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2005

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INTRODUCTION

The purpose of this publication is to provisde foreign investors with a broad overview of the legal framework within which business is conducted in Australia.

This publication deals primarily with:

- the regulation of foreign investment in Australia, including the Australian Government's policy on foreign investment and controls on debt funding;
- the legal structures available for investors in Australia;
- the tax system imposed by the Australian and State Governments; and
- the general system of business regulation applicable in Australia.

This publication has been prepared by the Australian offices of Baker & McKenzie as a general guide for those persons or corporations considering making an investment in Australia. However, before specific investment is made, consideration should be given to specific laws and regulations that may affect the investment decision.

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In Australia, Baker & McKenzie is unique among law firms. Today, with a market presence of 40 years, 80 partners and more than 200 lawyers who practice Australian law, we are a premium firm doing quality work for quality clients. We deliver a broad scope of corporate and commercial legal services required to respond to global and local business needs, consistently and with confidence.

Our clients are engaged in all areas of commercial activity, including Australian and international public and private companies, banks and other financial institutions, governments and government instrumentalities, professional firms, trade and industry associations, trustees, joint ventures and partnerships. We also represent many

significant foreign investors and companies doing business within Australia, as well as major local companies developing markets overseas.

Investors should also be aware of a range of other publications produced by Baker & McKenzie Australia. Details of these publications are included in Appendix C of this edition and copies are available on request.

1. AUSTRALIA – AN OVERVIEW

Government

Australia is a federation of 6 states, namely New South Wales, Victoria, South Australia, Western Australia, Tasmania and Queensland, and 2 mainland territories, the Northern Territory and the Australian Capital Territory. Australia also has some external territories.

Australia obtained its independence from Great Britain in 1901, when the Federation was formed and the Australian Constitution was adopted. Australia has enjoyed a history of stable government based on a parliamentary system similar to the British Westminster system.

Population

The population of Australia is 20,253,334.

The following figures were collected in the 2001 Census and reflect the *estimated* population of the states, territories and capital cities as at December 2003.

States and Territories		**Capital Cities**	
New South Wales	6,716,277	Sydney	4,198,543
Victoria	4,947,985	Melbourne	3,555,321
Queensland	3,840,111	Brisbane	1,735,181
Western Australia	1,969,046	Perth	1,431,498
South Australia	1,531,375	Adelaide	1,119,097
A.C.T.	322,579	Canberra	323,004
Tasmania	479,958	Hobart	199,926
Northern Territory	198,700	Darwin	108,039

As these figures indicate, the population is highly concentrated in urban areas, particularly on the east coast.

Language

English is the national language spoken in Australia. However, being a multicultural nation, with a significant migrant population, evident mainly in the cities, the diversity of languages and cultures has become distinctive in many areas.

Education

Primary and secondary schooling until Year 10 (age 15) is compulsory in Australia. However, people are encouraged to continue their secondary education up to the age of 18 to obtain a Higher School Certificate or its equivalent.

Tertiary education is available throughout Australia. Admission to these institutions is generally regulated by attainment of varying minimum standards for particular courses.

Public and privately-funded education systems co-exist. Public primary and secondary education is available to all Australians at no direct cost. For tertiary education, however, part of the direct cost is now recoverable for local students by way of a loan bearing interest, and repayable after graduation by way of salary deduction above certain levels. Foreign students typically pay higher fees to obtain entry to more limited available spaces.

Information for Visitors

Currency

The Australian dollar is a floating currency. During 2003-2004, the A$ fluctuated in the range of US$0.56 to its peak of US$0.75 = A$1.00 on 31 December 2003[+].

International Time

Australia spans 3 time zones. Eastern Australia is 10 hours ahead of Greenwich Mean Time (GMT), Central Australia is 9 and a half hours ahead of GMT and Western Australia is 8 hours ahead of GMT. From mid-spring to mid-autumn, all of Australia (except Queensland, Western Australia and the Northern Territory) adopts Daylight Saving Time, which is 1 hour in advance of the times previously stated.

Business Hours

Standard business hours in Australia are generally from 9:00 am to 5:00 or 5:30 pm, Monday to Friday inclusive. Retail outlets in most States also usually open on Saturdays and many are open on Sundays.

[+] Daily Exchange Rate Historical Statistics - Reserve Bank of Australia

National Holidays

Set out below is a list of national public holidays and their approximate dates. The dates may vary slightly from State to State and individual States do have additional public holidays.

• New Years Day	1 January
• Australia Day	26 January
• Good Friday	March/April
• Easter Monday	March/April
• Anzac Day	25 April
• Queen's Birthday	early June
• Christmas Day	25 December
• Boxing Day	26 December

The Federal System

There are 3 levels of government in Australia: Federal, State and Local.

Federal Government

Under the Constitution, Federal legislative power is vested in the Federal Parliament which consists of the House of Representatives (the lower house) and the Senate (the upper house). The party which holds the majority of seats in the lower house forms the Federal Government (called the Australian Government), which serves a term of 3 years. The leader of the majority party becomes the Prime Minister. Executive power is exercised by the "Cabinet" which comprises Ministers drawn from the majority party and headed by the Prime Minister. The Federal Parliament is located in Canberra, the nation's capital, which is where most senior bureaucrats also have their offices.

The 2 major political parties are the conservative Liberal-National Party coalition and the Australian Labor Party. At present, the Liberal-National Party coalition is in government, led by Prime Minister John Howard.

State Government

At the State level, each State has power to govern and to pass laws within the State. The parliaments of each State, except Queensland, also have 2 chambers; a lower house and an upper house. Again, executive power is exercised by the Cabinet which is headed by the Premier, who is the leader of the majority party in the lower house.

Members of the Federal and State Parliaments are elected by the people. Voting is compulsory for Australian citizens from the age of 18 in both State and Federal elections.

Local Government

Local governments derive their authority from statutes passed by State Parliaments. Such governments regulate local community matters such as property zoning. They raise revenue by levying rates on land ownership.

Division of Powers

The Australian Constitution provides for a division of powers between the Federal Parliament and the State Parliaments. Generally, the Federal Parliament is vested with specified powers to legislate in such areas as defence, taxation, interstate and overseas commerce, customs, banking, currency, foreign affairs and social services. Remaining powers are vested in the State Parliaments which have the right to legislate on all matters that the Australian Constitution does not consign exclusively to the Federal Parliament. The State Governments are responsible for such matters as justice (including most criminal and commercial law), education, health, housing, agriculture, lands, forests, water and mineral resources and transportation.

Although the Federal Government is the main taxation authority, the State Governments also raise revenue by means of various duties and levies. The Australian Government funds many State activities and functions, often attaching conditions to the use of funds.

The Legal System

Australian law consists of Federal laws passed by the Federal Parliament, State laws passed by the State Parliaments, and the common law. The common law is derived from English common law, as developed by the Australian courts. Most commercial law is State law, with the major exceptions being taxation, competition and trade practices, bankruptcy and copyright, trade marks and patents, all of which are Federal laws.

Matters in relation to corporations and securities are regulated by the *Corporations Act* which since 15 July 2001 has operated as a Commonwealth act for the whole of Australia

Australia has both a Federal system and a State system of courts. The Federal system is headed by the High Court of Australia which decides all constitutional matters and is the nation's final court of appeal. The Federal courts have jurisdiction to decide all matters of Federal law such as trade practices, bankruptcy and industrial law. The State courts have jurisdiction to decide all matters of State law but have also in many cases the right to hear matters of Federal jurisdiction in the first instance. The State court system in each State is headed by the Supreme Court of that State.

The Court System

High Court

Australia's final appellate court on all questions of law is the High Court. It consists of 7 judges and sits primarily in Canberra. The judges of the High Court are appointed by the Federal Cabinet. The High Court deals primarily with appeals from the Federal Court of Australia and the State Supreme Courts. Usually, special leave must be granted by the Court before a matter comes before it. The High Court is required to determine issues involving a wide range of Australian law, as well as establish in appropriate cases new legal precedent. It is primarily involved in constitutional law matters and the scope and validity of Commonwealth laws, but as the final appellate court, it also deals with issues of State law and the Common Law.

Federal Court

The Federal Court of Australia generally exercises statutory powers. It sits in all Australian capital cities. It primarily deals with taxation matters, trade practices, bankruptcy, copyright, trade marks and patents. Appeals from the Federal Court go firstly to a Full Bench of Federal Court Judges. Leave may then be sought to appeal to the High Court.

State Courts

State Supreme Courts have different "Divisions" or "Lists" so as to "stream" the different types of cases with which they deal. For example, in New South Wales, the Supreme Court has:

- a Commercial Division, which deals with significant commercial disputes, including banking and financial matters, commercial contract disputes and some insurance claims;

- an Equity Division, which exercises jurisdiction outside strict "common law" remedies;
- a Common Law Division which deals primarily with personal injury claims and with contract disputes which are not of the type dealt with by the Commercial Division or the Equity Division; and
- a Building Construction List and various specialist divisions.

Underneath the State Supreme Courts, each State has lower courts which deal with claims of smaller monetary amounts. For example, in New South Wales, the District Court deals with claims of up to $250,000.

"Cross vesting" legislation has ensured that the Federal Court and the Supreme Courts throughout Australia can usually exercise jurisdiction conferred on each other, so that there is considerable overlap in work done by the State Supreme Courts in their various Divisions and the Federal Court.

Industrial Courts

The States also have their own Industrial Courts or Industrial Tribunals. The Federal industrial body is the Industrial Relations Commission. These industrial tribunals sometimes exercise judicial powers but ordinarily exercise statutory conciliation and arbitration powers to resolve industrial disputes. They are far less formal in their proceedings.

Court Procedures - Some Features

Evidence in most Supreme Court commercial actions and the Federal Court is ordinarily given by way of statement or affidavit, prepared by witnesses in advance. Witnesses are then subject to cross examination on the written evidence they have provided. Civil proceedings are not ordinarily decided by a jury, the most important exception being defamation cases.

Australian Courts do not have a "deposition" procedure in the United States style. They do however, have very extensive procedures available for discovery of documents by parties to litigation before a matter is heard.

There is enormous variation in the time taken to bring a dispute to hearing. In an urgent case in some jurisdictions, a final hearing weeks or even days after the commencement of proceedings is possible. More commonly in the Federal and

Supreme Courts, it might be about a year or more from commencement to hearing. In other jurisdictions, for example the District Court of New South Wales, the delay may be 4 years or more.

Class Actions

There is a developing "class action" procedure available in the Federal Court of Australia. While there is no class action procedure available before State Supreme Courts, there are powers in those Courts to order actions to be heard jointly, and in representative proceedings, which can go some way towards reproducing features of a class action procedure.

2. FOREIGN INVESTMENT – GOVERNMENT POLICY

Foreign Interests

The obligation to submit investment proposals for examination by the Treasurer through Foreign Investment Review Board (FIRB) may arise under the Government's foreign investment guidelines or under the provisions of the *Foreign Acquisitions & Takeovers Act 1975*. The operation of both the guidelines and the Act may be triggered if a "foreign" interest or person is involved. Briefly, a foreign interest usually includes:

- a natural person not ordinarily resident in Australia;
- a corporation in which a natural person or persons not ordinarily resident in Australia or a foreign corporation or foreign corporations hold a controlling or aggregate controlling interest;
- the trustee of a trust estate in which either a natural person or persons not ordinarily resident in Australia or a foreign corporation or foreign corporations hold a substantial interest or aggregate substantial interest. A substantial foreign interest occurs 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, business or trust.

Proposals Requiring Notification

The following proposed transactions involving foreign interests must be submitted to and approved by FIRB prior to being implemented:

- acquisitions of substantial interests in existing Australian businesses with total assets over $50 million or where the proposal values the business at over $50 million. The acquisition may be either by way of a purchase of the assets/business direct, or of shares in the company which owns the assets/business;
- for US investors, under the Australia-United States Free Trade Agreement which came into effect on 1 January 2005, the notification threshold of $800 million applies, except for investments made in prescribed sensitive sectors, or if the investing entity is controlled by the US government, which are subject to a $50 million threshold.

- arrangements for leasing, hiring, managing or otherwise participating in the profits of a business where the value of the assets of the business is at least $50 million;
- agreements in relation to board representation or by alteration of the Constitution or other constituent documents of a company where the value of the assets of the company is at least $50 million;
- proposals to establish new businesses involving a total investment of $10 million or more. Total investment for these purposes means the total expenditure expected to be associated with the proposal, including the value of any leased assets. These proposals will be automatically approved unless they involve total investment in excess of $50 million;
- portfolio investments in the media of 5% or more and all non-portfolio investments irrespective of size;
- takeovers of offshore companies whose Australian subsidiaries or assets are valued at $50 million or more or account for more than 50% of the target company's global assets;
- a direct investment made by a foreign government or their agent, irrespective of the size;
- acquisitions of interests in urban land (whether commercial, residential or vacant land) (see later specific sector discussion of urban land); and
- any proposal where doubt exists as to whether the FIRB needs to be notified.

Specific Sectors

In relation to investments by foreign interests in certain sectors, namely rural businesses, agriculture, forestry, fishing, resource processing, oil and gas, mining, manufacturing, non-bank financial institutions, insurance, stockbroking, tourism and most other services, all proposals above certain thresholds need prior approval and therefore need to be notified. Notification thresholds are over $50 million for acquisitions of substantial interests in all existing businesses, $10 million or more for the establishment of new businesses and $50 million or more for offshore takeovers.

All tourism proposals, which incorporate an accommodation facility, irrespective of value, need to be notified.

In addition, although it may not be strictly necessary to submit other proposals to FIRB for approval, it may be advisable in some circumstances as a matter of courtesy to notify FIRB of transactions of a similar nature.

Examinable Proposals

Examination Policy

The Government registers, but normally raises no objections to, proposals above the notification thresholds where the relevant total assets/total investment falls below $100 million.

Proposals where the relevant total assets/total investment is $100 million or more require approval after a detailed examination under the guidelines to the Act. Proposals in sensitive sectors or those which raise specific national interest issues may also be subject to more detailed examination even where the $100 million threshold isn't reached.

Finally, approvals of proposals may be made subject to the parties meeting certain conditions. In practice, these conditions relate almost entirely to the time period for real estate development or to environmental requirements.

Urban Land

Proposals involving the acquisition of interests in Australian urban land (ie real property other than land that is integral to a farming business) are subject to special scrutiny.

The definition of an "interest" in Australian urban land is extremely wide and includes options over freeholds, leases with a term exceeding 5 years (including any option for a further term), any financing or other arrangements for the sharing of profits from investment in urban real estate and shareholding or unitholding interests in companies or trusts that hold more than half of its assets in urban land.

Proposals involving the acquisition of interests in Australian urban land are subject to examination by FIRB irrespective of value, unless they fall within specific exemptions set out in the regulations to the *Act*. The major exemptions are:

- acquisitions of developed non-residential commercial property valued at less than $50 million or $5 million if it is heritage protected;

- acquisitions by Australian citizens residing overseas;
- acquisitions of residential property by foreign persons who hold permanent resident visas or who hold or are eligible to hold a 'special category visa' (eg a New Zealand citizen), or by foreign persons purchasing as joint tenants with their Australian citizen spouse;
- acquisitions from real estate developers of home units or similar accommodation "off the plan", under construction or which are newly completed but have never been occupied or sold, where the real estate developers have obtained prior written approval from FIRB and provided that not more than half of the units are bought by foreign interests;
- acquisitions of industrial or commercial real estate that are wholly and directly incidental to the conduct of the present or proposed business activities of the foreign interest concerned and are to be used immediately for those activities. This exemption does not apply to foreign companies engaged in real estate business;
- acquisitions of offices and residences by foreign government missions for use as official missions or staff residences (but subject to sale when no longer required for this use);
- acquisitions of residential real estate within a resort which has been designated as an Integrated Tourism Resort ("ITR") prior to September 1999. For resorts designated as ITRs from September 1999, the exemption only applies to developed residential property which is subject to a long term (10 years or more) lease to the resort/hotel operator, making it available for tourist accommodation when not occupied by the owner. All other property including vacant land for development within an ITR is subject to foreign investment restrictions. The operators of the ITR are required to report to FIRB annually providing details of the ownership of all accommodation within the resort. To be designated as an ITR, a development must be a destination tourist development covering a minimum of 50 hectares constructed by a single developer and incorporate core hotel facilities of sufficient size and standard providing not less than 20% of the resort's total accommodation, non hotel accommodation and extensive recreational facilities within the resort. As a general rule, the commercial and recreational facilities must account for about 70% to 80% of the area of the resort;

- acquisitions of strata titled hotel rooms in designated hotels where the rooms are subject to a long term (at least 10 years) hotel management agreement. A designated hotel is one which offers a full range of hotel services, where all rooms are subject to a hotel management agreement under which the owners are entitled only to receipt of income, not occupancy and owners are not permitted to opt out of the management agreement, and the common property of the hotel must be held by the hotel manager;
- acquisitions of an interest in a time share scheme where the entitlement of the foreign person and any of that person's associates does not exceed an aggregate of 4 weeks in any year; and
- acquisitions by a responsible entity of a registered managed investment scheme and the acquisition is primarily for the benefit of scheme members ordinarily resident in Australia.

Any acquisition by foreign interests of an interest in urban land outside these exemptions must be notified and requires approval. Proposals will normally be approved unless judged contrary to national interest, where they involve:

- acquisitions of vacant land for development subject to conditions requiring continuous substantial construction to commence within 12 months, a minimum of 50% of the acquisition cost or market value (whichever is higher) to be spent on the development and notification of the completion date and actual development expenditure on completion of the development;
- acquisitions of existing residential properties for redevelopment subject to conditions which include that the redevelopment proposal must provide for an increase of the number of dwellings and a minimum of 50% of the acquisition cost or market value (whichever is higher) to be spent on the development. A proposal may be approved for a single dwelling if the property is shown to be uninhabitable;
- acquisitions of developed commercial real estate valued at $50 million or more. Acquisitions of developed commercial real estate valued between the notification threshold and $100 million will not be subject to detailed examination unless the facts of the proposal raise issues of national interest;

- acquisitions of developed residential real estate by foreign owned companies operating in Australia for the purpose of providing accommodation for their senior executives resident in Australia for periods longer than 12 months, provided the accommodation is sold when no longer required. The number of dwellings which may be acquired will depend on the scope of the company's operations and assets in Australia. Normally only 2 dwellings will be permitted under this category unless there are special circumstances;
- acquisition of home units or similar accommodation either "off the plan", under construction or newly completed provided that not more than half of the units in any one development are bought by foreign interests and the units or similar accommodation have not been rented or occupied prior to the sale;
- acquisitions of developed residential real estate by certain categories of foreign nationals temporarily resident in Australia for a period exceeding 12 months, for use as their principal place of residence, provided that the property is sold when the purchaser ceases to be a temporary resident, when they leave Australia or no longer occupy the property. This category includes students aged 18 years and over studying courses of more than 12 months duration at recognised tertiary institutions, who purchase properties valued at up to a general limit of $300,000; and
- acquisitions of hotels and motels operating (or to be operated) under 1 title are normally approved under the tourism sector policy.

