening competition in a market, including:

- agreements, arrangements or understandings of any kind which have this purpose or effect;
- any arrangement involving the exclusive supply of goods or services to a particular persons; and
- some tying arrangements.

It therefore catches exclusive territory arrangements, restrictions on the types of customers to whom products can be supplied, and refusal to supply for reasons related to stocking the products of a competitor.

Some conduct which is automatically prohibited or which has an anti-competitive purpose may be permitted if the public benefit outweighs any anti-competitive detriment. An application to obtain immunity involves a public process and a consideration by the ACCC of the anti-competitive effects and the public benefits which arise from the conduct.

Merger regulation

The CCA prohibits any acquisition of assets or shares if the effect, or the likely effect, is to substantially lessen competition in any substantial market in Australia as a whole or in a State or Territory in Australia. There is no compulsory pre-notification requirement for mergers or acquisitions in Australia. The ACCC has, however, an informal clearance process which enables merger parties

to seek the ACCC's view on whether it will seek an injunction to stop a merger from proceeding. The ACCC encourages merger parties to notify the ACCC where both of the following apply:

- the products of the merger parties are either substitutes or complements; and
- the merged firm will have a postmerger market share of greater than 20 percent in the relevant market/s.

The ACCC's Merger Guidelines 2008 outline the analytical and evaluative framework applied by the ACCC when reviewing mergers and acquisitions and provides guidance on the factors the ACCC considers relevant to its consideration. In considering the effect of a merger, the ACCC will examine a range of factors including:

- the level of actual and potential import competition;
- the height of barriers to entry;
- the level of concentration in the market;
- the degree of countervailing power in the market;
- the ability of the merged entity to effect a significant and sustainable price increase;
- the extent to which substitutes are available in the market;
- the extent to which the market is undergoing change in terms of technological innovation, growth or concentration, or product differentiation;
- the nature and extent of vertical integration in the market; and
- whether the acquisition would result in the removal of a vigorous and effective competitor.

It is common practice to make an approach to the ACCC seeking an informal clearance for a proposed merger. Such an approach can be made on a confidential basis. However, the ACCC will usually reserve the right to make market inquiries once the transaction becomes public, and any confidential clearance will be qualified at least to that extent. The ACCC's Merger Review Process Guidelines were issued with effect from 1 July 2006 and specify a transparent process with the publication of timelines and statements of reasons for merger review decisions by the ACCC. The Australian Government has introduced a voluntary formal merger review process with limited appeal rights to the specialist Australian Competition Tribunal. In addition, authorisation of a merger on public interest grounds is possible even if it is likely to have an anti-competitive effect. Authorisation applications can be made to the ACCC or directly to the Australian Competition Tribunal.

Access regulation

Australia has introduced a range of statutory mechanisms which regulate access rights to infrastructure of national significance, sometimes colloquially called "essential facilities".

Australia has both a generic form of access regulation in the CCA and industry-specific schemes which are found in an array of specific legislative instruments and industry codes and schemes. In terms of industry-specific regimes, the following industries are specifically regulated:

- Telecommunications;
- Gas;
- Electricity;

- Water;
- Rail infrastructure;
- Airports; and
- Postal services.

The level of intervention found in these regimes varies. For example, the telecommunications and electricity regimes are the most interventionist, both in terms of the services which are regulated and the level of prescription they impose on industry participants.

Misleading or deceptive conduct and unconscionable conduct

A corporation must not engage in conduct which is misleading or deceptive, or which is likely to mislead or deceive, or make false representations. A person aggrieved as a result of such conduct has a cause of action in damages and may be entitled to other compensatory remedies. These provisions have been relied upon in a wide variety of cases, including pre-contractual negotiations and misleading advertising. The ACCC is vigilant in relation to consumer advertising.

There is also a prohibition on conduct in trade or commerce that is, in all the circumstances, "unconscionable". What is unconscionable is determined by considering a range of criteria, including by way of illustration:

- the relative bargaining positions of the parties;
- whether conditions imposed were reasonably necessary for the protection of legitimate interests;
- whether the party allegedly imposed upon was able to understand the relevant documents;

- the terms and conditions on which equivalent goods or services could have been obtained from another supplier;
- whether any undue influence or pressure was placed on, or unfair tactics were used, against a party;
- any applicable industry code; and
- the extent to which parties acted in good faith.

Country of origin labelling

The CCA has specific rules about country of origin labelling. Country of origin labelling is not mandatory for all products (except in relation to food for human consumption, pharmaceuticals and some other products such as devices which emit or receive electromagnetic radiation or contain lasers (which includes many consumer electronics), which have specific regulations), but where such claims are made these rules must be followed.

A "Made in Australia" label, for example, may only be affixed to a product that has been "substantially transformed" in Australia, and 50 percent or more of the cost of producing or manufacturing the goods must have occurred in Australia. To be able to label goods as the product of a certain country (such as "Product of X"), each significant ingredient or significant component of the goods must be derived from the named country and all, or virtually all, processes involved in the production or manufacture must have occurred in that country. There are also related provisions concerning the use of logos intended to designate a country of origin, such as the mark used to indicate that an article is "Australian Made".

PRODUCT LIABILITY

Over the last two decades, Australia has seen a significant growth in the level of product liability litigation. In part, this is attributable to an increasing level of public awareness about consumer rights, the activity of consumer watchdog groups, and an increasingly active and entrepreneurial plaintiffs' bar. It has also been encouraged by a number of high-profile cases, for example, contaminated food claims, pharmaceutical and medical device class actions and asbestos litigation.

In part, it is also due to legal developments which have expanded the avenues available to a plaintiff, or groups of plaintiffs, wishing to claim that they have been injured by a defective product. These developments include the introduction of a class action procedure and a strict liability regime for defective products.

How product liability litigation is conducted

Product liability litigation in Australia is typically conducted in either the Federal Court or the Supreme or District/County Courts of one of Australia's States or Territories. Most actions of significance are commenced in a State capital. Sydney, Melbourne, Brisbane and Perth have been the centres of multi-plaintiff product liability litigation.

Australian courts operate on an adversarial basis. The Australian legal system has its origins in the English legal system and utilises rules of practice, procedure and evidence which have more in common with those of the English courts than with the courts of the United States. As a result, there are a number of fundamental differences between the procedures in Australia and the United States:

- Australia does not have any procedure for depositions before trial, but places greater emphasis on documentary discovery (ie. producing documents which are relevant to determining the issues in dispute). However, recent civil litigation reform proposals have suggested the adoption of a deposition procedure in Australia;
- although the courts of the States and Territories make provision for jury trials in civil actions, juries are rare in most jurisdictions other than Victoria. There are no jury trials in the Federal Court; and
- in Australia, a successful party to litigation will usually recover a proportion of the costs of the litigation, including lawyers' fees and disbursements, from the unsuccessful party.

Class actions

Outside of North America, Australia has one of the world's most developed, and increasingly active, class action environments. The Australian rules are, in some respects, friendlier to plaintiffs than the rules in the United States.

The Federal Court's class action procedure allows proceedings to be commenced by one or more applicants representing a class of seven or more persons who all have a claim against the same person or entity which:

- arises out of the same, similar or related circumstances; and
- gives rise to a substantial common issue of law or fact.

An action commenced in this way is described as a "representative proceeding".

In product liability litigation, class actions allow persons, who have each allegedly suffered an injury by reason of their use of a particular allegedly defective good, to sue the manufacturer(s) in a single action brought on behalf of all represented parties.

In contrast to the United States, there is no requirement that a court certify a representative proceeding. rather, the onus is on the defendant to seek

an order that the proceedings no longer continue as representative proceedings because they do not meet the requirements of the rules or the procedure is otherwise unsuitable. Such orders have proved difficult to obtain.

Since the introduction of representative proceedings in Australia in 1992, there has been a significant rise in the commencement of such proceedings. In 2000, a class action procedure was also adopted in one other Australian jurisdiction, the Victorian Supreme Court. It has also been announced that the Federal Court class action regime will be introduced to the New South Wales Supreme Court. Most other Australian jurisdictions also have rules which allow a form of representative or class action proceeding, but these rules are not presently as comprehensive or formalised as the Federal and Victorian systems.

Recently, class actions have been commenced in a range of different contexts such as shareholder class actions, cartel class actions and financial services and planners class actions.

Litigation funding

In the context of class actions, there has been a growth in litigation funding as a commercial venture. Historically, the funding of proceedings was unlawful as it constituted what was called "champerty". However, in many Australian States, the tort of champerty is no longer a crime or a civil wrong. Litigation funding from third parties can now provide plaintiffs with a means of prosecuting actions which they would not otherwise have had the means to bring.

However, in all States, the courts can stay or dismiss representative proceedings if the funding arrangement is regarded as amounting to an abuse

of process. In August 2006, Australia's highest court held that litigation funding was not an abuse of process in itself or contrary to public policy. This decision has led to an increase in funded litigation, particularly with shareholder- and financial services-related actions.

There are already a number of specialist funders in the market. IMF is Australia's largest litigation funder and is the first to be listed on the Australian Stock Exchange. It provides funding of legal claims and other related services where the claim size is over A\$2 million.

Sources of liability

Actions in respect of the quality of products are likely to be based in one or more of three areas of Australian law:

- the Australian Consumer Law (ACL)
- the common law of contract; and
- the common law of negligence (now partially codified in most Australian jurisdictions).

Australian Consumer Law

From 1 January 2011, Australia has a new national Australian Consumer Law which applies at the State, Territory and Federal levels.

The new legal provisions are based on the consumer protection provisions of the Trade Practice Act (TPA) with changes based on best practice in State and Territory laws. It specifically includes a national unfair contract terms provision, a new national product safety legislative and regulatory framework and new penalties, enforcement powers and consumer redress options.

The consumer protection provisions can be grouped into four broad categories:

- The product safety provisions provide for mandatory consumer standards, product information and notification of voluntary recalls, and the power to order mandatory recalls. A breach of these provisions which causes loss or damage will also allow affected consumers to claim compensation.
- A prohibition against misleading or deceptive conduct in trade or commerce. This extremely wide-ranging provision has established a norm of conduct which, if breached, can give rise to a variety of remedies for a person who suffers damage other than personal injury and death. Almost all product liability claims (for property damage or economic loss) will include an allegation that the manufacturer, importer or seller of the product engaged in misleading or deceptive conduct. Most often, the impugned conduct is an alleged failure to warn the consumer about risk(s) said to be associated with a product.

A statutory remedy directly against manufacturers of defective products. The statutory remedy resembles an action for breach of contractual warranty or guarantee. It is restricted to consumer goods. In essence, manufacturers and importers are required to warrant or guarantee the quality, fitness for purpose and accurate description of their products.

A strict liability regime for manufacturers and importers of defective goods. That is to say, a person who suffers loss because of defective goods can recover damages from the manufacturer of that good without proving fault on the part of the manufacturer. Goods are defective if, according to a consumer expectations test, their safety is not such as the public is entitled to expect. This regime is broadly based on the European Community Product liability Directive. The Australian law limits

compensation for personal injury damages in product liability claims.

The common law of contract

Where a product is supplied by a manufacturer to a supplier or by a supplier to a consumer there will be a contract between the two parties. Under both the State and Territory Sales of Goods legislation terms about the quality of the product are implied into contracts for the supply of goods. In some instances, these conditions cannot be excluded or modified. If those terms are breached then the party which received the product will have an action for breach of contract. A statutory guarantee of acceptable quality also attaches to supplies of goods under the ACL.

The common law of negligence

The common law tort of negligence remains an important source of legal rights and remedies in relation to product liability claims under Australian law. Under the law of negligence a plaintiff may recover damages from a manufacturer if:

- the manufacturer (as defendant) owes the plaintiff a duty of care at law;
- the defendant breaches that duty by failing to meet the standard of care required by the law; and
- the plaintiff suffers damage because of the breach of duty.

In Australia, it is well settled that a broader duty of care is owed by the manufacturer and a more limited duty of care by the supplier of goods to the purchaser or user. The common law provides that the manufacturer ought reasonably to have the user in contemplation when considering issues of design,

manufacture, safety and distribution of goods.

A supplier is under a duty not to render defective goods and to pass on warnings about particular goods. In some cases, statutory duties have been used to impose what is, in effect, strict liability.

In 2003, in response to community concern over the size of personal injury awards and rising insurance premiums, the State and Territory Governments undertook an extensive program of civil liability reform. The reforms have made it more difficult for plaintiffs to commence, and succeed in, personal injury claims brought in negligence, in addition to limiting the award of damages recoverable.

The reforms are not identical in each jurisdiction, but, broadly speaking the reforms:

- partially codify the law of negligence;
- create special defences in relation to some categories of claim (product liability, except cases involving asbestos or other dust diseases), is not one of the special categories); and
- introduces caps and thresholds for the award of damages and, in some jurisdictions, a compulsory pre-court claims resolution procedure.

One of the more contentious issues arising from the reforms is whether the partial codification of the law of negligence has substantially changed the law and, if so, whether it has in fact made it easier or harder for plaintiffs in a variety of areas. At this stage, it seems that there has been a shift in judicial attitudes towards a narrowing of the scope of liability. The immediate effect of the reforms was a decrease in the level of all personal injury

litigation. It is not clear whether this effect will be sustained in the long term. There are a number of law reform proposals which, if implemented, might be expected to encourage more litigation.

Remedies

Monetary compensation is available for both pecuniary and non-pecuniary loss. In addition, courts may grant injunctions to restrain some breaches or attempted breaches of the consumer protection provisions. A court is given very broad power to make such orders as it thinks appropriate against a person who was involved in a contravention.

Damages

There are a number of technical differences between the calculation of damages in contract and negligence and under the statutory causes of action. However, in broad terms, a successful plaintiff in a product liability action will be able to recover:

- compensatory damages for any pain and suffering;
- damages for any expenses incurred to treat an injury or repair damage to property, including medical expenses;
- compensation for any loss of income because of injury or damage;
- an amount in respect of any costs which will be incurred in the future to treat an injury or repair damage to property; and
- compensation for any loss of life expectancy or ongoing impairment of earning capacity.