Banking

In addition to the requirements under the Act, the Government will consider foreign investment in the banking sector in accordance with applicable banking legislation and banking policy, including prudential requirements.

The Government has indicated that foreign owned banks are permitted to bid for banks in Australia. However, any proposed foreign takeover or acquisition of an Australian bank will be assessed on a case-by-case basis on its merits in accordance with the *Act*, like any other proposed foreign takeover or acquisition. Although there is a ban on any merger between the 4 major Australian banks, the Government has indicated that a foreign takeover of one of those banks may still be considered, subject to the "contrary to national interest" test and the *Act*.

The Government will permit the issue of new banking authorities to foreign owned banks where Australian Prudential Regulation Authority (APRA) is satisfied that the bank and its home supervisor are of sufficient standing and where the bank agrees to comply with APRA's prudential supervision and arrangements.

Civil Aviation

Foreign persons (including foreign airlines) can generally expect approval to acquire up to 100% of the equity in an Australian domestic airline, or start a new domestic airline, unless this is contrary to the national interest.

Under the *Air Navigation Act* 1920, foreign persons (including foreign airlines) can generally expect approval to acquire up to 49% of the equity in an Australian international carrier (other than Qantas) individually or in aggregate provided the proposal is not contrary to the national interest. In addition, a number of criteria must be satisfied relating to the nationality of Board members and operational location of the enterprise. The limits are set so as to retain status as a designated Australian international carrier airline under the bilateral air service system.

However, stricter requirements exist in the case of Qantas. The *Qantas Sale Act* 1992 restricts total foreign ownership of Qantas to a maximum of 49% in aggregate, with individual holdings limited to 25% and aggregate ownership by foreign airlines limited to 35%.

Radio and Television

All direct (non-portfolio) proposals by foreign interests to invest in the media sector (including newspapers and telecommunications below), irrespective of size are subject to prior approval under the Government's foreign investment policy. Proposals involving portfolio shareholdings of 5% or more must also be submitted for examination.

Foreign investment in radio and television is governed by the *Broadcasting Services Act 1992*, which deals with broadcasting licences. The *Broadcasting Services Act* provides that a "foreign person" must not be in a position to exercise control of a commercial television broadcasting licence. A person who has company interests exceeding 15% in a company holding a commercial television broadcasting licence is taken to be in a position to exercise control over that licence. Lesser interests can be considered to be control, in limited circumstances. An interest includes an interest in the shareholding, voting or dividends of a company.

The *Broadcasting Services Act* also provides that:

- 2 or more foreign persons may not hold an aggregate interest exceeding 20% in a company that holds a commercial television broadcasting licence; and
- for all subscription television broadcasting services licences, foreign interests are limited to a 20% interest for a single foreign person, and a 35% interest in aggregate.

Following changes to the legislation in 1992, specific controls over foreign interests in radio and other broadcasting services have been lifted.

Newspapers

Foreign investment in mass circulation newspapers is restricted. All proposals by foreign interests to acquire an interest of 5% or more, or to establish a newspaper in Australia are subject to case-by-case examination, irrespective of the size of the proposed investment. The maximum permitted foreign investment involvement in:

(a) metropolitan mass circulation newspapers by a single shareholder is 25% and unrelated foreign interests are allowed to have (non-portfolio) shareholdings of up to 5%; and

(b) provincial or suburban newspapers is less than 50% for non-portfolio shareholdings.

Telecommunications

Telstra Corporation Ltd (Telstra) is predominately owned by the Commonwealth of Australia. Since October 1997, the Government has partially privatised Telstra through the sale of 49.9% of its equity to institutional and individual investors. Aggregate foreign ownership of Telstra is restricted to 35% of that privatised equity and individual foreign investors are only allowed to acquire a holding of no more than 5 % of the privatised equity.

Prior approval is required for foreign involvement in the establishment of new entrants to the telecommunications sector or investment in existing businesses in the telecommunications sector. Proposals above the notification thresholds will be dealt with on a case-by case basis and will normally be approved unless they are judged to be contrary to the national interest.

In June 2003 the Government proposed legislation that aims to fully privatise Telstra through the sale of the Government's remaining 50.1% interest in the company. However, under present planning, the Government does not expect to implement the sale until 2005-06.

Mining

Substantial foreign mining investments in Australia may require FIRB approval depending on the value of the investment and whether the investment relates to a new or existing project. FIRB notification is required for foreign investment in existing projects valued at over $50 million ($800 million for US investors, with the exception of uranium mines and nucleur facilities, discussed below), and new projects involving a total investment of over $10 million (with different rules applying to US investors).

The acquisition of a mineral right, mining lease, mining tenement or production licence may also require FIRB approval irrespective of value, as proposals can involve acquisitions of land, as defined in the legislation.

Uranium

Foreign interests may explore for uranium and are not required to seek Australian participation in their exploration activities. Further uranium mines may now be developed following the Coalition Government's abolition of the "3 mines" policy which restricted uranium mining to the operation of the existing Ranger and Nabarlek projects in the Northern Territory and the operation of the Olympic Dam copper/uranium/gold deposit in South Australia.

The Government's current policy in relation to foreign investment in the uranium sector is to treat it on an equal footing as the mining sector generally, and no special restrictions apply. The establishment of a new uranium mine involving investment of $10 million or more, or the acquisition of a substantial interest in an existing uranium mining business valued at $50 million or more, requires FIRB approval, but no objections will be raised unless the proposal is regarded as contrary to the national interest and no detailed examination will occur prior to approval unless the $100 million threshold is to be exceeded.

The government does however, place stringent conditions on the export of uranium and will only approve the export of uranium to countries which are signatories of the Nucleur Non Proliferation Treaty and with which Australia has signed a separate bilateral agreement to ensure all trade is within International Atomic Energy Agency safeguards.

Airports

Proposed acquisitions of interests in Australian airports by foreign investors are examined on a case by case basis in accordance with the standard notification requirements.

Airports offered for sale by the Commonwealth Government are subject to the *Airports Act 1996* which provides for a 49% foreign ownership limit, a 5% airline ownership limit, and cross ownership limits between Sydney airport (together with Sydney West) and Melbourne, Brisbane and Perth airports.

Shipping

Under the *Shipping Registration Act 1981*, a ship must be majority Australian-owned to be registered in Australia, unless it is designated as being chartered by an Australian operator.

Foreign Governments

Proposals for direct investment by foreign governments or their agencies regardless of size, but excluding portfolio investments or investments related to diplomatic relations, must be submitted to FIRB for review.

State Regulation of Foreign Investment

Although regulation of foreign investment remains primarily with the Federal Government, from time to time States have introduced measures to regulate foreign investment within their particular State in areas such as mining, gaming and real property. For example, in Queensland foreign investors are currently required to register their interests in real estate. In addition, FIRB will often consult with the relevant State Government in connection with proposals relating to activities in that State. In that regard, a number of State Governments have released guides for investors which set out their attitude to various types of foreign investment in their State.

Foreign Debt Funding

In addition to the Federal Government's foreign investment policy there are provisions in the federal income tax legislation which directly affect the funding of foreign investment in Australia. The 2 most important of these are:

- the "thin capitalisation" rules, which regulate the ratio of the foreign debt to the equity of an Australian company; and

- the "corporate restructure" rules, which regulate the introduction of interest bearing debt to finance the restructuring of assets within related foreign controlled companies.

These provisions are discussed in Section 5.

3. FORMS OF BUSINESS ORGANISATION

Introduction

In formulating an investment proposal, the foreign investor should determine which form of business organisation is the most appropriate for its requirements. The major types of investment vehicle used in Australia by both residents and non-residents are:

- companies, including branch offices of foreign companies;
- joint ventures;
- partnerships; and
- trading trusts.

Specific advice as to the appropriate vehicle should be sought on a case by case basis.

Companies

An overseas company wishing to carry on business in Australia may elect either to register a subsidiary or establish a branch office by registering itself as a foreign company. Registration of a subsidiary or branch under the Corporations Act automatically confers the right to carry on business throughout Australia.

Choice of Branch v Subsidiary

The main factors relevant in deciding whether to establish a branch or subsidiary are:

- A subsidiary is a separate entity from its parent corporation. It has limited liability and the parent is not normally liable for the debts or obligations of a subsidiary. However, investors should be aware that a parent company can be held liable for the debts of its subsidiary where:
    - that subsidiary was insolvent or becomes insolvent at the time of incurring a debt;
    - there were reasonable grounds for suspecting that insolvency; and
    - the parent corporation or 1 or more of its directors suspected insolvency or should reasonably have suspected insolvency.
- On the other hand, an Australian branch of an overseas corporation is not a separate legal entity and that corporation will therefore, be liable for all debts and obligations of the Australian branch;

- From a taxation viewpoint, if a subsidiary is chosen, some establishment expenses will not be deductible at all from the company's assessable income and other establishment expenses will not be of use until the subsidiary is earning sufficient assessable income;
- The annual return of a branch office (which is available to the public) must include the worldwide financial accounts of the company of which it is a branch. Disclosure is not limited to the local branch operations;
- The use of a branch may lead to practical difficulties in dealing with Australian government organisations, financiers or other third parties. For example, in arranging Australian finance, institutions will normally require audited financial statements relating to the Australian operations of the applicant which may not be readily available in an acceptable form in the case of a branch; and
- Third parties dealing with a branch may need to be satisfied as to the nature of the foreign corporation's legal structure and the means by which it is able to bind itself to obligations in Australia.

Public Company or Proprietary Company

Several types of companies are available. The 2 most common are:

- public companies; and
- proprietary (or private) companies, which are further divided into large and small proprietary companies.

A small proprietary company is defined as one which has, on a consolidated basis (judged at year end), at least 2 of the following:

- gross operating revenue of less than $10 million;
- gross assets of less than $5 million; and
- fewer than 50 employees.

If the proprietary company does not meet these requirements, it is a large proprietary company.

The major differences between public and proprietary companies are:

- a proprietary company cannot have more than 50 non-employee shareholders;

- a proprietary company must be either limited by shares or be an unlimited company that has a share capital;
- a proprietary company cannot engage in any activity that would require the lodgment of a prospectus;
- a proprietary company must have at least 1 director who must also be ordinarily resident in Australia, whilst a public company must have at least 3 directors, 2 of whom must be ordinarily resident in Australia. There are no specific qualifications required to be satisfied to enable non-residents to act as directors of Australian companies, provided they have otherwise consented to act as directors;
- proprietary companies are not usually required to lodge all their constituent documents with the Australian Securities and Investments Commission ("ASIC"), while public companies are required to do so; and
- public companies must have a company secretary resident in Australia.

In all cases, both directors and secretaries must be individuals, not companies.

A proprietary company will usually be more appropriate if it is to be a wholly-owned subsidiary of a foreign company and if a public offering of shares or debentures is not intended. A proprietary company may be converted into a public company at any time.

For a description of the registration requirements for companies and other regulations concerning the operations of companies in Australia, see Section 4 below.

Joint Ventures

A foreign investor may wish to enter into a joint venture arrangement with one or more other parties with respect to the conduct of an Australian enterprise. Such arrangements may be either unincorporated or incorporated. There is no legislation directly regulating joint venture arrangements of either type.

Unincorporated Joint Ventures

Under an unincorporated joint venture, the respective rights and obligations of the participants are essentially determined by contract. The rights and duties of the participants are usually set out in detailed joint venture documents and may be interpreted and supplemented by reference to general contract law. A joint venture of this type is most suitable for specific projects or business ventures.

Careful structuring is required to ensure that the joint venture is not treated as a partnership for partnership law and tax purposes. This may carry with it certain taxation advantages and generally involves the joint venture agreement providing for the sharing of the product, of the joint venture rather than any sharing of profits.

Incorporated Joint Venture

A joint venture will often be conducted by a corporate entity owned by the joint venture participants. In this case, the participants normally enter into shareholder agreements while Australian company laws will apply to many aspects of their relationship.

Partnerships

General

A partnership under Australian law is an association of persons who carry on business in common with a view to profit. Business partnerships of more than 20 persons are prohibited, other than certain professional partnerships.

A partnership is formed by agreement between the parties and the rights and obligations of the partners are usually set out in a written partnership agreement. In addition, *Partnership Acts* in each State apply to regulate certain rights and obligations of partners. Subject to the terms of the partnership agreement, each partner is entitled to participate in the management of the partnership.

In general, the liability of partners for the debts of the partnership is unlimited, so that each partner is fully liable and may be sued personally. However, certain States of Australia now permit the formation of limited partnerships.

Limited Partnerships

Limited partnerships comprise 2 classes of partners:

- "limited partners" whose liability is limited to a pre-contributed sum; and
- "general partners" whose liability is unlimited and who generally undertake a managerial role.

Each limited partnership must be registered with the relevant State authority.

There are certain jurisdictional problems which cast doubt on the ability of the States to effectively limit liability under these arrangements. Most of the States have made reciprocal arrangements to overcome these problems.

It is unlikely that limited partnerships will be utilised as part of tax minimisation arrangements following legislation that certain limited partnerships are to be treated as companies for tax purposes.

Trading Trusts

A trading trust is a trust arrangement under which a trustee (usually a limited liability company) conducts a business or holds an investment on behalf of certain beneficiaries. To establish the trust, a nominal amount is normally settled by a party (the settlor) to be held by the trustee on behalf of and in trust for the beneficiaries. Once the trust is created, the trustee acquires the business or investment and holds it on trust for the beneficiaries in accordance with the terms of the trust instrument.

The duties owed by the trustee to the beneficiaries are regulated by the trust deed, State legislation and the general law. Trusts fall broadly into 2 categories:

- discretionary trusts; and
- unit trusts.

Discretionary Trusts

Under this form of trust, the trustee has a discretion over the distribution of the income and capital of the trust to any of the beneficiaries identified in the trust deed. Discretionary trusts have historically been employed for family tax planning purposes as a means of splitting income among various family members. Discretionary trusts are usually inappropriate as investment vehicles.

Unit Trusts

Unit trusts are trusts in which investors subscribe for units issued by the trustee. Each unit confers upon the holder a proportionate interest in the overall assets and undertaking of the trust. Unit trusts have been used as vehicles for public investment schemes.

Sole Trader

Any person may carry on business as an individual using either their own name or a registered business name. A sole trader is personally liable for all debts incurred by them in carrying on that business.

Comparative Business Advantages

The choice of an appropriate structure will depend upon the facts of any particular case. As a general indication, some advantages usually associated with the different structures are:

Companies (and Incorporated Joint Ventures)

The major advantages in adopting a corporate structure are:

- the liability of shareholders is usually limited to the amount of their capital contribution in the company;
- the corporate structure facilitates the coordination of the interests of a large number of investors under a well defined legal framework in situations where other business forms may be unworkable;
- public companies are able to raise finance from the general public at large through offers to subscribe for securities;
- profits may be accumulated and re-invested by the company without the need for distribution to shareholders; and
- the differential between the corporate tax rate of 30% and the top personal tax rate of 47% may give rise to tax planning opportunities in certain circumstances.

Partnerships

The major advantages of partnerships are:

- the partnership structure is often more flexible than other structures;
- partnerships are under no obligation to make public disclosures of reports and accounts;
- in contrast to the use of companies and trusts, a partnership enables the participants to offset losses and expenditure incurred in relation to unrelated activities against the income of the partnership for tax purposes. However, these benefits will not extend to limited partnerships; and
- where professionals conduct business jointly with other members of the same profession, legal or ethical restrictions may exist which limit the conduct of the business as a company and the partnership structure may be appropriate.

In those States in which it is permitted, the limited partnership also offers the benefit of limited liability for some of the partners.

Trusts

Advantages of trusts include:

- trusts may be more effective for tax purposes where assets are to be held for ultimate sale;
- a trust may be structured so that the liability of the unitholders or beneficiaries of the trust is limited;
- trusts facilitate certain public investment schemes, where an independent trustee (called a "responsible entity") is required to protect the interests of the investing public; and
- the trust structure is often more flexible than the company structure. For example, the legal restrictions which apply to reductions in the capital of a company do not apply to similar reductions in the capital of a trust.

4. COMPANIES AND SECURITIES REGULATION

The National Scheme

All corporations in Australia are required to comply with provisions of the *Corporations Act*. The legislation is administered by a single national regulatory authority called the Australian Securities & Investments Commission ("ASIC").

ASIC regulates the registration of companies and the registration of foreign companies or branches in Australia. It also maintains a publicly available database on each registered entity, and regulates and oversees all aspects of corporate and securities law activity and transactions, including the release of policy statements and practice notes for use by corporations and their advisers.

Registration Requirements

Subsidiary

A subsidiary (whether a proprietary or a public company) is registered in the following manner:

- if a company name is requested it must be reserved with ASIC (otherwise the registration number will be the company's name);
- an application for registration must be lodged with ASIC accompanied by certain prescribed documents and the necessary filing fees; and
- a certificate of registration is issued, entitling the company to carry on business in every State and Territory of Australia.

A company can be registered on lodgment of the necessary application forms with ASIC, or alternatively, a clean shelf company, with all corporate records, can be readily acquired from third parties. Upon acquisition, the company's name can be changed, subject to availability, by resolution of the shareholders and the issue of a certificate of registration of change of name by ASIC.

The rules on internal management of a company are contained in the company's constitution. For comzpanies existing as at 1 July 1998, the memorandum of association and articles of association of a company will be taken to be the company's

constitution. If a proprietary company does not adopt a company constitution it automatically adopts as its constitution the rules on internal management which appear in the *Corporations Act* as "replaceable rules". The "replaceable rules" can then be displaced in whole or in part by specifically adopting a company constitution.

Companies do not need to have a common seal.

Branch

If an overseas company elects to carry on business in Australia by establishing a branch rather than forming a subsidiary, the company must register as a foreign company. To do so, the company must:

- reserve the name of the overseas company with ASIC;
- lodge copies of its constituent documents;
- provide details of its registered office in Australia and of its company officers;
- lodge a memorandum of appointment of a local agent to carry out limited functions such as accepting service of process and certain notices; and
- pay the relevant fees.

In contrast to a subsidiary, a foreign company is not required to have resident directors or secretaries to operate a branch.

Publication Requirements

Both Australian companies and registered foreign companies are required to display their name and Australian Company Number ("ACN") or Australian Registered Body Number ("ARBN") on all public documents and negotiable instruments. Registered foreign companies are also required to specify their jurisdiction of registration on these documents and instruments. "Public documents" are broadly defined and include business letters, invoices, receipts, orders, certain advertising and promotional materials and official notices or publications of the company.

Compliance and Reporting Requirements

Registered Office

Every public company must have a registered office in Australia which must be open to the public generally for not less than 3 hours between 9am and 5pm on each

business day. A proprietary company is not required to keep its registered office open, but must provide access to its minute book and registers upon request.

The company's minute book and registers must be maintained at its registered office unless permission for an alternative arrangement has been granted by ASIC.