Exemplary, punitive or aggravated damages can be awarded by the courts, although not in relation to claims brought under the ACL and, in some Australian jurisdictions,

not in negligence actions seeking damages for personal injury.

In relation to claims in negligence for personal injury, civil liability reforms limit the amount of damages recoverable in relation to these heads of damages. Further, the law of contract and statute both provide the courts with a range of alternative remedies, enabling the courts to order manufacturers and suppliers to undertake remedial conduct.

Product recall

Legal obligations in respect of product recall are to be found in a mixture of Federal and State legislation and the common law. General provisions are contained in the ACL, with additional separate provisions contained in separate legislation in relation to specific categories of good; eg. food, pharmaceuticals, medical devices and automobiles.

At common law, manufacturers and suppliers of consumer products have a duty to take reasonable care to ensure that their products do not injure consumers. This duty extends beyond the production and sale of the product. A manufacturer must act if a hazard is revealed once the product is on the market or in use.

When deciding what action to take, the manufacturer should have regard to:

- the seriousness of the potential harm involved;
- the probability of such harm occurring; and
- the expense, difficulty and inconvenience of the proposed remedial action.

The manufacturer must balance these considerations but must recognise that it is not simply a cost-benefit exercise. Importance must be placed on the safety of consumers. If the

consequences of the materialisation of the harm are death or serious bodily injury, there are good reasons for conducting a recall.

State law also imposes reporting obligations in some instances concerning intentional contamination or tampering.

CONSUMER PRODUCT REGULATION

Legislation at State, Territory and Federal levels imposes a number of controls in relation to the composition, design and labelling of consumer products. These laws often set out minimum safety and information requirements that aim to minimise the risk of injury and to enable consumers to make more informed purchasing decisions.

Regulatory authorities often conduct random inspections and sampling to determine whether products comply with mandatory requirements. An investigation can also be initiated by a complaint from a consumer or competitor.

Failure by a manufacturer, supplier or importer to comply with these laws could result in more than simply incurring penalties under the relevant legislation. Entry into Australia may be refused for non-compliant imported goods. Consumers may take private legal action for damages suffered as a result of failing to comply with a standard. This could result in hefty legal fees and court costs, loss of reputation from bad publicity, and loss of customers to competitors.

This highlights the need for companies dealing in consumer goods to have an effective compliance program in place to ensure that all risks in their products are identified and effectively managed.

Complexity of laws

The legal requirements which apply to consumer goods are overlapping. In some cases, there are considerable variations in the way in which different jurisdictions regulate certain products and identifying what laws apply to each product can be difficult. Additional labelling requirements are imposed on certain imported goods. There is also other more general legislation such as the ACL and other consumer protection legislation. Industry guidelines and codes of practice may also be relevant.

With the passage of the ACL, a harmonisation process has begun to identify existing state and territory standards to become national. In future, permanent bans and mandatory standards will only be made by the Federal Government.

Further difficulty may arise if products cannot be easily classified under legislation. For example, at the cosmetic-medicine interface (and also the food-medicine interface) it is possible that products with a similar composition, but arguably different functions, can attract different regulatory requirements. In such cases, the presentation, proposed use of and claims made in marketing the product will be important in determining its classification.

Australian standards

Australian standards are generally voluntary and are not binding in themselves unless adopted by law. Many of them, however, are adopted by State, Territory and Federal legislation and compliance becomes mandatory. Australian standards, for example, may require specified goods to comply with particular performance characteristics, composition, methods of manufacture or process, construction, packaging rules or may define the type of information to be given to consumers.

Currently, around 2,400 Australian standards are referenced in legislation, either in whole or in part. In some cases, independent certification for compliance with a standard is also required. For example, under electrical safety laws, common household appliances such as toasters and heaters must comply with the relevant Australian standards, must hold a certificate of approval, and must be marked to show that approval.

Australian standards are also used as the basis of mandatory consumer product standards under the ACL. Products that must comply with Australian standards under the legislation include bicycles (performance and safety requirements), children's nightclothes (design and

fabric specifications and labelling requirements) and sunglasses (performance and safety requirements).

Failure to comply with a standard that has been adopted by legislation constitutes an offence. Failure to comply with a standard, whether voluntary or mandatory, may also be evidence of negligence and may be evidence that the product is defective or not fit for purpose.

Hazardous goods

Products containing ingredients that, because of their chemical properties, have the potential to harm people or the environment, are subject to strict legislative control. For example, household cleaning products and medicines containing poisonous substances fall into this category. There is a range of legislation that imposes restrictions on the storage, handling, transportation, packaging, labelling and advertising of these goods. The level of control will depend on a number of factors including the proposed use of, and the nature of, the active constituents and their quantities in the products.

Many of the labelling and packaging requirements for poisons are set out in the Standard for the Uniform Scheduling of Drugs and Poisons and are adopted in various degrees by legislation. They provide for information to be included with these products such as instructions for use, cautions and safety directions. In some cases, special packaging is required; eg. child resistant safety closures.

Dangerous goods legislation also contains requirements for the transportation, labelling and construction of packaging of goods that are explosive, poisonous, flammable or corrosive.

Registration of certain goods

Registration requirements often apply to manufacturers of goods or to the goods themselves. Examples of products that must be registered before they can be available for sale in Australia are therapeutic goods. Therapeutic goods can only be manufactured by a licensed manufacturer, and must also be included on the Australian Register of Therapeutic Goods as either listed or registered goods. There are standards for the manufacture, composition, handling, labelling and advertising of such goods.

Therapeutic goods may be assessed for safety and efficacy, depending on the level of risk and the claims made on the product. Sponsors of therapeutic goods must hold the relevant level of evidence to support claims made on packaging and in advertising. The legislation also provides a procedure for pre-publication clearance for advertisements of certain therapeutic goods.

Other consumer goods that require registration include chemical products that kill pests, such as herbicides and pesticides, other products such as fertilisers, and certain pool chemicals. Any persons wishing to supply such products must apply through the Australian Pesticides and Veterinary Medicines Authority. There are also standards for the labelling of these products.

Food

The States and Territories have food legislation to regulate the composition, packaging, advertising and labelling of food and the hygiene of food premises and equipment.

The Australia New Zealand Food Standards Code has been adopted by all the States and Territories.

It prescribes labelling requirements for all food. Certain statements are prohibited and others are regulated and may only be used in specific circumstances. For example, health and nutrition claims and claims that a food is one for a specific dietary use are strictly regulated. These restrictions may become tighter in the future depending upon the outcome of certain reform proposals.

There is also a general prohibition on the addition of substances to food, such as additives, vitamins and minerals, and certain botanicals, unless specifically permitted for a particular food. In addition to the general requirements, the Code sets out prescribed standards for particular foods. Some foods must undergo rigorous safety assessments before they can be made available for sale; eg. novel and genetically modified food.

Trade measurement

State and Territory trade measurement legislation also imposes certain labelling requirements for packaged foods and other packaged consumer products. These requirements are also being harmonised. The requirements of the legislation apply to all goods packed for sale in Australia and goods fully imported for sale in Australia, unless specifically exempted from the marking requirements. The legislation also includes offences in relation to short measure of packaged goods.