Preparation of Accounts

Unless exempted by an ASIC Class Order, public companies and large proprietary companies are required to prepare an audited profit and loss account and balance sheet for each financial year that gives a true and fair view of the company's financial position for that period.

Whilst a small proprietary company is still required to maintain proper accounting records, it will only have to prepare an annual financial report and directors report and have them lodged with ASIC, if it is required to do so by ASIC, or by at least 5% of its members, or if it is controlled by a foreign company which has not lodged audited consolidated accounts with ASIC. A foreign controlled small proprietary company may also apply to the ASIC on an annual basis under the terms of several ASIC Class Orders for relief from lodging an annual report and directors report.

Auditors

Every company is required to appoint an auditor within 1 month after registration. However if the company is a small proprietary company, this is only necessary where the company is required to prepare audited financial statements (as is the case where the company is controlled by foreign companies which have not lodged audited consolidated accounts with ASIC or otherwise qualified for relief under the applicable Class Order). The auditor can be appointed by the directors, or by shareholders resolution, and holds office until the first annual general meeting. The auditor then appointed will hold office until a vacancy occurs and may only be removed from office by resolution of the company at a general meeting of which special notice has been given.

Annual General Meeting

Unless its constitution provides otherwise, a proprietary company is not required to hold an annual general meeting. However, a public company must hold an annual general meeting at least once every calendar year and within 5 months of the end of its financial year.

All general meetings require at least 21 days notice, and at least 28 days notice in the case of a public company listed on the Australian Stock Exchange ("ASX"). All resolutions of a proprietary company may be passed by circular resolution signed by all of the members.

Corporate Disclosure

ASIC issues every company with an annual statement in an annual review based on the company's date of registration.

Companies can apply to ASIC to alter their review date.

All public companies, and all proprietary companies (unless otherwise exempted - see above), are required to prepare an annual financial report and a directors report, which must be lodged with ASIC within 4 months after the end of the company's financial year. The financial reporting obligation of a company is a separate obligation from the obligation to respond to the annual review documents. Disclosing entities (such as listed public companies or trusts) must lodge annual accounts within 90 days after the end of the financial year, and half yearly accounts within 75 days.

Disclosing entities (typically this is only listed public companies or trusts) must also disclose, on a continuous basis, information not generally available and which would reasonably be expected to have a material effect on the value of the entity's publicly traded securities. Directors may be criminally liable if the failure to disclose is intentional or reckless. If the failure to disclose is negligent, the entity and any of its directors knowingly involved in the contravention may incur civil liability to any person suffering loss as a result.

A branch office must also make certain, but more limited, continuing disclosures. As for a locally registered company, the most important requirement is the obligation to file an annual return (including certain financial statements) with ASIC. The annual return is available for inspection by the public. The continuous disclosure requirements applicable to Australian disclosing entities are not applicable to branch offices of a foreign company (unless the foreign company is listed on the ASX).

Ongoing Requirements

In addition to the minutes of directors and shareholders meetings, a company must maintain registers of members, option holders, debenture holders and charges.

Any changes to the company name, officers, registered office and other matters concerning the business of the company must be notified to ASIC on the appropriate form as and when those changes occur. Proprietary companies are not required to lodge their company constitution for registration, or resolutions embodying changes to the constitution, unless the resolutions are related to the name, share capital or status of the proprietary company.

Company Directors – Duties and Liabilities

Duties

The directors of a company have a duty to act honestly in the best interests of the company. Duties imposed under the *Corporations Act* and the general law include:

- the duty of care, diligence and skill;
- the duty to act in good faith for the benefit of the company as a whole; and
- the duty to use powers for proper purposes and to avoid the possibility of any conflict of interest.

The duty of care, diligence and skill requires the directors to acquaint themselves with, and take responsibility for, the running of the company. A director is expected to be capable of understanding the company's affairs to the extent of actually reaching a reasonably informed opinion of its financial capacity. A director must exhibit in the performance of his or her duties a degree of skill that may reasonably be expected from a person of like knowledge and experience. This duty extends both to executive directors and to non-executive directors. A director may not be able to argue a lack of formal training or knowledge of financial statements to avoid his or her duties, nor can directors rely unquestionably on management to satisfy their duties.

The standard of care required of a director must be assessed by reference to the particular circumstances of the director concerned. A breach of the duty of care and diligence will only give rise to civil sanctions and will not provide a basis for a criminal offence.

Directors must avoid any actual or potential conflicts between personal interests and their duties to the company. Even if the director does not profit from a particular transaction, the director may be in breach of this duty. There are specific restrictions on voting and attendance at directors meetings for directors of public companies where a "material personal interest" exists in the matter under consideration.

A conflict may also arise where the director has a personal interest in a contract made by the company or when a director is a director of 2 or more companies which are parties to a contract. A director may not take advantage of a commercial opportunity that may have been available to the company unless full disclosure to and assent from the members is obtained.

A public company must not give any "financial benefit" to a related party, which includes anything that confers a financial advantage. A "related party" includes a director of the company or a parent company, a close relative of the director or a company controlled by any of those people. There are certain benefits which are exempted from the prohibition, including benefits approved by ASIC and shareholders, arm's length transactions on commercial terms and "reasonable remuneration" to an officer.

Business Judgement Rule

The *Corporations Act* contains the concept of a statutory business judgment rule. This rule operates to create more certainty for directors in exercising their duties, in that it establishes a clearer presumption in favour of a director's judgment made in good faith and in the interests of the company.

Statutory Derivative Action

The *Corporations Act* also contains a statutory derivative action which will enable shareholders or directors of a company to bring an action on behalf of the company for a wrong done to the company where the company is unwilling or unable to bring the action itself. The rationale behind this ability is to encourage company management to be more accountable to the shareholders for decisions they make.

Insurance and Indemnities

The *Corporations Act* prohibits a company or its related companies from indemnifying a director or other officer of a company (not including legal costs) where:

- the liability is incurred to the company itself as an officer of the company; or
- a civil penalty or compensation order is imposed on the officer under the *Corporations Act*; or
- the liability is owed by the officer to someone other than the company and it did not arise out of conduct in good faith.

Indemnities by the company to an officer of the company for legal costs are permitted except where:

- the officer is defending proceedings in which the officer is liable on one of the above three grounds;
- the officer is found guilty in a criminal proceeding;
- ASIC has established a successful action against the officer; or
- the Court has denied relief sought by the officer.

The company may loan or advance the officer money to cover the legal proceedings, but that money must be repaid if the director loses the proceedings. The advance may be retained as an indemnity if the officer wins the proceedings.

There is also a prohibition on the company taking out insurance or paying premiums to insure against liability incurred by an officer of the company which involves a wilful breach of duty in relation to the company or where the officer has made improper use of information or of his or her position to gain an advantage at the expense of the company. A company may take out insurance and pay the premiums to protect its directors and officers from other risks, including costs and expenses in defending civil and criminal proceedings, whatever the outcome.

Insolvent Trading

The *Corporations Act* imposes a positive duty on directors to prevent their company from trading while insolvent. Civil (and in some cases criminal) liability may attach to directors for breach of this requirement, including liability to pay certain debts of the company. The circumstances in which a debt is regarded as having been incurred includes, for example, the issue of redeemable preference shares. If the company is insolvent when the preference shares are to be redeemed, the directors risk personal liability for the debt.

The provisions apply to debts incurred where there were reasonable grounds to suspect that the company would not be able to pay its debts as and when they became due. In determining this issue, consideration is given to both what the director actually knew and what the director ought reasonably to have known. There are various statutory defences that may apply under the *Corporations Act*.

Other Liabilities

The *Corporations Act* also imposes personal liability on directors in various circumstances where provisions of the Act are breached. This may include a failure to comply with the requirements as to company and business names, insider trading in a company's securities, inaccuracies or omissions in the contents of any company prospectus, breach of the prohibition on financial assistance for share acquisitions, and breach of provisions relating to the preparation of accounts.

Directors may also be personally liable for breach by the company of other legislation, including laws in the following areas:

- occupational health and safety;
- trade practices and fair trading;
- environmental protection;
- equal opportunity and discrimination;
- customs & excises; and
- taxation.

Offerings of Securities

The *Corporations Act* prescribes various requirements in relation to the capital raising activities of both local and foreign corporations in Australia. Generally, a person is prohibited from offering securities to an Australian resident unless it first lodges with ASIC a prospectus which complies with certain disclosure-oriented statutory requirements.

Offers which are exempt from this prohibition include:

(a) personal offers where no more than 20 people invest during any 12 month period for amounts up to $2,000,000 in aggregate;

(b) offers where the minimum subscription is $500,000 by each person to whom the offer or invitation is made;

(c) offers made to "sophisticated investors". This is defined to include persons who meet a wealth test (ie. net assets of more than $2.5 million or income exceeding $250,000 per annum) or persons who a licensed security dealer considers to be "sophisticated" based on previous investment experience; and

(d) certain employee share schemes.

In addition a reduced disclosure standard will apply to one-off offerings of up to $5 million based on an Offer Information Statement ("OIS"). ASIC has also introduced a Profile Statement ("PS") which may be used in connection with ASIC approved offers where a prospectus has been lodged.

The onus lies on the issuer to ensure that the prospectus complies with the full and fair disclosure requirements of the *Corporations Act*. The prospectus must contain all such information as investors and their professional advisers would reasonably require and reasonably expect to find in the prospectus for the purpose of making an informed investment decision.

The company, directors, and expert advisers can benefit from a uniform "due diligence" defence for misleading statements in a prospectus if they can prove they made reasonable inquiries and they believed on reasonable grounds that the prospectus did not contain any materially misleading or deceptive statements or omit any material matters. Professional advisers will only be liable for statements in a prospectus attributed to them with their consent.

A special disclosure regime exists for offers of interests in a managed investment scheme (such as units in a unit trust).

The ASIC has issued certain exemptions providing relief from procedural requirements for prospectuses lodged and distributed both in Australia and in another country where the issuer has securities quoted on a foreign stock exchange. However, the full and fair disclosure requirements of the *Corporations Act* are still required to be met by the company offering the securities.

Prospectuses may be issued electronically as well as in hard copy. The offering of securities over the Internet is permissible subject to certain requirements including the issuer taking reasonable steps to ensure the investor receives an application form and the use of safeguards to ensure that offers are made only to those jurisdictions intended to be covered by the issuer.

Listings of Securities of Foreign Companies

The ASX has detailed listing rules which set out the pre-conditions to listing and official quotation of securities and which prescribe requirements to be satisfied by listed companies on an ongoing basis.

Foreign corporations may apply for listing on the ASX. If a foreign corporation is listed on a stock exchange recognised by the ASX (eg the New York Stock Exchange, NASDAQ or the London Stock Exchange), and also meets certain asset and profitability criteria, it may qualify as an "exempt foreign company" under the ASX Listing Rules. The Listing Committee also has the discretion to waive the qualifying criteria.

To qualify as an exempt foreign company, the corporation must also lodge an information memorandum with ASX and the ASIC. In certain circumstances, ASIC is prepared to allow secondary trading in the securities of an exempt foreign company where the company has provided to ASIC and the ASX a package of material giving full, accurate and current information as to the financial condition of the company and the rights attaching to the securities available for secondary trading. This replaces the prospectus or information memorandum usually prepared in connection with such trading.

This process enables a foreign corporation to utilise a fast and inexpensive method of gaining an Australian listing. Such a corporation must undertake to maintain an informed market (this would usually be satisfied by sending the ASX copies of all documents lodged by the foreign company on its home stock exchange) and to allow for electronic share registration and transfer records in Australia (the ASX maintains an electronic depository receipt system to facilitate this), but need not comply with most of the ASX listing rules.

Trading in Securities and Takeovers

The *Corporations Act* also regulates:

- trading in securities and the conduct of participants in the securities industry; and
- the acquisition of shares in listed and certain unlisted companies. Generally, a person is prohibited from acquiring more than 20% of the voting shares of a listed Australian company, or more than 20% of the voting interests of a listed trust. Exceptions to the prohibitions include takeover offers to all shareholders where the offer documents are lodged with ASIC, and acquisitions with shareholder approval.

More information on Takeovers can be found in this publication in the section: "Public Company Takeovers in Australia".

Employee Share and Option Plans

The *Corporations Act* and ASX listing rules impose various approval requirements on the adoption of employee share or option plans by public companies.

Once the employee share or option plan is established, it usually will be implemented by an offer of securities to employees or executives. Any such offering will need to comply with the prospectus provisions of the *Corporations Act* unless an exception is applicable. ASIC has also released various Class Orders which give relief from the prospectus provisions if certain requirements are followed.

Return of Capital

The *Corporations Act* provides for a relatively simple procedure for a company to reduce its share capital (such as returning capital to shareholders) or offer to buy-back its own shares.

A company may reduce its share capital provided the reduction in capital is fair and reasonable to all shareholders and does not materially prejudice the company's ability to pay its creditors. Shareholder approval will be required, and the form of approval (including voting restrictions) will depend on whether the capital reduction applies equally to all shareholders or not.

The *Corporations Act* has standardised the procedural requirements for buybacks by all types of companies, whether proprietary or public. Except in the case of selective buybacks (involving the company buying back shares from selected shareholders), shareholder approval will be required if the buyback will result in more than 10% of the company's issued shares being acquired in a 12 month period. A selective buyback requires the unanimous approval of all shareholders or the passage of a special resolution of shareholders at which no vote is cast by the selling shareholders or their associates.

Certain information must be provided to shareholders and to ASIC before some buybacks can be implemented, and directors must still ensure that the buyback does not result in the company becoming insolvent, as they may otherwise incur personal liability for any subsequent debts of the company.

Corporate Insolvency

General

The *Corporations Act* provides a uniform set of laws governing the various forms of insolvency administration for companies in Australia although there are procedural differences observed in the various State Supreme Courts and in the Federal Court of Australia, all of which have jurisdiction in this area.

Company Liquidation

Liquidation may be effected on a voluntary basis where a company resolves to wind itself up. In these circumstances, control of the winding-up process and appointment of a liquidator will generally be in the hands of members if the company is solvent, or creditors if it is insolvent. Alternatively, compulsory liquidation occurs where a creditor or other applicant applies to a court for an order that the company be wound up and a liquidator appointed.

There is also an interim procedure, known as a provisional liquidation, where a liquidator is appointed as an urgent measure to maintain the status quo in a company.

In both the compulsory and voluntary liquidations, there is an automatic stay of all proceedings and enforcements once the winding up order is made.

The liquidator has the role of investigating the company and is entitled to possession of its books and records and to question its directors to ascertain the reasons for the company's failure. The liquidator can also seek to recover and sell the company's assets for distribution in accordance with a statutory order for payment.

The liquidator also has the power to claim for a return of moneys from creditors in certain circumstances where they have been paid out by the debtor company within the 6 month period prior to the commencement of the winding up. These actions are commonly called "preference actions".

As an alternative to liquidation, ASIC also has power to deregister a defunct company where it has reason to believe that the company is not carrying on business, or is not in operation. Any assets of the company vest in ASIC on deregistration. On application, the registration can be reinstated on reasonable cause being shown.

Receiverships

A receivership is a form of company administration which can be invoked by either a secured creditor or by a court order.

The most common form of receivership involves a secured creditor, exercising its powers under a charge held over some or all of a company's assets, appointing a receiver over those assets.

The receiver will usually (although not always) act as the agent for the company and will have extensive powers, as prescribed in the security document and under various legislation, to arrange for the orderly sale of the secured assets for the benefit of the secured creditor. The directors of the debtor company retain their powers to deal with assets other than the secured assets.

A receivership does not operate to stay proceedings against the company, and the company may still be placed in liquidation by an unsecured creditor. The receivership is determined once the receiver has paid out his or her costs and expenses of the receivership, the debt of the secured creditor and certain statutory priority payments.

Mortgagee in Possession

A mortgagee of a company's assets may appoint an insolvency practitioner or some other person to act as its agent to collect in the secured assets and sell them on the mortgagee's behalf. In these circumstances, the agent acts as the agent for the mortgagee and is personally liable (subject to any indemnity it has obtained) for his or her dealings with the secured assets.

Again, there is no stay of proceedings on the agent's appointment and unsecured creditors can seek to enforce their debts against the company and wind it up.

Schemes of Arrangement

The *Corporations Act* provides a mechanism whereby a debtor company may apply to the courts for a stay of a winding up for the purpose of entering into a scheme of arrangement. A scheme usually provides for a trustee to be appointed to a company to strictly control its cashflow and distribute certain assets among the company's creditors.

A scheme of arrangement is described as a "formal" scheme if it has the statutory protection of the *Corporations Act* and in this case acts as a stay of actions by creditors. A company can also enter into a scheme of arrangement with its members.

It is possible also for a company to enter into agreements with its various creditors by way of an informal scheme, through a moratorium of debts to allow the company to restructure and compromise its claims.

Voluntary Administrations

This form of administration enables an insolvent company, or a company that is likely to be insolvent in the future, to be administered so that its chances of continuing in business are maximised. If that is not possible and a liquidation is to occur, the members and creditors stand to receive a better return from what would otherwise have applied with an immediate liquidation.

An administrator can be appointed by the directors of the company, or by a chargee, liquidator or provisional liquidator (where the company is already in liquidation).

The appointment of an administrator to a company operates to stay all proceedings against the company and restrictions are imposed upon the rights of owners, lessors or secured creditors to access the property or security (subject to a number of limited exceptions).

The voluntary administrator must inform the company's creditors and call meetings with those creditors within specified time limits. The creditors can then resolve either to bring the administration to an end, put the company into liquidation or have the company enter into a deed of company arrangement.

If the company enters into a deed of company arrangement, a person (usually the administrator) is appointed as the administrator of the deed with all the powers set out in the deed and under the *Corporations Act*.

5. TAXATION

General

The Australian Federal Government is the most significant taxing authority in Australia. Taxes imposed by the Australian Government include income taxes (which in turn include capital gains tax), fringe benefits tax, Goods and Services Tax ("GST"), customs duty on certain imports and excise duty on certain goods.

Australian income tax is generally based on a 30 June year end, although foreign corporations and their subsidiaries can generally obtain approval to lodge tax returns based on a substituted accounting period where, for example, the foreign parent company has a different fiscal year end.

The State and Territory Governments levy taxes such as stamp duties, land tax and payroll tax. The State Governments *do not* impose a tax on income or capital gains. Local Governments impose tax in the form of rates.

Income Tax

The most important tax is income tax (which covers both income and capital gains) which is dealt with by the *Income Tax Assessment Act 1936, the Income Tax Assessment Act 1997* and the *Taxation Administration Act 1953* ("the Tax Acts"). Generally, a resident of Australia is assessable to tax on income and capital gains derived by it from all sources, whether within or outside of Australia. A non-resident is assessable to tax only on income derived by it from Australian sources and on capital gains made (or deemed to be made) in respect of assets that have a "necessary connection with Australia". Capital gains made in respect of assetss are usually only taxed if the asset was acquired on or after 20 September 1985. Certain types of income such as dividends, interest and royalties may be taxed by way of withholding tax. Other types of income and capital gains are taxed on a net basis, that is after allowing for expenses and other allowances to be deducted from the gross income and capital gains. If the country in which the non-resident entity is resident has a Double Tax Agreement with Australia, that Agreement may result in an exemption or a reduction in the rate of tax.

The income tax system is administered by the Australian Taxation Office.

The impact of Australia's income tax rules will depend on the structure of the Australian operations.

Companies Generally

An Australian resident company is liable to pay Australian tax on income and capital gains derived from all sources, either within or outside Australia. Tax is, in general, imposed on the company's net income. The rate of company tax is 30%.

A non-resident company is liable to pay Australian tax on income derived from Australian sources (other than income subject to withholding tax) and capital gains having the necessary connection with Australia. The rate is also 30% on the net amount.

In addition to tax on income, the company will be required to pay tax on taxable fringe benefits provided to employees. The fringe benefits tax rate is 48.5%.

Tax losses incurred after the commencement of the 1989/90 tax year are able to be carried forward indefinitely provided either the continuity of ownership test or the same business test is satisfied. The Government has indicated that these rules may change in 2005.

Groups of companies that have a 100% common parent can form a consolidated group. Where a consolidated group is formed, the head company is treated as the sole taxpayer with the other members of the group being effectively regarded as branches of the head company. If the head company defaults in the payment of any income tax (and certain related taxes), then the other members of the group become jointly and severally liable for the unpaid tax unless there is a valid tax sharing agreement ("TSA"). Broadly, a TSA allocates responsibility for income taxes.

Taxation of Dividends

Dividends paid out of taxed income are known as "franked" dividends.

Broadly, the extent to which a company can "frank" a dividend depends upon the balance of its "franking account" at the relevant time.

The franking account represents an accumulation of the amount of profits subjected to the full corporate tax rate of 30% either directly through tax paid or indirectly through franked dividends received from other companies. For example, given the current 30% company tax rate, for each $100 of taxable profit $30 of tax must be paid and an amount of $70 can be paid as a fully franked dividend.

The imputation system allows Australian resident shareholders to receive franked dividends partially tax free or effectively tax free where the taxpayer's marginal rate is less than or equal to 30%. If the taxpayer's marginal tax rate exceeds 30%, any franked dividends received will be subject to additional tax in their hands. If the shareholder's marginal tax rate is 48.5%, the dividend would be subject to an additional 18.5% tax. If the marginal rate is less than 30%, taxpayers are entitled to offset their "excess franking credit" against tax on other income. Individuals and certain superannuation funds are allowed a refund of excess credits.

Fully franked dividends paid to non-residents are exempt from dividend withholding tax. Partially franked dividends and unfranked dividends are subject to withholding tax (but only on the unfranked portion of the dividends) unless they benefit from a foreign dividend account credit. The rate of dividend withholding tax is 30% unless a Double Tax Agreement applies to reduce the rate. The rates allowed by the various Double Tax Agreements are set out in Appendix A.

Branches

Australia does not impose a separate branch profits tax. There is no withholding tax imposed on the remittance of profits of an Australian branch to its head office.

No Taxable Presence

Non-resident companies (that are resident in countries with which Australia has a Double Tax Agreement) may be able to organise their Australian operations without creating a permanent establishment. This is often the case with buy/sell operations. Such companies will not be taxable in Australia on their business profits if they do not have a permanent establishment in Australia (but may still be liable for tax on income subject to withholding tax and on capital gains).

Partnerships

A "partnership" is defined for tax purposes to mean an association of persons carrying on business as partners or in receipt of income jointly but does not include a company. A general partnership is not a separate taxable entity, although it is required to lodge a tax return. The partnership return determines the net partnership income or loss for the year. Each partner must then include in its personal individual income tax return their individual share of partnership income (or loss) and pay tax on this income accordingly. The net income or loss of a partnership is calculated as if the partnership were a resident taxpayer. Non resident partners are taxed on their share of the net income that has an Australian source.

Non-resident partners who are partners in an Australian partnership need only pay Australian tax on their share of the net income of the partnership attributable to sources in Australia.

Limited partnerships formed in Australia and those formed outside Australia, but which carry on business in Australia are in most instances treated as resident companies for income tax purposes and taxed accordingly. Distributions to partners of those limited partnership are taxed as dividends.

Trusts

For Australian tax purposes, trusts are not separate legal entities. As such, a trust is not liable to pay income tax although the trustee of a trust must lodge an income tax return on behalf of the trust. In certain limited circumstances, the trustee is liable to be assessed and to pay tax on the net income in his or her representative capacity. The beneficiaries are assessable on their share of the net income if they are presently entitled to the income of the trust, are not under a legal disability, and are resident at the end of the year of income. For non-resident beneficiaries the position is similar except that they are taxed on their share of the net income that has an Australian source.

Losses incurred in any particular year by a trust are not available to the beneficiaries. Losses can be carried forward and offset against future income of the trust.

Certain public unit trusts, called "corporate unit trusts" and "public trading trusts", are treated as companies for tax purposes (and taxed at the corporate rate of tax, currently 30%) and the distributions from these trusts are taxed as if they were dividends.

Individuals

Resident individuals are assessable to income tax on income and capital gains from all sources, whether within or outside Australia. A non-resident is generally assessable to tax only on income derived from Australian sources and capital gains having the necessary connection with Australia. A person is deemed to be a resident of Australia if that person:

- resides in Australia;
- is domiciled in Australia, unless that person's permanent place of abode is outside Australia;

- has actually been in Australia for more than half the year, unless that person's usual place of abode is outside Australia and he/she does not intend to take up residence in Australia; or
- meets certain other tests relating to government funded superannuation.

Resident individuals are currently taxed on a net income basis at rates from nil (on income of less than $6,000) to 47% (on income in excess of $70,000). In addition, a Medicare levy is payable. The levy ranges from 0% to 2.5% of taxable income. Non-resident individuals also pay the top marginal rate of 47% on income in excess of $70,000. However, the lowest rate on non-residents' income is 29%. The relevant rates of tax are set out in Appendix B.

Australians Engaged Overseas

The employment related earnings of Australian residents employed overseas for not less than 91 days are wholly exempt from tax in Australia if those earnings are subject to tax in the country in which those earnings were derived, and tax has been or will be paid in that country.

Persons other than employees may also qualify for exemption from Australian tax on overseas earnings in certain projects and subject to approval by the Minister for Trade.

Foreign Debt Funding

Interest Withholding Tax

Interest paid to the non-resident is subject to a withholding tax of 10% on the interest paid.

This interest withholding tax is the final liability to tax of the non-resident in Australia.

There is, however, an exemption from interest withholding tax in respect of interest paid on certain debentures which satisfy a public offer test.

Generally, Australia's Double Tax Agreements do not affect the withholding tax liability in any way. However, from 1 July 2003 interest withholding tax will not be payable where the interest is derived by a US resident financial institution which is unrelated to and dealing wholly independently with the payer. A similar rule applies to UK resident financial institutions as of 1 July 2004.

Thin Capitalisation

Thin capitalisation arises where an investment in Australia is excessively geared with debt. In order to minimise the avoidance of tax, legislation discourages excessive gearing by denying an interest deduction for interest (and other similar expenses) where the debt exceeds certain acceptable thresholds. The main thresholds are:

(i) the debt must not exceed 75% of the value of the assets (less certain non debt liabilities); or

(ii) if the debt does exceed the threshold in (i), the debt satisfies an "arm's length" test.

Under rules introduced late in 2001, the characterisation of debt and equity is based, broadly speaking, on economic substance rather than legal form.

There is a minimum threshold of $250,000 such that where the total "debt deductions" of the entity do not exceed $250,000 for the income year, a deduction will not be denied for the interest under the thin capitalisation rules regardless of the entity's gearing ratio.

The new thin capitalisation rules contain specific provisions for financial entities.

Corporation Reconstruction

Following the introduction of the consolidation rules, the restructuring of groups that are not consolidated will be difficult as only very limited reconstruction relief is available.

Royalties

Generally, royalties paid by an Australian to a non-resident are subject to withholding tax. Tax is levied at the rate of 30% of the gross royalty paid. This is reduced to 10% by most of Australia's Double Tax Agreements. The Double Tax Agreement with the US and with the UK reduce this rate to 5%.

Management and Service Fees

A parent company may wish to charge its subsidiary a fee for services actually rendered as a manager and coordinator of group activities, such as planning and advising in service areas of finance, investment, production, marketing, insurance,

personnel, legal research, etc. The fee will be exempt from Australian tax if the service fee does not have an Australian source or, where there is a relevant Double Tax Agreement, the fee is not attributable to a permanent establishment of the service provider in Australia.

Foreign Exchange Gains and Losses

Realised exchange gains are generally assessable and exchange losses generally deductible.

With respect to a branch office, foreign exchange "losses" arising out of transactions between an overseas company and its Australian branch office are not deductible (nor are exchange "gains" assessable) since there is only one recognised entity involved in the transaction.

International Profit Shifting

Certain provisions are aimed at reducing the ability of companies to shift profits out of Australia to another tax jurisdiction, whether by transfer pricing or other means.

If, under an international agreement, property or services are acquired or provided (as the case may be) and the Australian Taxation Office (ATO) considers that the amount paid indicates that the parties were not dealing on an "arms length" basis, the ATO is empowered to substitute its own estimation of what would have been paid had the parties been dealing at "arms length".

There are no legislative guidelines as to the meaning of "arms length" but the ATO has issued several public rulings indicating that it will apply to the Organisation for Economic Co-operation & Development (OECD) guidelines. The legislation does not limit reviewable arrangements to those between related parties. It is possible to obtain an advance pricing agreement with the Australian Taxation Office.

Transactions between a head office and a branch and between a parent company and a subsidiary are treated on the same basis.

The Australian Taxation Office can impose additional tax when it applies its anti-profit shifting rules. The level of additional tax attracted depends on the extent to which tax avoidance played a part in the profit-shifting arrangement concerned.

Capital Gains Tax

Capital gains realised on assets acquired after 19 September 1985 are subject to income tax unless specifically exempted. For assets acquired on or before 21 September 1999 an adjustment to the cost of the asset can be made for inflation up until 30 September 1999. After this date no adjustment can be made for inflation. Assets acquired on or after 21 September 1999 will not be adjusted in this way. An "asset" for capital gains tax purposes is defined to mean any form of property and includes intangible as well as tangible property.

A net capital gain (capital gains less capital losses) is included in a taxpayer's assessable income. Income tax is imposed at the taxpayer's marginal rate of tax on any net capital gain made by the taxpayer.

In some cases, the market value of the asset will be substituted for the cash consideration (if any) received on disposal of the asset. This will occur, for example, in the case of gifts and certain disposals not at "arm's length".

A capital loss, being the difference between the unindexed cost of an asset and the proceeds of sale, may be offset only against capital gains. Most capital losses can be carried forward indefinitely until absorbed against future capital gains.

Australian residents are subject to tax on the disposal of all worldwide assets. Non-residents will generally be liable for tax on gains made on assets that have the necessary connection with Australia which include any asset used in carrying on a trade or business wholly or partly at or through a permanent establishment in Australia, land and buildings and specified interests in land situated in Australia, shares in Australian resident public companies or units in Australian resident unit trusts, where the non-resident or its associates had at least a 10% interest in the company or unit trust; and any shares in Australian resident private companies and interests in resident trusts. Non-residents otherwise liable to capital gains tax on the disposal of Australian assets such as shares, may have the protection of a double tax agreement (for example, when the capital gain represents a business profit).

Individuals (and certain other taxpayers) may be able to claim a discount on capital gains made on the disposal of certain assets. For example, an individual may be entitled to a 50% discount if the gain is made in respect of an asset held by the individual for at least 12 months and the individual has not claimed indexation in determining the gain.

Taxation of Foreign Source Income

Australia taxes its residents on their worldwide income subject to:

- an exemption system for certain non-portfolio income derived by companies from foreign companies;
- an exemption for income taxed on an accruals basis under the controlled foreign corporation rules or the foreign investment fund rules; and
- a foreign tax credit system for income that is not exempt.

Australia does not tax non-residents on income not sourced in Australia.

Payment of Tax

Self Assessment System

Australia has a self-assessment system: that is, taxpayers are responsible for determining their own assessable income. The self-assessment system is supported by a binding ruling system which allows taxpayers to obtain advance rulings from the Taxation Office. A taxpayer can challenge an unfavourable ruling.

Companies

Companies must pay their income tax in advance by way of quarterly instalments or, in some instances an annual instalment of taxation. The quarterly instalments are payable within 21 days after the end of each quarter with the amount based on the ordinary income for that quarter.

An annual income tax return must also be lodged by companies showing the total income and deductions (as well as other disclosure information) for the year. The balance of any unpaid tax must then be paid.

Other Entities

Taxpayers other than companies (such as individuals, trusts and, for these purposes, partnerships) must lodge a return of income each year. Such taxpayers may also be liable to pay tax in advance on a quarterly basis.

Obligations of Employers

Entities and persons employing other persons in Australia are required to make deductions of tax from payments of salary or wages to those persons. The amounts deducted must then be forwarded to the ATO. Substantial penalties apply for failure to observe these requirements. Similar obligations apply in relation to some contractors.

Fringe Benefits Tax

Fringe benefits tax at the rate of 48.5% is imposed on employers (both resident and non-resident) on the taxable value of fringe benefits provided to employees or associates of employees in Australia. There are specific rules for determining the taxable value of various types of fringe benefits, including the private use of motor cars, free or low interest loans, release of debts, payments of private expenses, free or subsidised residential accommodation and free or discounted goods or services. However, certain other benefits may be treated as direct taxable income to the employee rather than a fringe benefit. The fringe benefits tax is tax deductible for ordinary income tax purposes. The fringe benefits tax year is the 12 months beginning 1 April and ending 31 March.

There are special rules for living away from home allowances.

Employees are exempt from tax on fringe benefits.

Goods and Services Tax

A GST was introduced with effect on 1 July 2000. It is a broad based consumption tax on supplies of goods, real property, intangibles and other rights in the course of an enterprise. The rate of GST is 10%. This is a flat rate on all taxable supplies. GST will generally apply regardless of whether the contract under which the supply is made, was entered into before or after 1 July 2000 (with limited relief from GST available to some contracts entered into before then).

The GST operates in the same way as similar value added taxes in comparable jurisdictions such as Canada, the UK and New Zealand. While makers of taxable supplies will be liable to GST on those supplies, they will be able to offset this liability against input credits to which they are entitled as a result of taxable supplies they themselves have acquired.

There are a limited number of exemptions. Importantly, the acquisition of a going concern (for example the sale of a business), should generally be exempt from GST subject to satisfaction of certain statutory requirements. Exports, supplies of certain food and medical supplies will also be exempt. Such supplies are often referred to as zero-rated in other jurisdictions, however for Australian purposes they are known as "GST-free". This results in no GST being payable on the supply of the goods or services with the supplier being able to claim an input tax credit for GST paid on any inputs used in making the supply.

Some other supplies are input taxed. This means that no GST will be payable on the supply but the supplier will need to absorb some or all of GST costs passed on to it by its own suppliers. Financial supplies make up the bulk of input taxed supplies.

Australian Business Number ("ABN")

Businesses must register for an Australian Business Number ("ABN").

The ABN will eventually replace the Australian Company Number ("ACN") and will ordinarily be based on the ACN with an additional 2 digits. It will be a single identifier for each business dealing with the Australian Tax Office and other government bodies and should streamline business reporting requirements.

Stamp Duty

Stamp duty is a tax levied on instruments (and, in some cases, transactions effected without a document being brought into being) by State and Territory Governments, including loan arrangements, transfers of some marketable securities, conveyances of property and certain dealings in real estate.

The legislation varies from State to State. Some details on the various rates of duty currently applying for conveyances are set out in Section 12 below.

It is important to note that a party to a dutiable contract will usually not be able to enforce its rights under the contract unless the relevant document has been presented at the appropriate State Revenue Office and has been duly stamped. The parties to a contract have a limited period of grace from the date on which the document was first signed to lodge the document for stamping without attracting any penalties.

Stamp duty may be payable on transactions involving a change in ownership of Australian property, even if the change occurs through an acquisition of a non Australian entity by a non Australian from a non Australian.

New South Wales has also recently introduced duty on the vendor of certain real estate. If applicable, the vendor must pay duty at 2.25%.

Exchange Control and Tax Screening Requirements

Exchange controls were effectively abolished in Australia for most transactions.

Notwithstanding this change, there is a requirement that exports and imports of Australian and foreign cash in the amount of $10,000 or more must be reported to the Cash Transaction Reports Agency ("CTRA"). The CTRA does not have any power to restrict a person from transferring currency to or from Australia; rather, its role is limited to collecting data and forwarding it to various authorities.

Double Tax Agreements

Australia has agreements for the avoidance of double taxation with a large number of countries, and undertakes an active program to pursue additions to its double tax agreement network. Countries with which it has agreements are set out in Appendix A. By and large, these treaties are modelled on the OECD draft agreement but in important instances they diverge markedly from that model. Various treaties including the treaties with the United States and United Kingdom, provide for information sharing with overseas revenue authorities to varying degrees.

Research and Development Concession

Tax benefits exist to promote research and development in new product markets and methods and to encourage refinement and improvement of existing products and procedures.

The scheme operates by means of a 125% (but potentially175%) tax concession for eligible research and development expenditure.

Regional Headquarters Program

The Australian Government, through *Invest Australia*, has a regional headquarters program to facilitate the establishment of regional headquarters and regional operating centres by international companies. A company must meet the Treasurer's guidelines which require the company in Australia to provide certain management related services to an associated company outside Australia.

If a company qualifies under the regional headquarters program (RHQ), certain tax incentives are available for deductibility of business expenses. The incentives provide that certain costs associated with the establishment of an RHQ can be deductible expenses for tax purposes, whether of a revenue or capital nature, and which are incurred within a 2 year window from 1 year before and after the RHQ company first derives assessable income from the provision of "regional headquarters support".

Note: The law in this Taxation section is stated as at 1 November 2004.

6. BANKING AND FINANCE

General

Australia is well served by a wide range of local and foreign financial institutions providing a comprehensive range of financial services.

The Australian financial sector is subject to the supervision of the Australian Prudential Regulation Authority ("APRA"), the Reserve Bank of Australia (the "Reserve Bank") and ASIC. These agencies are members of the Council of Financial Regulators.

- APRA has responsibility for prudential regulation of all banks, insurance companies, superannuation funds, credit unions, and friendly and building societies. APRA is also responsible for the collection of statistical data from registered financial corporations, APRA-regulated entities and subsidiaries of ADIs, amongst others;
- The Reserve Bank has responsibility for the overall stability of the Australian financial system and regulation of the payments system and for setting monetary policy; and
- ASIC has responsibility for corporate regulation of financial services and consumer protection and market integrity functions in respect of banks, finance companies, merchant banks, building societies, credit unions, friendly societies, superannuation interests, retirement savings accounts and general life and insurance products.