Advertising claims

The ACL contains a general prohibition on misleading or deceptive conduct when occurring in trade or commerce. It also prohibits certain false representations: eg. that goods are of a particular standard, quality, value, grade, composition, style or model or have a particular history or a particular previous use.

Labelling and advertising claims on products are susceptible to challenge under these provisions and must be capable of substantiation. Regulators have the power to issue substantiation notices requiring evidence for claims and infringement notices (fines) for claims which they consider infringe the legislation. In assessing whether claims are misleading, courts will look at whether the express and implied representations are correct and whether the overall impression is accurate.

PROPERTY LAW

Urban real estate acquisitions

All acquisitions of Australian urban real estate by foreign interests should be submitted to the Foreign Investment Review Board in advance for approval, unless they fall within an exempt category. Urban real estate means all Australian real property other than rural land (being land used wholly and exclusively for carrying on a substantial business of primary production).

Proposals that require approval (unless otherwise exempt) include acquisitions of:

- residential real estate (including hobby farms and rural residential land);
- vacant non-residential land;
- developed non-residential commercial real estate valued at A\$50 million or more (A\$953 million (for the calendar year 2009 and which amount is indexed annually) or more for prescribed foreign investors (presently US investors)) or A\$5 million or more if it is commercial heritage listed real estate and the acquirer is not a prescribed foreign investor (presently a US investor);
- accommodation facilities;

- residential and commercial leases for five years or more (provided that for the asset the subject of a commercial lease, the same thresholds detailed above for developed commercial real estate and commercial heritage listed real estate apply);
- a profit-sharing arrangement over urban land (provided that for the asset the subject of the profit sharing arrangement, the same thresholds detailed above for developed commercial real estate and commercial heritage listed real estate apply);
- property being acquired by a foreign government or its agent;
- shares in a company or units in a trust that holds more than half its total assets in urban land (except where the urban land owned would not normally require foreign investment approval); and
- options over urban real estate.

Exempt categories: There are a number of exemptions which indicate a relatively liberal approach to foreign investment in this sector, except in the case of developed residential real estate.

Acquisitions that are exempt include acquisitions of:

- residential real estate by foreign nationals holding a permanent resident visa;
- developed non-residential commercial real estate (except where the land is an accommodation facility) where the real estate is valued at less than A\$5 million for commercial heritage listed real estate where the acquirer is not a prescribed foreign investor (presently a US investor) and in any other case less than A\$50 million (or A\$953 million (for the calendar year 2009 and which amount is indexed annually) for prescribed foreign investors (presently US investors));
- developed commercial real estate where the real estate is to be used immediately and in its present state for industrial or non-residential commercial purposes and the acquisition is required for the purchaser's proposed or existing business activities; and
- an interest in a time share scheme where the entitlement is not greater than four weeks in any year.

Exemptions also apply to acquisitions by Australian citizens who are resident abroad and by foreign nationals purchasing (as joint tenants) with their Australian citizen spouse.

Real estate transactions normally approved: Many acquisitions of an interest in urban real estate are normally approved (or permitted without the need for foreign investment approval), even if they do not fall into one of the exempt categories, providing they are not considered contrary to the national interest.

Acquisitions that may fall into this category, subject to specific policy limitations for these categories, include:

- developed non-residential commercial real estate;
- developed second-hand residential real estate required by foreign nationals temporarily resident in Australia holding a current relevant temporary resident visa or foreign-owned companies operating a business in Australia to accommodate their Australian-based staff;
- single blocks of residential vacant land or new dwellings by foreign nationals temporarily resident in Australia holding a current relevant temporary resident visa;
- vacant residential and commercial land for development where continuous substantial construction is commenced within 24 months;
- existing residential real estate for redevelopment;
- dwellings in a new residential development provided developers market locally as well as overseas;
- residential real estate in an integrated tourism resort;
- strata-titled hotel rooms in designated hotels; and
- accommodation businesses operating under one title where

the properties are occupied on a short-term commercial basis.

Contracts and auctions: All contracts by foreign persons to acquire interests in Australian real estate must be conditional upon foreign investment approval (if it is required), unless approval was obtained prior to entering into the contract. For properties to be purchased at auction, prior foreign investment approval (if it is required) must be obtained to bid, and potentially buy, at the auction.

Queensland real estate: There are additional notification requirements under the Foreign Ownership of Land Register Act 1988 (Qld) for acquisitions of Queensland real estate.

Native title and cultural heritage

Since 1992, the Australian courts have recognised that native title to lands, as recognised under the laws and customs of the Aboriginal inhabitants of Australia, may have survived the process of European settlement.

The courts have held that native title will have survived unless extinguished, either by an act of Government such as the creation of title to land which is inconsistent with the continued existence of the native title right (eg. a grant of freehold title or the creation of a lease giving the right of exclusive possession) or act of Parliament, or by the loss of connection between the land and the group or clan of Aboriginal peoples concerned.

This means that native title may continue to exist over large areas of the Australian continent – particularly in State-owned reserves, parks, forests, beaches, and other Crown lands.

These developments in the common law are supported by the Federal Native Title Act 1993 (Cth) (NTA), which recognises and protects native title, and under which a national register of native title claims has been established.

Under the NTA, any future act of Government which adversely affects native title will be invalid, to the extent of any inconsistency with native title, unless the act (eg. the grant of a title or authority to use so-called Crown land) falls into one of the exceptions in the NTA. These include future acts which permit the construction or operation of certain types of infrastructure operated for the public.

They also include future acts done where the Government concerned strictly follows certain procedures laid down in the NTA giving both to registered holders of, and registered claimants to, native title the right to make submissions in relation to the future acts and, in some instances, negotiate over the doing of the future act.

In project development it will of course be of considerable importance for there to be no uncertainty over the validity of titles and permits granted by Governments for the purposes of the project.

Since 1998, the NTA has allowed an alternative future act process. Many businesses and developers find it more convenient to commence the process of negotiation and registration of an indigenous land use agreement (ILUA) with the registered native title claimants at an early stage of project development. Any act done in conformity with a registered ILUA will be valid.

An ILUA will commonly deal with such matters as the preservation of sacred or important sites, the exchange of important cultural information

concerning the Aboriginal group or clan concerned, the employment of members of the group or clan by the project developer, and the payment of compensation for the effect on native title of the project development.

The recognition of Aboriginal native title is a relatively recent development in Australian property law, and it can present challenges, both in mining in remote areas and in infrastructure development. The early commencement of negotiations with native title claimants, however, will generally result in native title presenting no insurmountable obstacles to a successful project.

The Federal Government and each of the States and Territories have also passed legislation to protect Aboriginal cultural heritage and, in the case of major projects, Cultural Heritage Management Plans generally must be negotiated with relevant Aboriginal parties. These negotiations should also be commenced at an early stage of the project development and held contemporaneously with the negotiation of native title issues.

ENVIRONMENTAL LAWS

Environmental and planning laws in Australia have undergone, and continue to undergo, significant change. There is new legislation at both the Federal and State levels in all jurisdictions including laws which specifically respond to climate change. This, combined with changes in the policies by regulatory authorities, particularly in relation to enforcement, means that the extent to which that legislation impacts on the day-to-day operation of businesses has significantly increased.