Classes of Financial Institutions and their regulation

Authorised deposit-taking institutions (ADIs)

An Authorised Deposit-taking Institution or ADI is a body corporate which is granted an authority to carry on "banking business" (which consists of both taking deposits and making advances) in Australia by APRA under the *Banking Act* 1959. The fact that a body corporate has an authority to carry on banking business in Australia does not mean that it may call itself a "bank". APRA's consent is required before an ADI can assume or use the words "bank", "banker" or "banking" (in any language) in its name or in connection with its business.

There are four major banks and a number of smaller banks and foreign owned banks in Australia falling into this category of financial institution. These institutions provide a full range of financial services at both a commercial and retail level throughout Australia. The ADI category also includes building societies and credit unions which engage principally in the provision of personal finance to the retail market.

Foreign banks are permitted to operate in Australia through a branch or through a locally incorporated subsidiary. A locally incorporated subsidiary or a branch of a foreign bank wishing to carry on a banking business in Australia must be an ADI and regulated under the *Banking Act 1959*, or obtain an exemption from the requirement to be an ADI.

APRA is responsible for the prudential regulation of all ADIs under the Banking Act 1959. In some cases, APRA is required to consult with the Reserve Bank, most importantly on questions affecting the stability of the Australian financial system. ADIs are required to observe capital adequacy standards set by APRA. However, they do not need to maintain deposits with APRA. ADIs are also required to provide information to APRA if requested, including statements of assets and liabilities and other prescribed information on a regular basis.

Shareholdings in ADIs are limited by the *Financial Sector (Shareholdings) Act 1998*.

In July 2004 APRA released a draft prudential standard on business continuity management which, if introduced, would require ADIs to identify, assess and manage potential business continuity risks and undertake regular reviews of their business continuity management framework. APRA intends to issue the finalised standard by mid 2005, which would come into immediate effect upon release.

The *Financial Sector (Collection of Data) Act 2001* applies to ADIs. Under that Act APRA may determine reporting standards for ADIs and require them to provide APRA with information about their businesses and activities. APRA's current requirements for ADIs include the provision of information relating to capital adequacy and off-balance sheet business. ADIs however are not "registrable corporations" under that Act and therefore the registration regime under that Act does not apply to them.

Merchant banks & other financial corporations

Merchant banks offer a number of financial services to the corporate market. Often the merchant banks are owned by foreign banks not themselves authorised to conduct banking business in Australia.

Merchant banks operate without a banking authority under the *Banking Act 1959*, and so are not ADIs and cannot carry on banking business unless they have an exemption from the requirement for a banking authority. However, they may use the expression "merchant bank", "merchant banker" or "merchant banking" in relation to their business.

Merchant banks are also not subject to the prudential supervision of APRA however, they are required to be registered under the *Financial Sector (Collection of Data) Act 2001*.

The *Financial Sector (Collection of Data) Act 2001* applies to foreign corporations, and trading or financial corporations formed within Australia with total assets in Australia (including assets of related corporations), exceeding the amount prescribed under that Act (which is currently A$5 million) and whose sole or principal business activities in Australia are the borrowing of money and the provision of finance:

- if the total value of assets of the corporation in Australia comprising debts due to the corporation resulting from transactions entered into in the course of provision of finance exceed a prescribed percentage (which is currently 50%); or
- if the corporation engages in the provision of finance in the course of carrying on a business in Australia of selling goods by retail and the total value of assets of the corporation (and any related corporation), comprising debts due to the corporation resulting from transactions entered into in the course of provision of finance exceed a prescribed amount (which is currently A$25 million).

"Registrable corporations" under the *Financial Sector (Collection of Data) Act 2001* (which excludes ADIs) must register under that Act with APRA. Under that Act, APRA is required to prepare a list of registered corporations (which are known as "registered entities" or "Registered Financial Corporations (RFCs) in which the corporations are divided into such categories as it determines. Categories of corporations under the *Financial Sector (Collection of Data) Act 2001* include money market corporations, intra group financiers and other corporations (such as finance companies, general financiers and pastoral finance companies). Merchant banks are usually placed in the category of money market corporations.

Under the *Financial Sector (Collection of Data) Act 2001* and its regulations, a registered corporation is required to furnish to APRA statements of assets and liabilities and other prescribed information on a regular basis for statistical purposes. Corporations

registered under the *Financial Sector (Collection of Data) Act 2001* are prohibited from advertising that they are "registered under the Financial Sector (Collection of Data) Act 2001" or "registered with the Australian Prudential Regulation Authority".

The major source of regulation of merchant banks and other non-ADI financial corporations is the *Corporations Act*, particularly in the areas of licensing, conduct and the taking of deposits, which may be made with or without the issue and registration of a prospectus or a Product Disclosure Statement depending on the circumstances.

Others

Finally, there are a number of other financial institutions including superannuation funds, friendly societies, insurance companies and finance companies, engaging principally in the provision of personal finance to the retail market. Superannuation funds, building and friendly societies, credit unions and insurance companies are subject to the prudential supervision of APRA.

Regulation of financial services

The *Financial Services Reform Act 2001* was enacted as part of the Australian Government's Corporate Law Economic Reform Program and commenced operation on 11 March 2002. It implemented a new regime under the *Corporations Act* to regulate licensing, product disclosure and conduct in relation to the provision of financial services and the operation of financial markets in Australia. There was a two-year transition period and the previous licensing and product disclosure regime continued during that transition period. This transition period ended on 11 March 2004.

An **Australian financial services licence** is required in order to carry on a business of providing financial services. A person will provide a financial service if they:

- provide financial product advice;
- deal in a financial product;
- make a market for a financial product;
- operate a registered managed investment scheme; or
- provide a custodial or depository service.

"Financial products" are facilities through which a person makes a financial investment, manages financial risk, and/or makes non-cash payments. They include:

- securities;
- interests in managed investment schemes;
- derivatives;
- insurance contracts;
- interests in superannuation funds;
- retirement savings accounts ("RSA");
- deposit-taking facilities made available by an ADI;
- cash management trusts operated by non-ADIs; and
- foreign exchange contracts which are not to be settled immediately.

The following are specifically excluded from the definition of "financial product":

- credit contracts;
- foreign exchange contracts where settlement occurs immediately;
- letters of credit;
- bank cheques;
- bank guarantees; and
- credit cards.

An **Australian market licence** will be required to operate a financial market in Australia unless the market is exempt.

The new **product disclosure regime** for financial services is based on three documents:

- the Financial Services Guide, which must be provided to retail clients if financial services are provided;
- the Statement of Advice, which must be provided to retail clients if personal advice is provided; and
- the Product Disclosure Document, which must be provided to retail clients if financial products are issued, recommended, and in limited circumstances, sold.

For financial products which are not insurance, superannuation or RSA products, the financial product or service is considered to be provided to a **retail client** if:

- the financial product or service provided has a price or value of less than A$500,000;
- where the financial product or service is provided for use in connection with a business, that business is a small business (a small business is one employing less than 20 people (or less than 100 people if the business is, or includes, the manufacture of goods));
- the client has net assets of less than A$2.5 million;
- the client does not have a gross income for each of the last 2 financial years of at least A$250,000; and
- the client is not a professional investor.

Regulation of related activities

- **Financial Transaction Reports**: Under the *Financial Transaction Reports Act 1988*, all cash dealers are required to hold certain account information and signatory information in relation to each account held by them before allowing withdrawals from the account. Cash dealers must also report to Australian Transaction Reports and Analysis Centre (AUSTRAC):
- significant cash transactions - transactions of A$10,000 or more in Australian currency or the equivalent of A$10,000 or more in foreign currency;
- international funds transfer instructions; and
- suspicious transactions - any transaction which the cash dealer has reasonable grounds to suspect may be relevant to investigation of criminal activity, including tax evasion.

"Cash dealers" include:

- banks, building societies and credit unions referred to as 'financial institutions';
- Australian financial services licensees who deal in securities and/or derivatives (as defined in the *Corporations Act*);
- persons carrying on a business of issuing, selling or redeeming travellers cheques, money orders or similar instruments;
- currency and bullion sellers; and

- persons carrying on the business of collecting and holding currency on behalf of others, exchanging currency and remitting or transferring currency into or out of Australia.

The *Financial Transaction Reports Act 1988* provides penalties for avoiding reporting requirements and providing false or incomplete information. Penalties also apply to persons who facilitate or assist in these activities.

- **Consumer Credit:** The provision of credit to consumers for domestic, personal or household use is regulated under the *Consumer Credit Code* throughout Australia.
- **General Banking:** The *Code of Banking Practice* is a voluntary code that has been adopted by most banks with significant retail operations. Similar voluntary codes have been adopted by building societies and credit unions.

  A revised *Code of Banking Practice* was published in August 2003 to expand the scope of the Code's application. This was followed in May 2004 by the publication of a modified version of the Code incorporating changes to the guarantee provisions.

Foreign banks operating in Australia

Foreign banks may operate through locally incorporated subsidiaries or through branches or may establish representative offices in Australia. APRA has issued prudential statements which clarify the conditions attaching to the operation and the entry criteria for foreign banks wishing to operate in these ways.

"Banking business" consists of both taking deposits and making advances. To carry on banking business in Australia, foreign banks must obtain a banking authority issued by APRA under the *Banking Act 1959*. A banking authority may be granted by APRA subject to conditions, and these may be varied, revoked, or added to at any time by APRA by notice in writing. Foreign banks may either operate as a branch or as a locally incorporated subsidiary, or may also hold a dual authority to operate both as a locally incorporated subsidiary and as a branch. Representative offices can only conduct liaison services and cannot carry on any form of banking business.

The granting of an authority to carry on banking business comes with the right to use the expression "authorised deposit-taking institution" or "ADI". Additional consent from APRA is required to use the words "bank", "banker" or "banking" (in any language) in a name or in connection with a business.

Only bodies corporate can carry on banking business in Australia.

Applicants for a banking authority are expected to be able to comply with APRA's prudential requirements, which are set out in various prudential statements, from the commencement of their banking operations.

There are no restrictions on the number or size of operations of foreign banks operating as subsidiaries or branches in the Australian market.

Locally incorporated subsidiaries of foreign banks

Foreign bank subsidiaries incorporated in Australia are expected to maintain a significant presence in Australia and add some depth to the local banking markets. They must satisfy the same legislative and prudential requirements as Australian owned banks including the following:

- be incorporated in Australia;
- have approval from the foreign bank parent's home supervisor to establish a locally incorporated ADI in Australia;
- satisfy APRA that their parent is subject to adequate standards of prudential supervision in their home country and is supervised on a consolidated basis consistent with the provisions of the Basel Concordat, and that the home supervisor is willing to cooperate in the supervision of the subsidiary in terms of the Concordat;
- hold a minimum amount of A$50 million in core capital;
- satisfy APRA that they are able to comply with the Capital Adequacy Standards set by APRA from the commencement of their banking operations;
- comply with the *Financial Sector (Shareholdings) Act 1998* in terms of its ownership;
- ownership in their parent is wide spread unless exemptions from the *Financial Sector (Shareholdings) Act 1998* apply;
- all its substantial shareholders including its parent, are able to demonstrate to APRA that:
    - they are "fit and proper" in the sense of being well-established and financially sound entities of standing and substance;
    - their involvement in the bank will be a long-term commitment; and
    - they are able to contribute additional capital, if required;

- satisfy the "Board Composition" requirements which:
- require at least two directors to be totally independent of the management of the subsidiary, its parent, and any subsidiary or other associate of the parent, and who are not directors of the parent or any other subsidiary or associate;
- allow non-executive directors (including the chairman) of the board to be executives of the parent;
- satisfy APRA that the proposed (or existing) information and accounting systems are adequate for maintaining up-to-date records of all transactions and commitment undertaken by the subsidiary, so as to keep management continuously and accurately informed;
- satisfy APRA that the proposed risk management and internal control systems are adequate and appropriate for monitoring and limiting risk exposures in relation to their domestic and offshore operations from the commencement of their banking operations;
- demonstrate that their arrangements for reporting to the parent are adequate;
- satisfy APRA as to their capability of producing accurately and promptly, all required statutory and prudential information;
- have in place arrangements with an external auditor to report to APRA on the observance of prudential standards, compliance with statutory requirements, the reliability of information supplied to APRA and any other matters agreed between the bank, the external auditor and APRA;
- satisfy APRA on the adequacy of internal audit arrangements; and
- submit to APRA an acceptable business plan which includes projections of the scope, scale and specialisation of operations and cash flows and earnings for the early years of operation.

Branches of foreign banks

Foreign banks operating as branches in Australia (which are also known as "foreign ADIs") must submit their local operations to the prudential supervision of APRA and provide information to APRA on request in connection with its prudential responsibilities. Foreign bank branches, unlike locally incorporated subsidiaries, are not subject to the depositor protection provisions of the *Banking Act 1959*. They are not required to maintain endowed capital in Australia and are not subject to any capital-based large exposure limits. As there is less protection for depositors with

branches compared to those with locally incorporated banks, foreign bank branches are required to confine their deposit-taking activities to "wholesale" markets. In particular:

- they are not permitted to accept initial deposits and other funds from individuals and non-corporate institutions of less than A$250,000; but
- they are able to accept deposits and other funds in any amount from incorporated entities, non-residents and their employees.

Moreover, they must disclose to customers that they are not subject to the depositor protection provisions of the *Banking Act 1959*. There are no other specific restrictions placed on sources of funding or on the use of funds. Specifically, cheque accounts and credit card accounts may be offered subject to the above.

If foreign banks wish to undertake "retail" deposit taking, locally incorporated banking subsidiaries must be established.

Foreign banks applying to operate a branch in Australia must satisfy a number of criteria including the following:

- have approval from their home supervisor to operate a banking operation in Australia;
- be incorporated and authorised as a bank under the laws of their home country;
- demonstrate to APRA that both itself and its substantial shareholders are "fit and proper" in the sense of being well-established and financially sound entities of standing and substance, that the involvement of its substantial shareholders in the bank will be a long-term commitment and that they are able to contribute additional capital, if required;
- be able to meet capital adequacy standards required by the home country supervisor, where these standards must be consistent in all substantial respects with the Basel Capital Adequacy Framework;
- be subject to adequate standards of prudential supervision in their home country, be supervised on a consolidated basis consistent with the provisions of the Basel Concordat and that the home supervisor is willing to cooperate in the supervision of the subsidiary in terms of the Concordat;

- satisfy APRA that proposed risk management and internal control systems are adequate and appropriate for monitoring and limiting risk exposures in relation to domestic and offshore operations from the commencement of the banking operations;
- demonstrate that arrangements for reporting to head office are adequate;
- satisfy APRA that the proposed (or existing) information and accounting systems are adequate for maintaining up-to-date records of all transactions and commitment undertaken by the bank, so as to keep management continuously and accurately informed;
- satisfy APRA as to their capability of producing accurately and promptly all required statutory and prudential information, and as to the appropriateness and soundness of the proposed operational arrangements for the branch;
- have in place arrangements with an external auditor to report to APRA on the observance of prudential standards, compliance with statutory requirements, the reliability of information supplied to APRA and any other matters agreed between the bank, the external auditor and APRA;
- satisfy APRA on the adequacy of audit internal arrangements; and
- submit to APRA an acceptable business plan which includes projections of the scope, scale and specialisation of operations and cash flows and earnings for the early years of operation.

Operating both a branch and a locally incorporated subsidiary

A foreign bank may operate both a branch and a locally incorporated banking subsidiary in Australia, but the branch and subsidiary must conduct their business so as to make clear their separate legal status and banking authorisation. In particular, they are required to have

- separate books of account;
- separate statistical (including prudential) reporting to APRA;
- separate internal risk monitoring and management systems;
- separate systems of delegation; and
- separate chief executive officers responsible for the proper management and prudent operation of the branch and subsidiary respectively.

Banking transactions between a subsidiary bank and a branch should be at "arms length", and therefore, the subsidiary would normally be expected not to purchase assets from the branch. The branch and the subsidiary may share premises and support services such as personnel, financial control and treasury operations.

A limit is placed on the exposure (both direct and indirect) of a banking subsidiary to its parent bank (including its Australian branch).

Representative offices

A foreign bank wishing to establish a representative office in Australia is required to meet minimum entry standards and comply with operating conditions set by APRA. An applicant must satisfy APRA that:

- it is recognised as a bank under the laws of its home country;
- it is of substance and good repute;
- it is subject to adequate standards of prudential supervision in its home country; and
- it has received approval from its home supervisor to establish a representative office in Australia.

A representative office must only conduct liaison services and must not conduct any form of banking business in Australia. The range of prohibited activities includes soliciting or receiving deposits, granting loans, dealing in or issuing securities, dealing in derivatives products and buying or selling foreign exchange. The representative office must also not engage directly in financial transactions, except those necessary or incidental to the maintenance of the office in Australia. The activities of the representative office must be kept separate from any financial enterprise operating in Australia. The foreign bank establishing a representative office must be registered as a foreign company under the *Corporations Act*.

Secured Financing

Types of securities

The principal types of security over property in Australia, available to a financier include the mortgage and the company charge, and, although used to a lesser extent in commercial transactions, the pledge. In the case of real property held under the

Torrens System (see Section 12), a specific form of statutory mortgage is also available which is effected by registration against the registered title of the company.

All kinds of property, both real and personal (including rights under contracts) may be the subject of a legal or equitable mortgage, or a company charge. Usually, an equitable mortgagee will have the right to perfect its title to the secured property as legal owner at any time. Mortgagees and chargees have a power of sale (together with other security rights) over the secured property which is exercisable on default. Any property which is capable of being transferred by actual or constructive delivery may be the subject of a pledge, which is created by agreement between the parties for the transfer of possession of the relevant property as security for obligations owed to the financier, with a right to sell on default.

Formal requirements

Generally, there are few onerous formal requirements. To be registrable, mortgages of land under the Torrens System must use a prescribed form in each State or Territory. Other mortgages of land must be in writing. In addition, to obtain the benefit of certain types of rights which are implied in securities by statute, the security instrument may need to be in the form of a deed in some States. It is common practice to draft securities as deeds. Other formal requirements exist to ensure registration of the security interest, such as in relation to bills of sale.

Perfection of securities

Part 2K.2 of the *Corporations Act* governs the provision of notice by registration, and the priority, of certain charges granted by companies incorporated, or registered as foreign companies, in Australia. A "charge" for this purpose includes a mortgage. Registrable charges attain priority on registration over earlier charges which are later registered under the *Corporations Act*, unless the chargee had notice of the earlier charge when the later charge was created. Charges which are not registrable remain subject to the common law rules of priority. Generally, the chargee under the charge created first will have priority over later chargees. However, a prior chargee will be defeated by a later mortgagee or owner who took its interest in the property in good faith for value and without notice of the prior security interest.

Charges are required to be registered if granted over certain classes of assets identified in the *Corporations Act* including uncalled share capital, personal chattels (excluding ships), goodwill and certain types of intellectual property, and book debts, and over any of the property or business of the company if it is a floating charge.

A mortgage over real property is not registrable under the *Corporations Act*. However, a statutory mortgage over land under the Torrens System and other mortgages of non-Torrens System land are registrable with the land titles office in the relevant State or Territory.

A failure to register a mortgage or charge will adversely affect the priority of the security against other securities over the company. A registrable charge which is unregistered will also be unenforceable against the liquidator of the company.

In respect of securities over certain personal property (including equipment) granted by individuals, the bills of sale legislation in certain States requires registration of the security in order to ensure priority and full enforceability.

Enforcement

The common methods of enforcing security held by a financier are referred to in Section 4 (see "Corporate Insolvency"). Commonly, a financier will either appoint a receiver to the secured property of the company, or alternatively the financier itself (often through an insolvency practitioner as its agent) will take possession of the property as mortgagee in possession. In both cases, the assets of the company secured to the financier are intended to be sold by the receiver or mortgagee to recover monies outstanding.

Stamp Duty on Security

Secured financing in Australia is subject to significant stamp duties imposed by State governments. If a loan is secured by a mortgage, charge or other security over property (which includes real estate, shares, inventory, accounts receivable and all other forms of property), situated in Australia, stamp duty up to an effective rate of 0.45% of the amount of the loan may be payable.

Foreign companies doing business in Australia should note that this stamp duty may be payable even when the loan has no real connection with Australia. For example, a loan made to the foreign parent company outside Australia by a foreign bank may attract stamp duty if shares in an Australian subsidiary form part of the security for the loan. Moreover, the duty will be calculated by reference to the amount of the loan, not the value of the Australian shares. Careful structuring is required to minimise stamp duty in these circumstances.

Offshore Banking Units

Offshore banking units ("OBU") are not separate legal entities. An ADI, a person authorised to deal in foreign exchange in Australia and certain other persons may apply to the Treasurer to be designated an OBU. An OBU may be conducted through an Australian resident company or through an Australian branch of a foreign company. However, the offshore banking activities must be conducted in Australia.

Certain offshore banking activities will qualify for concessional tax rates if they are transacted with an "offshore person" that is, a resident that is carrying on business through a permanent establishment outside Australia, or a non-resident that is not carrying on business through a permanent establishment in Australia or another OBU.

7. INTELLECTUAL PROPERTY

General

Federal legislation provides for the registration and protection of intellectual property such as trade marks, patents and industrial designs. Copyright is also protected under Federal law, without requiring registration. The registration of company and business names is available under the *Corporations Act* and under State business names legislation, and there is separate legislation providing protection for the topography of computer chips, and for unique plant varieties. Australia has also introduced a system of geographic indicators for wine.

The law in each of these areas is complex. Specific advice should be sought if a particular name, mark, product, or design is to be manufactured, marketed or used in Australia. However, a brief description of the major features of these laws is set out below.

Expenses incurred in developing or acquiring a unit of "industrial property" being rights in a patent, copyright or registered design (but not a trade mark), may be allowable deductions for income tax purposes over the life of the unit of property.

Trade Marks

Distinctive signs used or intended to be used in relation to particular goods and/or services are readily protectable under the *Trade Marks Act, 1995*. "Signs" are broadly defined, and include amongst others, words, numbers, logos, names, colours, shapes, sounds and smells.

While trade mark registration is not mandatory, the benefits are significant. Briefly these are:

- in enforcement (infringement) proceedings there is no need for the registered owner to establish a reputation in the trade mark or that use of the offending mark is likely to deceive or confuse the public;
- the rights of the registerd owner extend throughout the Commonwealth of Australia, not merely to those regions in which reputation can be established;
- a trade mark registration acts as a deterrent on the public record to others who may be considering adopting the same or a similar mark;

- a trade mark registration is a readily identifiable intellectual property right that can be sold or used as security; and
- registration provides a defence a third party's claim of to infringement if the mark is used.

Not all signs are registrable as trade marks in Australia. The basic requirements for registration are that the sign:

- is not identical or deceptively similar to a sign, which is already being used by a third party or which is the subject of a prior registration or application in respect of the same goods or services; and
- is distinctive or capable of becoming distinctive. There is no need to show that the mark has been used provided the mark is sufficiently distinctive.

The registration process in Australia is relatively straightforward and where no objections or oppositions are encountered registration can be achieved in 10 - 12 months from filing.

The registered owner of a trade mark can, and in order to protect the mark should, bring an action for infringement if a person, who is not an authorised user, uses a sign which is substantially identical with, or deceptively similar to, the trade mark in relation to goods or services in respect of which the trade mark is registered, or on similar goods or closely related services. "Well known" registered trade marks are given protection against use even on unrelated goods and services.

Registered trade marks can be licensed or assigned and are renewable every ten years. They can be removed for non-use. If a mark has been registered for more than five years but has not been used during the last three years, either by the owner or an authorised user, the registration can be removed on the application of an "aggrieved" third party.

Name Protection

Under the *Corporations Act*, every company carrying on business in Australia is required to register its name with ASIC. In addition, each state and territory in Australia has a *Business Names Act*, which provides that any company or individual carrying on business under a name other than its own name is required to register that business name with the relevant authority. Business names and company names are allocated on a "first come-first served" basis so no search is conducted for prior rights

already on the trade marks register. Also, the fact that a company has a well-known trading name or trade mark overseas does not, in itself, entitle it to register that name or mark as a company or business name in Australia.

An application may be made to the appropriate authority by any person for the registration of a business or corporate name. That application will not be rejected unless it is determined that:

- in the case of a business name, the name is the same as or would be confused with other existing company names registered in Australia or existing business names registered in the same state;
- in the case of a company name, the name is identical to an existing company or registered business name; or
- the name is offensive or otherwise prohibited.

If an overseas company proposes to establish a branch or subsidiary in Australia, an application to secure the particular company or business name should be made at the earliest possible time. Although a business name cannot be registered until a branch or subsidiary has been established in Australia, a company name can be "reserved" for up to two months at a time with extensions of further two month periods at the discretion of ASIC.

A common form of name piracy which some overseas companies have suffered is the unauthorised registration of their trading name or trade mark as business names in one or more Australian States, or as a corporate name under the Corporations Act. The use of such a name can constitute registered trade mark infringement if the name is identical or similar to an earlier mark registered for similar goods or services. If the earlier mark also has a reputation in Australia acquired through use, the use of the name may also amount to passing off and misleading and deceptive conduct under relevant fair trading legislation. Orders can be obtained from the Court requiring deregistration of the offending business or company name.

Domain Names

Internet domain names within the Australian top level country-code,<au> are administered by an industry self-regulatory organisation named the .au Domain Administration (auDA).

The <.au> domain is divided into a number of sub-domains ("second-level domains" or "2LDs"). The most popular is <.com.au>, which is intended for use by commercial entities.

The current eligibility requirements for a registration of a <.com.au> domain are set out in auDA's Domain Name Eligibility and Allocation Policy.

- Registrants must be "Australian", meaning that they must be:
    - an Australian registered company;
    - trading under a registered business name in any Australian State or Territory;
    - a foreign company licensed to trade in Australia;
    - an Australian partnership or sole trader; or
    - the registered owner of or applicant for an Australian trade mark.
- Domain names are allocated on a first come, first served basis (provided the applicant meets the eligibility criteria);
- Domain names must be unique within the <.com.au> sub-domain space, be at least two characters long, contain only alpha numeric characters and hyphens, not include zip code/postcodes or state names, and not be included on auDA's Reserved List, which includes geographic names and other names and words protected by statute;
- The domain name must either:
    - exactly match the registrant's registered company name or business name (Corporate Name) or the words comprising the registrant's Australian trade mark registration or application;
    - be an acronym or abbreviation of the registrant's Corporate Name or the words comprising the registrant's Australian trade mark registration or application; or
    - be otherwise closely and substantially connected to the registrant because the domain name refers to, for example, a product or service which the registrant sells or provides.
- Generic domain names are registrable, provided they are closely connected with the registrant's business.

A new Dispute Resolution Policy for <.au> domain names - the "auDRP" - was introduced on 1 August 2002. The new policy is similar to ICANN's Uniform Dispute Resolution Policy (UDRP).

auDA has also implemented a new policy (the "Transfers (Change of Registrant) Policy", effective July 2004), to discourage the secondary market in domain names and piracy or "cybersquatting". The net effect of the new rules is that transfers of domain names are prohibited unless the situation falls within a finite list of prescribed scenarious. Any purported transfer not within the prescribed situations may cause the registrar to refuse to record the transfer and may also cause the registration to be vulnerable to cancellation. Even if a transfer is permitted under the policy, the parties must follow a prescriptive transfer procedure, which includes the proposed registrant filing with the registrar evidence in support of the transfer by way of statutory declaration. The registrar must also be satisfied that the proposed new registrant is eligble to hold the registration.

Permitted transfer scenarios include where:

- a registrant sells all or part of its business or assets to the proposed new registrant (and the deed of sale includes the transfer of the registration);
- a registrant assigns all or part of its intellectual property rights to the proposed new registrant (and the deed of assignment includes the transfer of the registration);
- a registrant and the proposed new registrant belong to the same group of companies (i.e. sister companies or parent/subsidiary);
- a tribunal or Court issues an order requiring the transfer; or
- the transfer is part of an arrangement settling a dispute between the registrant and proposed new registrant (and the settlement document provides for the transfer).

Copyright

Owners of certain original works and other copyright subject matter (such as artistic works, sound recordings and computer programs) have various rights under the *Copyright Act 1968*. There is no statutory system of registration of copyright in Australia. The owner of a copyright which has been infringed can bring an action to seek an injunction and obtain damages or an account of profits.

In relation to computer software programs, copyright protection as a literary work extends not only to computer programs written in source code, but also to object code programs.

In 2001, Australian copyright law was amended to reflect "digital agenda" reforms taking place at an international level. These are aimed at ensuring that copyright laws can be enforced in a digital environment, and are centred around a new technology-neutral right of communication to the public.

Australia is a member of Trade-Related Aspects of Intellectual Property (TRIPS) and the Berne and Universal Copyright Conventions and as a result, works and other copyright subject matter created by the citizens of member countries or first published in the relevant member country are entitled to the same protection in Australia as if they had been created and first published in Australia.

The term of copyright was recently extended as a result of amendments to the Copyright Act to give effect to the US-Australia Free Trade Agreement. Copyright now generally lasts for 70 years following the death of the author.

Moral rights held by individuals in relation to literary, dramatic, musical, artistic and cinematograph works are given protection. These rights include the right of attribution of authorship, the right not to have authorship of a work falsely attributed, and the right of integrity of a work. Moral rights continue in force essentially until copyright ceases to subsist in the work, with the exception of the right of integrity, which ceases on the death of the author. Remedies for infringement of moral rights include injunctions, damages, declarations and similar orders.

Patents

Australia's *Patents Act 1990* confers upon the owners of standard patents the exclusive right to make, use, sell, hire and otherwise exploit a patented invention for a period of 20 years from the date of filing the patent. "Invention" in this context means any manner of new manufacture. Recent amendments to the 1990 Act bring Australia in line with the USA and Europe by allowing extensions to the terms of patents for pharmaceutical substances by up to 5 years provided the patent claims an active ingredient.

Australia is a party to the Paris Convention for the Protection of Industrial Property and an application may be made claiming the priority date of a convention country application, as long as the Australian application is made within 12 months. As Australia is a subscriber to the Patent Co-operation Treaty ("PCT"), a PCT international application can be filed in Australia and the priority date of a PCT application filed overseas will be used in respect of the Australian patent applications.

In order to sustain a valid patent, an invention must be novel, not obvious when compared with the prior art base that existed before the "priority date" of the patent and useful.

The most recent significant changes to the *Patents Act 1990* is the adoption of different standards for assessing novelty and inventiveness, depending on the filing date of the patent:

(a) Patents filed before April 1991 are assessed by reference to prior art in Australia only;

(b) Patents filed between April 1991 and April 2002 are assessed by reference to prior disclosures in recorded form anywhere in the world and by use in Australia; and

(c) Patents filed after April 2002 must be novel and inventive when compared to information made publicly available anywhere in the world, either by publication of a document or by the doing of an act.

There is also a new "grace period" which allows a patent application to be filed (and protection to be subsequently obtained) within a period of 12 months of initial publication or use of the invention by or with the consent of the applicant.

Innovation Patents

An innovation patent, which is for a term of eight years, is an alternative form of protection to that given by the standard patent. The purpose of the innovation patent system is to ensure easy and inexpensive short-term monopoly protection for lower level or incremental inventions. This system facilitates the grant of patents without substantive examination. Generally an innovation patent is granted after it passes a formalities check, usually within 1-3 months. No opposition proceedings are permitted at this stage. Substantive examination only occurs if required by the Commissioner or specifically requested by the patentee or a third party. The incentive level for innovation patents is lower than for standard patents. Innovation patents provide the same scope of protection as standard patents. It must be requested in order for the patent to be legally enforceable.

Registered Designs

Design features of products, such as shape, configuration, pattern or ornamentation may be protected from imitation by registration of those features as "designs" under the *Designs Act 2003*. This Act confers upon the registered owner/s of a design

proprietary and monopoly rights in that design. To be valid a design registration must be for a design which is new and distinctive. Prior use or publication (in Australia or elsewhere) will destroy registrability.

Where an artistic work is industrially applied as a design and articles made to this three dimensional design are put on the market in Australia, copyright protection is unlikely to be available and design registration would be the only protection possible (if the design were still new and distinctive).

Since the *Trade Marks Act 1995*, there has been some overlap between trade mark and design legislation. It is now possible to register shapes as trade marks. Traders may potentially register their product as both a design and a trade mark and obtain protection under both regimes.

Under the Paris Convention, an applicant for a design application in a member country has a period of six months within which to file a corresponding design application in Australia, in which case the Australian application has the priority date of the overseas application.

Designs law was recently overhauled. The new Act has reduced the term of protection from 16 years to 10 years and introduced a new regime for spare parts including a "right to repair" defence.

Confidential Information/Trade Secrets

Trade secrets are part of the broader concept of confidential information which is protected by the courts and which spans commercial secrets, personal secrets, artistic secrets and State secrets.

The term "trade secrets" refers broadly to information which is of commercial value to the holder of the information and is known only by the holder or others to whom the holder has disclosed the information subject to an obligation to maintain its confidentiality. Customer lists, marketing techniques, software, know how, product specifications and manufacturing processes can all be trade secrets.

Although the *Copyright Act* may protect the particular form in which information is embodied, and the *Patents Act* may protect the subject matter of information (which discloses a patentable invention the subject of a patent registration), there is no Federal or State legislation which protects secret information, as such. It is generally accepted in Australia that as trade secrets are simply information, property rights do not attach to them.

Trade secrets are protected either by express contractual obligations to maintain the secrecy of confidential information or by application of the general principle that anyone to whom information, which is confidential, is communicated in circumstances of confidence has an obligation of good faith to maintain the confidentiality of the information.

It is common to impose express obligations of confidentiality in employment, licensing and sale contracts. As protection for trade secrets is lost once the information is no longer secret, a contractual obligation which outlives the secrecy of the information or which otherwise relates to information which is not confidential, may be unenforceable or at least ineligible for relief in the event of a breach.

Injunctions can be obtained to restrain the disclosure of trade secrets. If the secret has already been disclosed, damages are available to compensate for the loss suffered as a result of unauthorised use or disclosure, or alternatively an account of profits made as a result of the use or disclosure.

Exploitation of Intellectual Property Rights

Intellectual property rights are the most important assets of many businesses and are bought and sold, licensed and the subject of joint ventures and other collaborations. Central to any intellectual property transaction is a clear understanding of who owns what and the limits on the uses to which it can be put. Issues such as ownership of rights generated by the activities of employees, contractors or multiple collaborators need to be addressed before many transactions proceed and are part and parcel of the due diligence process. Similarly, extensive searching and enquiries often need to be made in order to establish clear title to rights.

The ownership position in Australia will not necessarily correspond exactly to that in the United States, the United Kingdom or elsewhere. For example, the United States "work for hire" doctrine has no general equivalent. In Australia, commissioned contractors or consultants will usually own the intellectual property rights in their own work in the absence of an assignment of those rights in favour of the commissioning party. There is also a need to seek separate Australian advice on the form of assignments and licences including:

- whether a licence is exclusive within the meaning of the relevant Australian legislation, which is often critical to whether or not the licensee is able to sue infringers;

- whether there is any anti-trust or competition law concern arising out of the terms of the transaction;
- whether there are any income tax, capital gains tax or stamp duty issues arising out of the transaction;
- the rights of the parties in relation to any termination of a licence; and
- whether or not there are any statutory implied warranties or conditions which apply to the transaction, and the extent to which liability can be limited for breach of any such warranties or conditions.

Franchising

Until recently franchising had not been the subject of specific legislation in Australia. Although there was some regulation of franchises in the petroleum and real estate industries, the majority of franchising was subject only to a system of voluntary self-regulation. This situation has changed with the introduction of mandatory industry-specific legislation in the form of the Franchising Code of Conduct ("the Code") in 1998. Compliance with the Code is mandatory for all business arrangements that fall within the scope of a "franchise agreement". This term is defined broadly in the Code and includes traditional business format franchises as well as certain distribution arrangements and other commercial relationships not ordinarily considered to be "franchises".

The Code requires, among other things, disclosure of certain information regarding the business and a cooling off period providing the franchisee with the right to terminate within 7 days of entering into the agreement. The Code also prohibits franchise agreements from containing release from liability provisions, provides for transfers and terminations of franchise agreements and requires compliance with prescribed dispute resolution provisions.

Non-compliance with the Code may result in the imposition of injunctions, damages, undertakings, corrective advertising or other such orders as a Court thinks appropriate. Penalties cannot be imposed for a breach of the Code. Parties who are only indirectly involved in a breach of the Code may also be found liable for breach. This includes any party that aids, abets, counsels, induces or is in any way knowingly concerned in or a party to the contravention. Under the Code, both franchisees and the Australian Competition and Consumer Commission (ACCC) may take action against a franchisor for a breach of the Code.

Enforcement of Rights

Intellectual property rights are usually enforced by way of a civil action in the Federal Court of Australia, Federal Magistrates Court of Australia or in the Supreme Court of a State of Territory. In addition to final relief granted after a full trial, it is possible to obtain:

- An interlocutory injunction to prevent further infringing activities until trial;
- A summary judgment disposing of the proceedings without the need for a trial;
- A delivery up order, forfeiting infringing goods;
- An "Anton Piller" order for the inspection and preservation of documents and articles pending trial;
- A "Mareva injunction" to prevent the infringer disposing of assets or absconding from the jurisdiction; or
- A "Norwich Pharmacal" order for affidavits disclosing sources and customers.

Interlocutory Injunctions

Supporting evidence may be put before the Court in the form of an affidavit (sworn statement) for claimants who reside outside the jurisdiction in which they seek to enforce their rights. That is, a non-Australian rights holder usually will not have to travel to Australia to obtain the interlocutory injunction.

Delay or acquiescence by the applicant can operate to deny the grant of an interlocutory injunction.