Essentially, all environmental and planning legislation is State and Territory-based, with limited involvement of Federal laws. The divergence of legislation can cause significant difficulties in interpretation across State and Territory borders.

Federal laws

Federal laws usually give effect to environmental obligations under international treaties or can be triggered where the relevant undertaking requires Federal involvement. For example, the activity may take place on Federal land, or potentially impact on a matter of national environmental significance.

The primary Federal legislation, the Environmental Protection and Biodiversity Conservation Act 1999 (Cth) generally covers environmental,

planning and heritage matters although other specific Federal legislation may also apply if the proposed undertaking is likely to impact on items of indigenous heritage, nuclear safety or involve the import and export of particular waste products.

To the extent that Federal environmental and planning legislation may apply to a particular business or activity, this will invariably be in addition to any obligations under the legislation of the State or Territory in which the business operates.

State and Territory laws

State and Territory laws relating to environment and planning vary in their provisions and complexity. The laws of New South Wales are the most comprehensive although changes in equivalent legislation in Queensland, Victoria, South Australia and more recently Western Australia are quickly bringing the mainland States of Australia into some degree of uniformity.

Generally, the environmental legislation at a State and Territory level creates various environmental offences. This can be under a general environmental duty to avoid pollution or specific offences for polluting waters, air or land or causing noise pollution.

Environmental legislation may also prescribe that certain businesses, or businesses which undertake specific activities, require approvals or licences from environmental regulatory authorities. These approvals generally act as a licence to pollute within certain limits and therefore constitute an exemption to the offence provisions of the legislation.

Most States have a statutory authority whose responsibility it is to protect the environment. Approvals and licences issued by those authorities determine how the activity may be carried out and may impose obligations by way of conditions. Conditions can relate to such issues as providing financial assurances for compliance with the environmental obligations imposed under the licence, entering into emission trading systems or requiring payment of licence fees calculated according to the quantity of pollutants generated by the activity.

More specific State or Territory legislation may also impose obligations where the activity has or may have an impact on threatened fauna or flora, indigenous and non-indigenous heritage, conservation, waste, hazardous chemicals and dangerous goods. Further approvals or permits may be required under this secondary legislation.

Most Australian jurisdictions have legislation which addresses the management of and responsibility for contamination of land. Initial responsibility is usually (but not always) cast on the person whose activities are likely to have caused the contamination. In some circumstances, however, other classes of persons such as an owner or occupier of land may bear some responsibility at law for contamination of that land. This may have repercussions for the acquisition of land or corporate entities which own or have owned land in Australia which may be contaminated. Whether land is contaminated may also affect the suitability of that land for particular uses and/or result in obligations to investigate, remediate, monitor or control contamination.

Approvals to conduct a business in Australia which involves the use of or development of land may also be required under applicable planning laws. Planning legislation in the States and Territories controls development and the manner in which it may be carried out. Planning approval requirements depend on the land zoning of the relevant parcel of land and the nature of the business to be conducted.

The form and detail of the impact assessment process for new development varies greatly between the States. Depending on the type of development, assessment may be undertaken at a Local or a State Government level, or by a specific statutory authority. In certain circumstances, assessment at the Federal level may also be required.

Public participation in the assessment process is generally provided in planning legislation although the rights of third parties to appeal to the courts against the determination of the relevant authority may be more limited.

Inquiries, public hearings and independent assessment panels may also form part of the assessment process.

Invariably, planning approvals for development or major infrastructure projects will be subject to conditions which will regulate the manner in which the development can be carried out and operated. Conditions may also require financial or other contributions (such as dedication of land or provision of ecological offsets). Consequently, the conditions which attach to a planning approval can have significant implications for the conduct of a business.

Due diligence

Whether acquiring a business or setting up a new business in Australia, it is essential that the applicable State, Territory or Federal laws are identified in order to determine the obligations and responsibilities that the business will have in relation to the environment and the carrying out of development. It will also be essential to identify potential risks and liabilities that the business may have under environmental and planning laws. Appropriate due diligence will assist in identifying those obligations, responsibilities and risks.

CLIMATE CHANGE

There has been a patchwork response to the issue of climate change to date, both internationally and in Australia. In Australia, in addition to specific legislative action, greenhouse gas emissions from projects are becoming increasingly the subject of planning approval assessment, mostly under the application of the principles of ecologically sustainable development.

Since Australia ratified the Kyoto Protocol in December 2007, climate change has been the subject of a number of significant policy developments at the Federal level. The current Government states that it is strongly committed to reducing Australia's carbon pollution and has set a target for Australia of reducing greenhouse gas emissions by 5 to 25 percent below 2000 levels by 2020. In 2009, the Government attempted to introduce a Federal emissions trading scheme, called the Carbon Pollution Reduction Scheme (CPRS) which was originally due to commence on 1 July 2011. However, the CPRS failed to obtain bipartisan support and was rejected by the Australian Parliament's upper house, the Senate, in December 2009. In February 2011, the Government announced its intention to introduce a carbon price mechanism after it reached agreement with one of the other political parties, the Greens, on certain elements of the mechanism.

The proposed start date for the scheme is 1 July 2012 but this will depend on further agreement being reached during the course of 2011 with the Greens and independents on issues such as permit price, abatement target and compensation measures. As many of the details of the scheme are yet to be determined and the opposition Liberal-National Coalition remain opposed to the scheme in principle, it remains to be seen if the target start date can be achieved.

It is intended that the carbon price mechanism will start with a fixed price (via fixed price permits within an emissions trading scheme) which would increase annually before converting to a cap-and-trade system within three to five years (12 months notice to be given). The set price and its escalation rate are not yet known.

International emission units would not be capable of being used for compliance during the fixed price period, although this may change as part of the negotiations to implement the Scheme.

The carbon price mechanism would have broad coverage, covering all six Kyoto greenhouse gases and capturing greenhouse gas emissions and removals in stationary energy, transport, industrial processes, fugitive emissions (other than from decommissioned coal mines) and emissions from non-legacy waste. Emissions from agriculture and sources under the proposed Carbon Farming

Initiative (an initiative designed to enable domestic offsets to be created from soil sequestration and other land management processes) would be excluded from the mechanism.

It is yet to be determined how existing Commonwealth, State and Territory policies will work with the carbon price mechanism. Similarly, details of industry and household assistance are yet to be decided.

The Federal Government has also extended the renewable energy target scheme with the objective that 20 percent of Australia's electricity supply comes from renewable energy sources by 2020. There is also a scheme that allows for the creation of "Solar Credits" for small-scale solar, wind and hydro systems and through its Clean Energy Initiative, it is also investing \$4.5 billion to support the research, development and demonstration of low-emission energy technologies, including industrial scale carbon capture and storage and solar energy.

New federal legislation has also been introduced to require large commercial buildings to disclose details of their energy efficiency as part of the National Strategy on Energy Efficiency. In addition, most of the individual States and Territories have their own schemes and programs to encourage use of renewable energy, energy savings and energy efficiency.

FINANCIAL SERVICES

Australia has a sophisticated and stable banking system. The banking system is prudentially regulated by the Australian Prudential Regulation Authority.

There are four major banks (Australia and New Zealand Banking Group Limited, Commonwealth Bank of Australia, National Australia Bank Limited and Westpac Banking Corporation) as well as investment banks and a number of regional banks. Significant foreign banks have a presence in Australia. Non-bank financial institutions also operate within the system; eg. credit unions, building societies, friendly societies and finance companies.

Together, these entities offer a full range of banking and finance services and products to Australian businesses and consumers. For businesses, these include corporate finance, project finance, derivatives, asset and structured finance, property and construction finance and debt capital markets transactions and for consumers, retail and electronic banking.

Foreign currency/domestic currency reporting obligations

There are no restrictions on the amount of currency (whether in cash or by an

international funds transfer instruction) that may be brought into or taken out of Australia. However, there are reporting obligations for certain transactions under the Financial Transaction Reports Act 1988 (Cth) and the Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (Cth).

The main object of the Financial Transaction Reports Act is to assist in the administration and enforcement of taxation laws and the Act has a primary focus on the identification of money laundering. The Anti-Money Laundering and Counter-Terrorism Financing Act targets money laundering and terrorism financing. The provisions of the Anti-Money Laundering and Counter-Terrorism Financing Act have commenced over a period of time, with the initial provisions (including, for example, reporting obligations regarding cross-border transfers of physical currency and bearer negotiable instruments) commencing in December 2006 and the final provisions (including those dealing with enhanced customer due diligence) commencing in December 2008.

There are areas of overlap between the Financial Transaction Reports Act and the Anti-Money Laundering and Counter-Terrorism Financing Act.

Financial Transaction Reports Act 1988 (Cth)

The Financial Transaction Reports Act places reporting obligations largely on individuals and organisations known as "cash dealers".

Cash dealers include financial institutions, financial corporations, insurance companies and intermediaries, securities and derivatives dealers, trustees or managers of unit trusts and gaming institutions.

One of the primary obligations under this Act is that cash dealers are required to report certain transactions, including the following, to the Australian Transaction Reports and Analysis Centre (AUSTRAC):

- suspect transactions; ie. where the cash dealer has reasonable grounds to suspect the transaction relates to evasion or breach of taxation or certain other laws or dealings with the proceeds of crime.
- cash transactions of A\$10,000 (or the foreign currency equivalent) or more.

If these transactions are now reported under the Anti-Money Laundering and Counter-Terrorism Financing Act then compliance with the Financial Transaction Reports Act is not required.

Compliance with the Financial Transaction Reports Act will therefore primarily only have ongoing relevance for cash dealers that are not also reporting entities under the Anti-Money Laundering and Counter-Terrorism Financing Act.

Anti-Money Laundering and Counter-Terrorism Financing Act

The Anti-Money Laundering and Counter-Terrorism Financing Act creates a new anti-money laundering and counter-terrorism financing reporting and regulation regime for Australia. The Act commenced on 12 December 2006, however the various obligations imposed under specific Parts of the Act came into force over a two-year period.

The Act imposes obligations on “reporting entities” who provide certain “designated services”. Reporting entities include, for example, businesses operating in the financial services sector, gambling service providers and bullion dealers. While the Federal Government has announced its intention to extend the operation of the Act to those who provide “professional services” (including real estate agents, accountants, and company directors), a date to extend the operation of the Act has not been set.

Designated services currently include a broad range of activities such as providing bank accounts, providing loans, factoring receivables, providing finance lease facilities, providing hire purchase facilities, issuing bills of exchange, promissory notes or letters of credit and many other financial transactions. Reporting entities providing a designated service will be required to, amongst other things:

- implement an Anti-Money Laundering and Counter-Terrorism Financing (AML/CTF) compliance program, which includes verifying

the identity of clients before a designated service is provided;

- report specific kinds of transactions and suspicious matters;
- perform ongoing customer due diligence; and
- keep accurate records (the initial record keeping obligations commenced on 13 December 2006).

The AML/CTF compliance program requires a reporting entity to identify, mitigate and manage the risk that a designated service might facilitate money laundering, and further obliges the reporting entity to verify the identity of a customer before providing that customer with most designated services. In some circumstances the identity of a customer (or its agent) will need to be re-verified; eg. where a suspicious matter arises in relation to an existing customer. Verification can be completed by obtaining reliable and independent documentation or electronic data or a combination of both. Certain minimum information will be required to be collected and verified depending on the type of customer.

Ongoing customer due diligence is also required to be undertaken by reporting entities to protect against involvement in, or facilitation of, money laundering or the financing of terrorism. This involves the collection of customer identification information, the monitoring of customer transactions to detect complex or unusual transactions, and the collection or verification of additional customer identification information, if the risk of money laundering increases, or a suspicious matter arises.

Reporting obligations under the Act require a reporting entity to report the following information to the Australian Transaction Reports and Analysis Centre (AUSTRAC):

- suspicious matters; eg. any potential tax evasion steps, false identities, the use of funds for terrorism financing or the commission of other crimes;
- cash transactions over a threshold of A\$10,000 (or the equivalent in any other currency); and
- certain designated services relating to international funds transfer instructions.

Interestingly, the Act provided for “prosecution-free” periods of 15 months after commencement, provided best endeavours are used to comply. Most of these prosecution-free periods, in relation to certain of the Act’s requirements, have since expired, and the remaining prosecution-free periods will expire in 2010.

Superannuation

Generally, all employers in Australia contribute quarterly a percentage of an employee’s salary or wages into a fund established to comply with superannuation legislation requirements (known as a complying superannuation fund). At present, the minimum level of contributions by an employer in respect of an employee is nine percent of that employee’s ordinary time earnings. Employees generally have the right to choose a superannuation fund and move their superannuation savings between funds.

Although the minimum superannuation contribution is currently nine percent, any employer and employee can contribute additional amounts. These voluntary contributions may be made as part of overall terms and conditions of employment. Alternatively, employees may make additional contributions to superannuation through salary reductions. In June 2008, there were almost 400,000 separate

superannuation entities in Australia, managing over A\$1 trillion in assets on behalf of over 32 million member accounts. It is forecast that this figure will increase to A\$8.6 trillion by 2040-41.

If the minimum contribution is not made by the employer, a special tax, called the Superannuation Guarantee Charge (SGC), is imposed upon the employer.

While contributions are not compulsory under legislation, the SGC makes contributing to a superannuation fund the lower cost option for employers.

It should further be noted that a complying superannuation fund is taxed at the concessional rate of up to 15 percent of its assessable income. Capital gains, including gains on the disposal of shares and other securities held by the fund, are taxed at the rate of 10 percent where the asset was held for 12 months or more. The Government also allows deductions for employers' superannuation contributions and deductions for contributions by people who are substantially self-employed.

In general, superannuation fund members are unable to access retirement benefits until they reach a minimum age. This is known as the preservation age. The preservation age for persons born before 1 July 1960 is 55 years.

For persons born after this date but before 30 June 1964, there is a gradual increase in the preservation age up to 60. For all persons born after 30 June 1964 the preservation age is 60 years. Payments made from a taxed superannuation fund to persons age 60 or more are tax-free. This encourages people to delay receiving superannuation benefits until they reach 60 years.