In order to obtain an interlocutory injunction (an injunction before trial) the applicant must be able to show:

- that there is a serious question to be tried (ie, the case has some prospects of succeeding); and
- that the balance of convenience favours the granting of an injunction. This will include whether the applicant will suffer irreparable injury for which damages would be an inadequate remedy.

The plaintiff will usually only be granted an interlocutory injunction on an undertaking to pay damages, which may be ordered to be paid by the Court in the event that the plaintiff is unsuccessful at trial. On the other hand, if an interlocutory injunction is denied, the defendant will usually be ordered to keep accounts of its dealings in infringing goods.

Summary Judgments

The Federal Court has a procedure whereby an applicant which can show that the defence of the respondent does not provide an answer to the applicant's claim can obtain a judgment without having to proceed to a full trial. Case law has confirmed that this rule can be applied in intellectual property cases, even where the issues raised are potentially complex ones. The procedure can be applied in relation to part only of the applicant's claim, if the judgment would have the effect of resolving the controversies between the parties.

Anton Piller Orders

An "Anton Piller" order is a particularly potent option in that it not only prevents a respondent from destroying evidence, but it assists in tracking the source from which the infringement arises. This order is made without notice to the infringer and allows the applicant's solicitors to search for and remove any infringing goods or means of producing them, together with any other evidence of infringement such as invoices, orders, correspondence and receipts. A respondent can also be ordered to disclose names and addresses of suppliers and answer questions on oath and give details as to the destination of goods sold.

In order to obtain an "Anton Pillar" order, the applicant must show:

- a strong prima facie case;
- that loss or damage, actual or potential, will be very serious; and
- that the infringer has incriminating documents or things and is likely to destroy that evidence

In most cases, an independent solicitor must be present at the execution of the orders.

Costs and Settlement

The costs of bringing an infringement action to an interlocutory or final hearing can be high. Costs include court fees, legal fees, costs of expert witnesses and costs of any independent legal solicitors. Costs may be awarded to a successful party, along with damages or an account of profits, but will usually only amount to approximately two thirds of the actual costs of litigation.

Urgent applications for an interlocutory hearing may be brought within two weeks. It may take one or two years to reach a final hearing, although this period is likely to be reduced if an interlocutory injunction is in place.

Where settlement is reached prior to a final determination (as is usually the case), the infringer can be required to submit to orders or give undertakings to the Court. Serious consequences would flow from subsequent infringing activities, as a breach of the undertakings would constitute contempt of court punishable by imprisonment or sequestration.

Revocation Proceedings

Application can be made to revoke a patent, design or trade mark. Such applications can be made by counter claim in infringement proceedings.

Customs Power/Border Seizure

Both copyright and trade mark legislation provide for intellectual property owners to object to the importation into Australia of infringing goods. This is done by way of written notice to Customs. The intellectual property owner therefore has a chance to have counterfeit goods seized before they are distributed.

However, the *Copyright Act* has a severely restricted application in preventing "grey" or "parallel" imports - genuine goods not intended for the Australian market. It is no longer possible to prevent parallel imports manufactured overseas by relying on the copyright in works found on packaging or labelling where the originating country is a member of the World Trade Organisation or a party to the Berne Convention. Parallel importation of legitimate sound recordings is also permitted, regardless of whether the sound recordings are accompanied by other copyright material. Parallel imports of software (including computer games) have since April 2003 been lawful.

Other Causes of Action

Other rights are enforced by.

- the common law action of "passing off" - where one party takes advantage of the goodwill or reputation built up by another, by misrepresenting that some relationship exists between the parties or their respective goods or services; and
- use of the Trade Practices Act, which prohibits corporations from engaging in misleading and deceptive conduct in the course of trade or commerce. Fair Trading legislation in most States prohibits individuals (including individuals trading under a business name) from engaging in misleading and deceptive conduct in the course of trade or commerce.

Intellectual property owners can also gain remedies for infringement by criminal proceedings.

8. RESTRICTIVE TRADE PRACTICES AND CONSUMER PROTECTION LAWS

General

Both the Australian and the State Governments have enacted legislation for the purpose of regulating certain restrictive trade practices and for protecting consumers from unfair commercial practices in their dealings with traders and lenders, including all online commercial activity.

The legislation is complex and wide-ranging. An overseas company proposing to manufacture or distribute goods or to enter into transactions with consumers in Australia should first seek specific advice as to how this legislative regime may affect its operations.

Restrictive Trade Practices

The main statute dealing with anti-trust or restrictive trade practices is the Federal *Trade Practices Act* 1974. Part IV of this Act prohibits or controls certain restrictive trade practices which can be divided into two categories. One category consists of practices that are prohibited regardless of their impact on competition. These practices include:

- resale price maintenance;
- third-line forcing (a type of exclusive dealing);
- collective boycotts;
- price fixing arrangements; and
- misuse of market power.

The second category consists of practices that are only prohibited if they have the purpose or likely effect of substantially lessening competition. These practices include:

- exclusive dealing arrangements (other than third line forcing);
- other anti-competitive contracts, arrangements and understandings;
- secondary boycotts; and
- acquisitions of shares in a corporation or of assets of a corporation or person (or interests in those shares or assets).

Foreign corporations should be aware that the *Trade Practices Act* may extend to offshore mergers of foreign corporations having subsidiaries in Australia if those mergers have anti-competitive effects within Australia. If the Australian Competition and Consumer Commission ("ACCC") is not satisfied that such a merger will have a public benefit in Australia, the Australian subsidiary could be required to cease operations in the relevant market or risk the imposition of a divestiture order.

Reform

The *Dawson Committee* proposed a number of changes to Part IV of the Trade Practices Act in the report it submitted to Government in January 2003. The Government responded with the *Trade Practices Legislation Amendment Bill 2004*, which was put before the Senate in August 2004. The proposed changes include an increase in the maximum penalties for breach (to the greater of $10 million or three times the benefit the company receives or, if that amount cannot be calculated, 10% of group Australian turnover), a new power for courts to prohibit an individual managing a company, and the power to prevent a company indemnifying individuals in respect of any penalties imposed on them. Third line forcing would no longer be automatically illegal but would be subject to a competition test and a joint venture defence to price fixing and the collective boycott prohibition would be introduced. The Bill also introduces a notification process for collective bargaining for transactions of up to $3 million and a formal voluntary merger clearance process. The Bill has not yet been passed, and its fate may be uncertain if there is a change in Government as a result of the 2004 federal election.

Access Regimes

Part IIIA of the *Trade Practices Act* provides a regime for certain services to be "declared" by the National Competition Council and for the terms of access by third parties to these declared services or so called "essential facilities" to be on arbitrated terms, where the owner of the facility has neither provided an acceptable access undertaking nor agreed access terms with the third party in question. The factors that must be established before any service is declared are detailed, and include the importance of the facility or service to competition in upstream or downstream markets and a national significance test. There is a separate telecommunications access regime set out in Part XIC of the Act. This complements the regime for regulating anti-competitive conduct in the telecommunications industry which is set out in

Part XIB of the Act. Part XIB gives the ACCC additional powers to require the filing of tariffs by carriers, to impose record keeping requirements and to give a "competition notice" stating that certain conduct by a carrier contravenes the Act.

Enforcement of Restrictive Trade Practices Laws

The *Trade Practices Act*, including Part IV, is administered and enforced by the ACCC although compliance with most sections can also be enforced by private action. The ACCC has become increasingly vigilant (and successful) in enforcing restrictive trade practices. A breach of the restrictive trade practices provisions is not a criminal offence but may lead to penalties of up to A$10 million for a corporation per breach. Individuals who are involved in breaching Part IV, such as directors, officers and employees may also be liable for penalties of up to A$500,000 per breach. Private actions can be brought seeking damages, compensation, injunctions and other remedial orders. The ACCC is actively seeking to have criminal sanctions (including imprisonment for individuals) introduced for cartel activities.

The ACCC can in certain cases issue an authorisation in relation to a proposed activity which would otherwise breach the statute, provided the benefit to the public outweighs the anti-competitive detriment. In addition, exclusive dealing conduct (including third line forcing) may be protected from ACCC challenge through a notification process.

Consumer Protection Laws

There is a wide range of Federal, State and Territory laws aimed at prohibiting unfair commercial practices and protecting both consumers and businesses from unconscionable conduct in their dealings with traders and lenders.

Trade Practices Act

The most significant consumer protection laws are found in Parts IVA, V, VA, VB and VC of the *Federal Trade Practices Act*. Practices prohibited under the Act include:

- misleading and deceptive conduct in trade or commerce;
- making false representations in connection with the supply of goods, services, land or employment;
- false representations about the country of origin of goods;
- bait advertising;

- referral selling and pyramid selling;
- unconscionable conduct in consumer transactions, and in business transactions for the supply or acquisition of goods or services of a value of A$3 million or less;
- sending unsolicited credit cards and sending invoices in respect of unsolicited goods, services or directory entries; and
- price exploitation in relation to GST.

Part V of the *Trade Practices Act* implies statutory conditions and warranties into certain contracts for the supply of goods or services to a "consumer". These include a warranty as to title, a condition that the goods comply with the description under which they are sold, and a condition of fitness for purpose where the purpose is made known. Similar warranties and conditions are implied into contracts for the supply of services.

For the purpose of the legislation, a person acquires goods or services as a "consumer" if the price does not exceed A$40,000 or, if the goods or services are of a kind ordinarily acquired for personal, domestic or household use or consumption. To qualify, goods must not be acquired for the purpose of resupply or use in manufacture.

The Act also makes provision for regulating product safety and product information including a number of mandatory product standards. These include mandatory standards for children toys, vehicle jacks, bicycle helmets, cosmetic labelling and tobacco labelling.

Part VA of the *Trade Practices Act* provides for strict liability for loss or damage arising from defective products. A product is defined as defective if its safety is not such as persons generally are entitled to expect. This statutory liability applies to all manufacturers as well as many importers and distributors of goods supplied in Australia, and cannot be excluded.

Enforcement of Consumer Protection Provisions under the Trade Practices Act

The ACCC administers and enforces the consumer protection provisions under the *Trade Practices Act*. Only the ACCC can take legal action seeking monetary penalties and a range of other remedies (such as orders for adverse publicity, probation, community service, corrective advertising and information disclosure), but private

parties can bring actions seeking damages, injunctions, and other remedial orders. Part VC of the Act provides that certain practices (such as making false representations), constitute criminal offences and monetary penalties may be imposed of up to A$1.1 million for a corporation and up to A$220,000 for an individual for each breach.

State and Territory Laws

All the States and Territories have consumer protection legislation. Some of these laws are identical to parts of the Federal laws described above but apply to a wider range of traders. In addition, there are many other State and Territory consumer protection statutes dealing with such things as the provision, regulation and enforcement of consumer credit, home finance contracts, the creation and enforcement of chattel security interests and chattel leases, fair trade legislation, door to door sales, unordered goods and services, false advertising and pyramid selling. Each State and Territory has also established tribunals or small claims agencies to resolve disputes in connection with certain consumer transactions where the amount in dispute is less than a prescribed amount.

Each State and Territory's consumer protection laws are administered and enforced by its Department of Consumer Affairs which takes an active role in the protection of the rights of consumers within the State or Territory. These Departments investigate violations and can bring proceedings to impose penalties or to vindicate the consumer's rights. Private proceedings can also be brought to enforce rights and obligations arising from these laws.

Packaging and Labelling

There is legislation regulating the packaging, labelling, ingredients, marketing and sale of certain products and general weights and measures regulations of which overseas suppliers need to be aware. The importation and sale of products that are packaged and labelled overseas will often not be legally acceptable in Australia without modification.

Vienna Sales Convention

Australia is a party to the Vienna Sales Convention which applies to govern many international sales of goods in which Australian parties are involved. Where the Convention applies, it will prevail over any Australian legislation (including that outlined above), which concerns the rights and obligations of the parties under the contract, subject to contrary agreement by the parties.

9. LABOUR LAWS

General

As Australia is a confederation (similar to Canada and the United States), each state of Australia has its own industrial relations legislation. In addition, certain employees and all employees employed in a Territory and the State of Victoria have access to the Federal industrial relations system contained in the *Workplace Relations Act 1996*.

Terms and Conditions of Employment

The law relating to the employment relationship and terms and conditions of work performed by employees in Australia is derived from a number of sources including:

- written or oral employment agreements (which include not only express terms agreed between the parties, but also a number of duties and obligations which are implied into the employment relationship by the Courts);
- the specific terms of the relevant contract of employment;
- Australian Workplace Agreements;
- Federal awards, State awards, or authorised collective agreements (referred to as Certified or Enterprise Agreements); and
- State and Federal legislation governing employment terms and working conditions, including legislation regulating annual leave and long service leave entitlements.

It is important when discussing Australian employment law to distinguish between two categories of employees, Award employees and Non-Award employees.

Award Employees

The first category consists of those employees who are covered by industrial awards, AWAs and collective workplace agreements which are approved, registered or certified by particular Federal and/or State industrial commissions. In most cases these awards and agreements set out minimum standards which must be complied with by an employer.

Non-award employees

The second category of employees are those whose relationship with the employer are primarily covered by private agreement. These employees are usually engaged in professional or senior managerial work and are on higher salaries. Private employment agreements may be in writing or oral. Alternatively, the employment agreement may be implied by the Common Law. There are no formal requirements which need to be satisfied for an employment agreement to be enforceable, and a letter of offer which is accepted by an employee will be sufficient.

Awards and Industrial Instruments

Generally speaking, an employer and employee cannot "contract out" of the terms and conditions of employment contained in an award or agreement. Failure to comply with these awards and agreements may lead to prosecution. An employer can however, give the employee more generous entitlements than those set out in the award/agreement, provided that the minimum entitlements are satisfied. Industrial relations legislation in most States, and the awards themselves, require their prominent display at the workplace.

Awards

An award is a binding order made by an industrial tribunal containing the terms and conditions of employment of certain employees. Awards regulate a large percentage of the work force in Australia. Awards may be state based awards or arise from the Federal jurisdiction. Whilst the award provisions cannot be excluded by contract, employees whose employment is governed by awards may receive additional benefits from their employment contract. Management positions are not normally covered by awards.

Federal awards

Federal awards are made by the Australian Industrial Relations Commission ("the Federal Commission"). They bind employers named as respondents to the Federal award. Employers can be respondents by either being named specifically or by being members of an employer organisation which is a party to the award. However, employers who are successors, assignees or transmittees of the business or part of the business of an employer who is named as a party to an award may also be bound.

The *Workplace Relations Act 1996* details 20 minimum conditions allowable in a Federal award. Allowable award matters cover things like rates of pay, ordinary hours of work and overtime, leave entitlements, allowances, redundancy pay, notice of

termination and dispute settling procedures. Provisions in Federal awards that are not "allowable award matters" ceased to have effect from 1 July 1998. All other conditions of employment are subject to agreement between the employee and employer. Since June 1998 matters contained in Federal awards which are not one of the 20 allowable matters are not enforceable.

The State of Victoria abolished their state award system in 1993. Employees may be covered by Victoria specific Federal awards, or must bargain directly with the employer over their individual terms and conditions, subject to various minimum conditions contained in the Federal legislation.

State awards

State awards are generally "common rule" awards. This means that they are binding on all employers and employees engaged in industries or occupations covered by the award.

New South Wales awards have broader application and generally apply to the employment of all persons performing the type of work regulated by the award. The scope of awards in New South Wales is not limited to allowable award matters. Rather, the award can deal with conditions of employment generally.

Collective Agreements

Collective agreements are agreements between an employer and employees about the terms and conditions of employment. When approved, collective agreements prevail over the conditions of employment in any applicable award. Collective agreements may be made with employees directly, or with a Union representing employees. In the Federal system, the agreement must be approved by a majority of the employees to be covered who cast a valid vote. In the New South Wales system, collective agreements made with a Union do not need to be approved by employees, but agreements made directly with employees must be approved by 65% of the employees to be covered.

In order to approve a collective agreement, the relevant labour tribunal must be satisfied of certain matters including that the agreement does not, on balance, disadvantage employees when compared with the terms and conditions of employment under a relevant award.

Certified Agreements

Certified Agreements are agreements between an employer and the workforce at a particular site. Certified Agreements can be negotiated with a trade union or with employees directly. Certified Agreements must be approved by the Federal Commission. The Federal Commission must be satisfied that the proposed Certified Agreement is no less favourable to the employees concerned than the relevant award applicable to the employees. Where there is no award coverage, the Federal Commission will designate an appropriate award as a benchmark for comparative purposes.

Australian Workplace Agreements (AWAs)

AWAs are agreements that are made directly between employers and employees. Most corporations can enter into an AWA with individual employees. These agreements override the terms and conditions of employment contained in a Federal or State award. In order to be approved an AWA must satisfy the "no-disadvantage" test. This is a global test applied by the Employment Advocate, and which requires that the employees must suffer no overall disadvantage. An AWA will not pass the no-disadvantage test if it would result in a reduction in the overall terms and conditions of employment. Trade unions do not have a right to be involved in negotiations of AWAs unless they are authorised by an employee or a group of employees.

Employment Advocate

The *Workplace Relations Act 1996* established the office of the Employment Advocate. The Employment Advocate is appointed to advise employees and employers about the operation of the legislation, to approve AWAs by applying the no-disadvantage test, to investigate complaints by employees and to assist in enforcement of minimum conditions.

Unions and Disputes

Unions

Approximately 20-25% of the workforce in Australia is unionised. Unions generally cover employees with common job classifications across an industry.

Settlement of Disputes

If there is an industrial dispute which includes a claim for increased wages, and the employer or employer representative association and the relevant union are unable to reach agreement between themselves, then either party may refer the matter to the appropriate industrial tribunal. If the conciliation process between the opposing parties fails, the matter may ultimately be resolved by arbitration before the industrial tribunal. In most cases this will finally determine rights between the employer and employees represented by the union.

One of the most important functions of the relevant State or Federal Industrial Relations Commission as part of the settlement of disputes is the regular hearing and determination of wage increases for employees.

Prevention of Industrial Action

Under the *Workplace Relations Act* 1996, powers are conferred on the Federal Commission and the Federal Court of Australia to make orders that unions cease industrial action against an employer. The process of obtaining such orders is quite detailed and is likely to be employed only in major or significant industrial disputes.

Express or Implied Terms of Employment

Remuneration

An employee's remuneration is traditionally a monetary salary. More senior employee, however, are commonly provided with a "package", with a number of other benefits in addition to monetary salary. Since the introduction of fringe benefits tax (as to which see Section 5 above), the cost to employers of providing employees with such a "package" has dramatically increased and many fringe benefits have become less common.

Restraints of Trade

An employer and employee may, by agreement, bind the employee to a post-employment restraint of trade. These restraints will only be enforceable if the employer can establish that the restraint is reasonable to protect its legitimate business interests and is in the public interest. The principles of law in this area are complex and differences exist between the laws of the various States.

Confidentiality

Australian law relating to trade secrets and confidential information generally is discussed in Section 7 above.

Termination

At Common Law an employer can only unilaterally terminate the employment relationship by giving the employee a period of notice of termination. The only exception to this is where the employee is guilty of gross or serious misconduct (which includes fraud or gross negligence).