Insurance and risk management

General and life insurers must be authorised under their respective statutes in order to carry on insurance business in Australia. They are subject to ongoing capital adequacy, solvency and reporting requirements, administered by the Australian Prudential Regulatory Authority (APRA), and their conduct of business is heavily regulated by legislation governing market conduct and the operation of insurance contracts. Insurers require an Australian Financial Services Licence (AFSL) if they provide financial services directly to retail clients.

Insurance brokers must also hold an AFSL in order to carry on business in Australia.

Reinsurers must also be authorised in order to carry on business in Australia and they have similar ongoing capital adequacy, solvency and reporting requirements, but are subject to far less regulation affecting individual contracts. "Contract Certainty" rules apply, but have a much narrower scope in their application to Australian reinsurance than is the case in the UK. Many of the major international reinsurers accept inwards business from Australia, however, there is an additional capital charge factor which has to be applied by APRA-regulated cedants, in respect of outwards reinsurance to offshore reinsurers which are not regulated by APRA, in calculating their minimum capital requirement.

Businesses seeking insurance in Australia will find a small but highly competitive and mature insurance and reinsurance market, with all the large international brokers active. Australian insurance legislation treats captive insurers the same as market insurers for most purposes, however APRA

will sometimes grant concessions in relation to some of the requirements on a case-by-case basis.

Alternative risk transfer methods are in use, with leading service providers offering specialist skills in appropriate risk management techniques.

Risk management is highly developed, with first-rate skills available and a highly qualified, regulated profession. Risk management, including by insurance, is a legislative requirement in many Australian industries, including the insurance industry itself. The current Australian Standard for managing operational risk is AS/NZS 4360:2004, last upgraded in 2004.

Financial services reform

Australia has been a world leader in the reform of the regime for regulation of the financial services industry. Most recently, the Government enacted the Financial Services Reform Act 2001 (Cth), which commenced in full on 11 March 2004 by way of amendments to the Australian Corporations Act.

The reforms have set new standards in particular parts of the financial services industry, and as such the entire sector is subject to consistent regulation. Specifically, the financial services reforms:

- provide a **uniform licensing regime** for entities which provide financial services such as providing financial product advice, operating managed investment schemes or dealing in respect of any of a range of financial products such as shares, debentures, interests in managed funds, superannuation (pensions), deposit products and derivatives (traditionally, the regulation of financial services in Australia has been on a product-by-product basis);

- provide a **uniform licensing regime** for entities operating financial products markets (such as stock and futures exchange) and clearing and settlement facilities (traditionally, application to the Minister was the only means by which these markets were regulated);
- introduce a **uniform set of training, competency and other conduct requirements**, particularly for those who sell or offer products to retail clients; and
- implement a **uniform selling and disclosure regime** with respect to the products and services covered by the reforms.

The aim of these reforms is to promote:

- a more efficient and flexible regime for financial markets and products;
- a fair and transparent market for financial products;
- fairness, honesty and professionalism by the providers of financial services;
- the provision of fair and effective services by clearing and settlement facilities;
- the removal of statutory barriers to competition in clearing and settlement facilities; and to
- provide the financial services industry with legislative certainty and consumers with confidence in the integrity of the system.

It should be noted that financial services licences are usually issued subject to various conditions and there are various statutory notification and client obligations imposed on licence holders. Foreign financial service providers who only wish to provide financial services to Australian wholesale clients may be able

to take advantage of certain licensing exemptions for qualifying foreign jurisdictions on the basis that they are subject to regulation in a jurisdiction which is comparable to the regulation that local Australian providers are subject to. These reforms have received international attention and have been labelled as “revolutionary”. Countries such as Hong Kong and Singapore have closely observed the reforms. Similarly, the United States, Canada and the United Kingdom have acknowledged the significance of Australia’s Wallis Report (1997), the foundation for the Financial Services Reform Act regime, in assisting with their own respective reforms. Therefore it is evident that the impact of these reforms, on both a national and international level, has been significant.

Managed/collective investment schemes

The managed investments industry continues to enjoy rapid growth in Australia. Australia has now become the fourth largest funds market in the world and has a managed funds market valued at A\$1.2 trillion dollars in consolidated assets as at March 2009 (despite the global financial crisis). It is the largest in the Asia-Pacific outside Japan, and is described as the most sophisticated retail funds management marketplace outside the United States. Funds under management in Australia, including managed funds and superannuation, has increased by almost A\$900 billion, or 10 percent per annum since 1994. Australia now has the highest level of managed funds per capita in the world.

The size of Australia’s funds management pool and its prospects of success through substantial growth, driven by the Government-mandated retirement income scheme, have attracted global firms to establish

operations in Australia. In fact, many global funds management groups, particularly from the United States, have established their presence in Australia over the past few years. This international presence has also been fuelled by the strong demand in Australia for international funds products. The high percentage of foreign assets held by Australian managed funds (close to 20 percent) reflects this.

The concentration and quality of skills and expertise have enabled Australia to become the funds management hub for the Asia-Pacific region, and is an additional major drawcard for global funds to establish operations in Australia. There is increasing Australian Federal Government support behind facilitating the international competitiveness of Australia’s financial services sector and there are ongoing industry and Government initiatives designed to achieve this outcome.

Collective investment vehicles are referred to in Australia as managed investment schemes. Managed investment schemes can be in various legal forms: some are mere contract-based schemes under which the promoter gives a personal promise that under certain conditions the investor will receive benefits. The most common legal form, however, is a unit trust. Unit trust products exist for each of the traditional and alternative asset classes including direct property, property securities, equity (domestic and foreign), cash, private equity, hedge funds and infrastructure.

A managed investment scheme is a scheme to which investors contribute funds that are pooled or used in a common enterprise to produce financial benefits for the investors. The most distinctive feature of interests in a managed investment scheme that sets it apart from shares and debentures is that investors do not have day-to-day control over

the operation of the scheme, and instead leave this task to a professional manager. In order to operate a managed investment scheme, an Australian Financial Services Licence is required, which authorises the licensee to operate the scheme. To obtain a licence, an entity must meet financial requirements, as well as several general licensing requirements that set minimum standards of competency, educational levels and experience for participants. In addition to this licensing requirement, if interests in a scheme are offered on a retail basis, the scheme will generally require registration. If, however, interests in the scheme are only offered to Australian wholesale investors, the scheme is not required to be registered.

There is a clear distinction between retail and wholesale investors and unless classified as wholesale, investors will be deemed to be retail.

Typical wholesale investors include institutional investors or investors who are regarded as being sophisticated or experienced investors making large investments.

A scheme that requires registration is highly regulated and must comply with the Corporations Act. Included in these regulatory requirements is the need for a responsible entity, being a public company, to operate the scheme. The responsible entity fuses the role of trustee and manager into one. The responsible entity is solely responsible to investors and the regulator for the operation of the scheme, and consequentially the responsible entity is subject to a number of duties that are imposed by the Corporations Act. These include the duties to act in the best interests of the members and to act with a degree of due diligence and care.

There are a number of options for foreign asset managers wanting to enter the Australian market. A number of foreign managers have established funds in Australia that are established under Australian law and operate on the same basis as domestic managers. Alternatively, a foreign manager may market established foreign schemes directly in Australia, either exclusively to Australian wholesale investors, or to retail investors as well.

In order to do so, however, where the target market is Australian wholesale investors, exemptions from certain provisions of the Corporations Act are required and are available to operators regulated in certain foreign jurisdictions (such as the United Kingdom, the United States, Singapore and Hong Kong). If the target market is Australian retail investors, then exemptions are much more limited and some Australian regulation of the foreign scheme or manager or both will be inevitable.

Typically, a strategic alliance is entered into by foreign managers with Australian licensees to minimise the Australian regulatory burden and gain access to Australian retail distribution.

In addition to considering the possible need for regulation upon foreign collective investment schemes and asset managers, there is a separate requirement that a foreign manager register as a foreign company in Australia and appoint a local agent if it carries on business in Australia. This requirement is likely to apply if it is actively promoting its foreign scheme to Australian investors.

ABOUT CLAYTON UTZ

Clayton Utz is one of Australia's largest and most successful law firms. With teams of highly skilled and dedicated lawyers working in Sydney, Melbourne, Brisbane, Canberra (the Federal Capital), Darwin, Perth and Hong Kong. We have a track record for providing consistent and commercial legal advice, Clayton Utz has a large base of loyal clients who have chosen the firm as their trusted legal advisers.

Our team of internationally experienced partners, our strong relationships with leading firms around the globe and our membership of high-profile international legal bodies mean our clients receive the best possible advice and support, wherever they do business.

Clayton Utz is a full service firm that represents some of Australia's biggest companies and intermediaries as well as significant public sector organisations and multi nationals with business interests locally and overseas. Clayton Utz is dedicated to providing quality legal services and building long-term client relationships.

International relationships offer global solutions

Clayton Utz maintains strong relationships with leading firms around the globe. Rather than compete with offshore firms, we develop relationships with them. Through these strong relationships, international clients investing in Australia can be assured that Clayton Utz will perform as a streamlined member of their international legal team, providing the highest level of legal services in the most efficient and effective manner.

Foreign language capability

Clayton Utz has a depth of language capability reflecting our commitment to providing outstanding client service. A number of our lawyers are bilingual or multilingual, so appropriately skilled lawyers can be called upon to assist with matters and translations at very short notice.

Our foreign language skills include Mandarin, Cantonese, Bahasa Indonesian, Hindi, Japanese, Korean, Malay, Tamil, Vietnamese, Afrikaans, Croatian, Danish, Dutch, French, German, Swedish, Ukrainian, Greek, and Italian.

Providing the full spectrum of commercial legal services

Clayton Utz is organised into key departments – Corporate, Litigation and Dispute Resolution, Banking & Financial Services and Property, Environment & Construction. Within these departments, we have specific practice groups which focus on the needs of individual sectors of commerce and industry and areas of legal practice, including:

Areas of law

- Banking & Finance
- Capital Markets & Securities
- Competition
- Compliance
- Construction & Major Projects
- Corporate/M&A
- Environment & Planning
- Insurance & Risk
- Intellectual Property
- International Arbitration
- Legal Technology Services
- Litigation & Dispute Resolution
- Native Title
- Product Liability
- Real Estate
- Restructuring & Insolvency
- Taxation
- Telecommunications, Media & Technology
- Workplace Relations, Employment & Safety

Industries

- Advertising & Marketing
- Agribusiness
- Banking & Finance
- Climate Change
- Construction & Major Projects
- Energy & Resources
- Government Services
- Healthcare & Life Sciences
- Leisure & Entertainment
- Private Equity
- Real Estate Markets
- Telecommunications, Media & Technology
- Transport & Logistics
- Water

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USEFUL AUSTRALIAN WEBSITES

Federal Government departments and bodies

AusIndustry

www.ausindustry.gov.au

Australia Open for Business

www.australia.gov.au

Australian Bureau of Statistics

www.abs.gov.au

Australian Taxation Office

www.ato.gov.au

Australian Tourist Commission

www.australia.com

Australian Trade Commission (Austrade)

www.austrade.com

Australian Treasury

www.treasury.gov.au

CSIRO

www.csiro.au

Department of Agriculture, Fisheries and Forestry

www.daff.gov.au

Department of Foreign Affairs & Trade

www.dfat.gov.au

Department of Immigration & Citizenship

www.immi.gov.au

Department of Innovation, Industry, Science and Research

www.innovation.gov.au

Department of the Environment, Water, Heritage and the Arts

www.environment.gov.au

Export Finance and Insurance Corporation

www.efic.gov.au

FIRB

(Foreign Investment Review Board)

www.firb.gov.au

IP Australia

www.ipaustralia.gov.au

Reserve Bank of Australia (Australia's central bank)

www.rba.gov.au

Federal regulators

Australian Competition and Consumer Commission

www.accc.gov.au

Australian Prudential Regulation Authority

www.apra.gov.au

Australian Securities and Investments Commission

www.asic.gov.au

Australian Communications and Media Authority

www.acma.gov.au

New South Wales

NSW Government

www.more.nsw.gov.au

Department of Environment, Climate Change and Water

www.environment.nsw.gov.au

Department of Primary Industries

www.dpi.nsw.gov.au

Department of State and Regional Development

www.business.nsw.gov.au

Victoria

Victorian Government

www.vic.gov.au

Business Victoria

www.business.vic.gov.au

Department of Innovation, Industry and Regional Development

www.diird.vic.gov.au

Department of Primary Industries

www.new.dpi.vic.gov.au

Department of Sustainability and Environment

www.dse.vic.gov.au/dse

Queensland

Queensland Government
www.qld.gov.au

Department of Employment,
Economic Development
and Innovation
www.dtrdi.qld.gov.au

Department of Environment
and Resource Management
www.derm.qld.gov.au

South Australia

South Australian Government
www.sa.gov.au

Department of Primary Industries
and Resources
www.pir.sa.gov.au

Department of Trade
and Economic Development
www.southaustralia.biz

Department for Transport,
Energy and Infrastructure
www.dtei.sa.gov.au

Western Australia

Western Australian Government
www.wa.gov.au

Department of Commerce
www.commerce.wa.gov.au

Department of Environment
and Conservation
www.dec.wa.gov.au

Department of Mines
and Petroleum
www.dmp.wa.gov.au

Department of State Development
www.dsd.wa.gov.au

Tasmania

Tasmanian Government
www.tas.gov.au

Department of Economic
Development, Tourism and the Arts
www.development.tas.gov.au

Department of Infrastructure,
Energy & Resources
www.dier.tas.gov.au

Department of Primary Industries,
Parks, Water and Environment
www.dpipwe.tas.gov.au

Australian Capital Territory

ACT Government
www.act.gov.au

Business and Industry
Development
www.business.act.gov.au

Department of the Environment,
Climate Change, Energy and Water
www.environment.act.gov.au

Northern Territory

Northern Territory Government
www.nt.gov.au

Department of Business
and Employment
www.nt.gov.au/dbe

Department of Regional
Development, Primary Industry,
Fisheries and Resources
www.nt.gov.au/d/

Business and industry groups

ASX
www.asx.com.au

auDA
www.auda.org.au

Australian Industry Group
www.aigroup.com.au

Environment Business Australia
www.environmentbusiness.com.au