In respect of non-award employees, it is usual to specify the required period of notice in an employment agreement. The length of notice usually varies depending on the status of the employee.

In circumstances where no period of notice has been agreed upon, the Common Law will imply an obligation that the employer provide a "reasonable" period of notice. What constitutes reasonable notice is not readily ascertainable and requires an examination of the circumstances surrounding each particular termination. Although the Courts have not adopted any particular formula to determine the reasonableness of a notice period, they commonly have regard to various factors, including the following:

- the employee's position within the organisation;
- the length of service of the employee;
- the qualifications required for the position held by the employee and the qualifications actually held by the employee;
- the employee's salary;
- the normal retiring age for an employee holding the position in question; and
- the length of time that is likely to elapse before the employee obtains equivalent or other suitable employment and their likely remuneration.

An employer may, with the employee's agreement, make a payment to the employee equivalent to the remuneration due during the notice period and terminate the relationship immediately. Such a payment is referred to as a "payment in lieu of notice".

As regards award employees, the applicable award or collective agreement will set out a specific notice period. However, this is a minimum only and the period may be increased by agreement between the parties.

In respect of both award and non-award employees, the *Workplace Relations Act 1996* (Cth) prescribes minimum notice requirements for employees. These requirements are set out under section 170CM(2) of the Act and are as follows:

Period of Service	Period of notice or payment in lieu thereof
(a) Less than 1 year	At least 1 week
(b) More than 1 year but less than 3 years	At least 2 weeks
(c) More than 3 years but less than 5 years	At least 3 weeks
(d) More than 5 years	At least 4 weeks

The minimum periods of notice set out above are increased by 1 week in cases where the employee has been in continuous employment for over 2 years and is over 45 years of age.

Provided that the period of notice specified in an employment agreement exceeds the above minimum, as well as the notice period set out in any applicable award, then the contractual notice period is enforceable. There is, however, a possibility that the notice period will be challenged as being unfair in the relevant unfair contract jurisdiction which exits in the states of Queensland and New South Wales discussed below.

Redundancy

Some employees are entitled to additional severance payments where their employment is terminated because their position within the employer's organisation disappears through no fault of their own. This is referred to as a "redundancy". Under Australian law an employee's position is considered to be redundant if:

- an employer has made a definite decision that the employer no longer wishes the job the employee has been doing to be done by anyone;
- the decision is not due to the ordinary turnover of labour;
- the decision leads to the termination of the employee's employment; and
- the termination of the employee is not on account of any personal act or default on the part of the employee.

Where a termination occurs in these circumstances, most State and Federal awards provide for additional termination payments, known as "redundancy payments", which are calculated according to the employee's length of service. Some awards also provide for lengthier periods of notice in the event of redundancy. Usually, awards also contain consultation requirements with the relevant unions and may provide that no redundancy payment is required if the employer finds its employees adequate alternative employment.

In the State of New South Wales, the *Employment Protection Act 1982* and the *Employment Protection Regulation 2001* confer minimum redundancy entitlements upon those State award employees whose applicable award does not make provision for redundancy payments.

Non-award employees are not entitled to redundancy payments unless these entitlements are set out in their employment agreements. However, in many industries, it is common for employers to make redundancy payments to non-award employees. If such employees are not granted similar entitlements to award employees within a company or within an industry, the termination of their employment or the employment contract itself may be challenged under the unfair contract provisions discussed below. In all cases, it should be noted that redundancy payments are separate and additional to the employer's obligation to provide "notice" of termination or a payment in lieu thereof.

Procedural Fairness and Unfair Dismissals

At Common Law, an employer can terminate the services of an employee without giving reasons provided that the appropriate period of notice is given in accordance with the applicable contract. However, this position has been altered by Federal and State industrial relations legislation which establishes certain minimum procedural standards which an employer must follow prior to terminating the services of an employee.

The primary legislative requirement is that an employer may not terminate the services of an employee in circumstances where the termination is harsh, unjust or unreasonable. In determining this question, the relevant industrial authority will consider (among other matters):

- whether or not a reason was provided by the employer for the termination, and whether or not the employee was provided with an opportunity to respond to this reason;

- whether or not there was a valid reason for the termination connected with the employee's capacity or conduct, or based on the operational requirements of the employer; and
- whether or not warnings of unsatisfactory performance were provided to the employee prior to the termination.

Generally speaking, these aspects of the State and Federal legislation require employers to do the following, prior to terminating a person's employment:

- provide employees with specific details of any concerns with their conduct or performance and give them an opportunity to respond to the same;
- provide employees with sufficient warning that if their conduct or performance does not improve, their employment may be terminated;
- where appropriate, counsel or train employees as to how their conduct or performance can be improved; OR
- provide employees with a final opportunity to respond before terminating their services.

If the termination arises as a result of a redundancy, the employer must still treat the employee in a procedurally fair manner, which usually involves:

a) selecting the employee for redundancy in a fair and objective manner based on the operational requirements of the business;
b) consulting with the employee as early as possible after the decision to make their position redundant;
c) considering and, if possible, offering the employee re-deployment elsewhere within the organisation;
d) permitting the employee to work out a reasonable period of notice and to seek alternative employment whilst still employed;
e) assisting the employee with outplacement; and
f) fairly compensating the employee for the loss of his or her employment by making a redundancy payment.

Where the relevant industrial authority finds that a termination was unfair, it can order re-instatement of the employee. It also has the power to order the payment of compensation of up to 6 months' remuneration.

It is important to note that the unfair dismissal jurisdiction described above is not open to non-award employees in New South Wales whose annual remuneration exceeds $85,400 per annum (indexed annually). Similar monetary thresholds exist in respect of the unfair dismissal jurisdiction in all other States. Although, in New South Wales and Queensland, employees may still be able to commence an unfair contract claim as discussed further below, making it important not to treat these employees differently.

Unlawful Termination

State and Federal industrial relations legislation also specifically precludes termination of employment (including redundancies) for various reasons, including:

- temporary absence from work because of illness or injury;
- union membership;
- race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin; and
- absence from work during maternity or parental leave.

It is unlawful to terminate a person's employment for any of the reasons set out above, regardless of the employee's level of remuneration.

Unfair Contracts

Under section 106 of the *Industrial Relations Act* 1996 (NSW), the Industrial Commission of New South Wales ("NSW Commission") has the power to amend or vary contracts and arrangements whereby a person performs work in an industry in New South Wales. The NSW Commission will only exercise this power if that contract or arrangement is harsh, unfair, or unconscionable. In this regard, a contract or arrangement may be unfair at the time it was entered into, or can subsequently become unfair because of the conduct of the parties. If the NSW Commission varies a contract or arrangement, it may also award unlimited compensation. All award and non-award employees may make an application for a remedy under the unfair contract provisions, so long as their employment contract relates to performance of work "in or of" New South Wales. While Queensland has similar legislation, it is rarely used and is of limited application. Other States do not have similar provisions.

The unfair contract provisions have been used in situations where employers have misrepresented employment benefits, or where the notice period in the employment contract is too short given the nature of the employment, or where the employer has sought to alter the employee's position or duties without their consent. It is important to note that from 24 June 2002, employees whose total remuneration (including both cash and non cash benefits) exceeds AUD$200,000 per annum are unable to commence an unfair contract claim under section 106.

Relevant Statutory Entitlements

Annual Leave and Long Service Leave

All States have legislation regulating the long service leave and annual leave entitlements of employees. For award Employees, the annual leave and long service leave provisions in the applicable award will prevail over the relevant State legislative or award provisions to the extent of any inconsistency.

All employees in Australia are entitled to 4 weeks' annual holiday on ordinary pay at the end of each year of employment. This entitlement cannot be excluded by contract, nor can payment be made to the employee in lieu of annual leave during their employment. Annual leave accumulates from year to year if not taken by the employee and accrues on a pro-rata basis in most cases.

Some awards provide for a 17.5% leave loading to be paid during annual leave in addition to the annual leave entitlement. The Victorian State Government has abolished annual leave loading for all employees in that State. The Australian Industrial Relations Commission may re-instate this loading in future in respect of any Victorian employees who become subject to a Federal award. Non-award employees will not usually have this entitlement.

In addition to annual leave, legislation in each State entitles all employees to a period of long service leave at ordinary pay, upon completion of a defined period of continuous service with an employer. The entitlement to long service leave generally continues to accrue to an employee with a new employer upon the sale or transmission of a business as if their service was unbroken.

As an example, in New South Wales an employee is entitled to 2 months' long service leave where the employee has completed at least 10 years' service. In respect of each 5 years' service thereafter, an entitlement to an additional 1 month's long service leave

arises. If the employee's service is terminated between 5 years and 10 years for reasons other than misconduct, the employee is usually entitled to payment in respect of pro-rata long service leave.

Public holidays

Employees are also entitled to be absent from work, without loss of pay, on those days during the year which are declared public holidays and gazetted by the Government as such. Although this entitlement is not set out in the legislation, it will usually be implied by the Common Law into contracts of employment. The standard public holidays in Australia are as follows:

New Years Day
Australia Day
Good Friday
Easter Saturday
Easter Sunday
Easter Monday
Anzac Day
Labour Day
Christmas Day
Boxing Day

Some States may have one or two other public holidays. In addition, public holidays may be applicable only to defined areas, such as Melbourne city on Melbourne Cup Day.

The Government Gazette will specify the particular dates upon which public holidays fall in a given year. Any applicable award may also provide for additional public holidays (such as Union picnic day).

Parental Leave

The *Workplace Relations Act 1996* and legislation in each state provides for a legislative right for female and male employees (whether covered by award or not), who have been employed with an employer for a continuous period of at least 12 months, to be entitled to unpaid maternity leave of up to 52 weeks duration. The employee is entitled to return to their position following the period of the leave, or an equivalent position if their original position has ceased to exist.

Sick Leave

Most awards contain sick leave provisions and sick leave is guaranteed in certain States. Sick leave will usually accrue from year to year if untaken, but it is rarely required to be paid out on termination. Sick leave is also generally provided by employees to non-award employees as a matter of contract.

Family or Carer's Leave

Many Federal and State awards contain provisions which allow employees to use part of their sick leave entitlement to care for other family members.

Workers Compensation

In all States, there is legislation that requires an employer to maintain insurance for the benefit of workers injured during the course of their employment.

Other State Laws

The States have passed a considerable body of legislation related to industrial safety and working conditions. Some Federal awards also contain provisions about these matters. They have also passed legislation establishing arbitration commissions and wages boards with the object of avoiding or resolving industrial conflicts and unrest.

Minimum Wages

Employers in Australia are required to pay minimum award wages to all adult award employees as periodically determined by the Federal Commission or State industrial tribunals. The minimum wage varies from award to award, and most awards will contain different minimum rates for different job classifications covered by the relevant award.

Hours of Work

While the standard working week in Australia is 40 hours, many awards now prescribe 38 hours or less. Typically, awards provide that standard hours must not exceed 8 hours in any consecutive 24 hour period.

Overtime Rates

Overtime rates are usually payable under awards and enterprise agreements for all time worked in excess of the standard hours for the week, and hours worked in excess of the standard hours for a day. Employer groups are attempting to have these so-called "penalty" rates phased out in favour of increased base rates.

Anti-Discrimination Legislation

At the present time there are at least eleven different Acts of parliament throughout Australia, at both the Federal and State levels, which deal with anti-discrimination. They set out various prohibitions on discrimination, possible defences and the various penalties and remedies which may apply. Most anti-discrimination legislation also establish relevant boards or tribunals to investigate, conciliate and/or determine complaints of discrimination.

Many discrimination laws have direct and indirect application to the employment relationship and in respect of termination of employment.

The following is a summary of the relevant Federal and New South Wales legislation that must be taken into account when considering the employment relationship:

Human Rights and Equal Opportunity Commission Act 1986 (Cth)

This legislation deals with discrimination on the basis of race, colour, sex, religion, political opinion, national extraction, social origin, age, medical record, criminal record, impairment, marital status, mental, intellectual or psychiatric disability, nationality, physical disability, sexual preference and trade union activity.

Racial Discrimination Act 1975 (Cth)

This legislation prohibits discrimination on the basis of race, colour, descent, national or ethnic origin and immigration.

The Sex Discrimination Act 1984 (Cth)

This Act prohibits discrimination on the basis of sex, sexual characteristics, marital status, family responsibility and pregnancy. It also has provisions dealing with sexual harassment.

Disability Discrimination Act 1992 (Cth)

This Act prohibits discrimination on the basis of physical, intellectual, psychiatric, sensory, neurological or learning disabilities.

Anti-Discrimination Act 1977 (NSW)

This Act prohibits discrimination on the grounds of race (including colour, nationality and ethnic or national origin), sex, marital status, pregnancy, responsibility as a carer, physical and intellectual impairment, homosexuality, transgender status, HIV/AIDS status, sexual harassment, racial vilification, homosexual vilification, transgender vilification, HIV/AIDS vilification, compulsory retirement and age.

Employer's Liability

Under both State and Federal anti-discrimination legislation, an unlawful act which is committed by an employee is deemed also to have been done by the employer, unless certain defences can be established. Under Federal anti-discrimination legislation, to avoid liability, an employer must show that it took "all reasonable steps" to prevent its employees from performing the discriminatory act.

Under New South Wales legislation, the only defence is that the employer did not authorise the employee to do the unlawful act. An employer will be taken to have authorised the unlawful act if the employer was aware of the act and failed to take effective action in the face of such knowledge. A corporate employer will be held to have knowledge of the act if it is brought to the attention of its management, whether by way of formal complaint or otherwise.

If a complaint is made to an employer or its management and the employer fails to take steps to prevent the conduct (such as speaking to the person(s) concerned, or educating staff as to their obligations with regard to appropriate workplace behaviour), then the employer is likely to be held liable for the discriminatory conduct.

Both the State and Federal anti-discrimination legislation places a duty on the employer to take positive steps to protect its employees from discrimination and harassment. At the very least this means preparing, distributing and properly administering an anti-discrimination and anti-sexual harassment policy which provides employees with an avenue to lodge a complaint and a procedure for the investigation of the complaint.

Superannuation

Background

Under the Superannuation Guarantee Scheme (established under the *Superannuation Guarantee Act* and the *Superannuation Guarantee (Administration) Act*, all employers are required to make minimum levels of contributions on behalf of each of their employees (currently 9% of each employee's wages or salary).

The Australian Government also provides an old age or invalidity pension to Australian residents who meet strict income and assets tests. The government pension is therefore generally only available to low income earners.

Superannuation Guarantee Charge

The Australian Government introduced a compulsory system of employer superannuation known as the superannuation guarantee charge ("SGC") on 1 July 1992. In broad terms, the SGC is only payable by those employers who fail to contribute the minimum prescribed level of superannuation support for their employees. Contributions will count towards these minimum obligations only if they are made to a superannuation fund which complies with the *Superannuation Industry (Supervision) Act 1993* and related legislation and regulations ("SIS Act").

Employers providing superannuation contributions at or about the prescribed level will not be subject to the SGC. Those contributions will generally be deductible business expenses. However, those failing to provide the prescribed level will be subject to the SGC, which is not tax deductible.

The prescribed level of employer contributions are:

Tax Year	Percentage of Salary
1999/00	7%
2000/01	8%
2001/02	8%
2002/03 and subsequently	9%

Taxation of Superannuation Funds and Benefits

Australian superannuation funds obtain concessional taxation treatment if they comply with the relevant provisions of the SIS Act and the tax Acts and associated regulations. The superannuation contributions tax for the financial year 2003/2004 is at a rate of

15% on tax deductible contributions made to a superannuation fund where the adjusted taxable income of a member is below $94,691. Where the member's adjusted taxable income is in excess of $114,981 per year, the superannuation contributions tax is 30%, as a surcharge tax rate of 15% applies. Graduated surcharge tax rates of between 1% and 15% (that is, total superannuation contributions tax rates of between 16% and 29%) apply for adjusted taxable incomes of members between $94,691 and $114,981.

Funds which fail to comply with this legislation are taxed on a non-concessional basis (47% tax rate in 2003/2004).

Employer contributions to superannuation funds are generally tax deductible, so it is in the interest of an employer to pay superannuation contributions. This applies to, however, maximum limits apply to the level of superannuation support eligible for concessional tax treatment, all employees whether they are part-time, full-time, casual or temporary employees.

Traditionally, Australian superannuation funds provide lump-sum benefits on retirement. However, more attractive treatment has recently been provided for pension benefits. Superannuation benefits paid from complying superannuation funds are generally subject to concessional taxation treatment in the hands of the employee.

Superannuation may also provide a tax-effective method of providing deferred employee remuneration. Careful structuring of executive remuneration packages may result in significant (tax and on-cost) savings to both the employer and the employee.

In addition to the legislation referred to above, some awards provide for further benefits in relation to superannuation. It is also possible for employers to agree to contribute more than the statutory minimum on behalf of employees.

Establishing a Superannuation Fund

An employer can establish and maintain its own (or group) superannuation/pension fund or contribute to an external master fund, usually operated by a financial institution or insurance company.

A superannuation fund is normally established by executing a trust deed which regulates the duties and obligations of the employer, trustee and employees. Careful attention needs to be given to ensure the fund obtains concessional tax status.

The SIS Act imposes onerous obligations on trustees and those managing superannuation funds. Employers considering the establishment of their own fund must ensure they are aware of their duties and do not breach relevant regulations, as significant civil and criminal sanctions may be imposed.

A popular alternative for smaller to medium sized employers is the use of an external master fund arrangement.

Self-Employed Persons

Certain taxation concessions are available to self-employed persons to encourage them to contribute towards their own retirement.

Occupational Health and Safety Law

At Common Law, an employer generally owes its employees a duty to take reasonable care for their safety. This general duty has been supplemented by State and Federal legislation. In New South Wales, the *Occupational Health and Safety Act 2000* and the *Occupational Health and Safety Regulation 2001* impose certain general and specific obligations upon employers. Similar legislative provisions exist in all States.

General Duties to Employees

Under section 8 of the *Occupational Health and Safety Act* 2000, all employers are obliged to ensure the health, safety and welfare at work of their employees. This means that employers must:

- ensure that premises controlled by the employer where the employees work (and the means of access to or exit from the premises) are safe and without risks to health;
- ensure that any plant or substance provided for use by the employees at work is safe and without risks to health when properly used;
- make arrangements for ensuring safety and absence of risk to health in connection with the use, handling, storage or transport of plant and substances;
- provide such information, instruction, training and supervision as may be necessary to ensure the health and safety at work of employees;

- ensure that systems of work and the working environment of employees are safe and without risk to health and that adequate facilities for their welfare at work are provided;
- take such steps as are necessary, to make available adequate information regarding the use for which the plant was designed and any conditions necessary to ensure that the plant will be safe and without risk to health; and
- take such steps as are necessary to provide information about any research or results from any testing which have been carried out in connection with substances used and any conditions necessary to ensure that substances will be safe and without risk to health when properly used.

Criminal convictions for the breach of these provisions can be recorded against employers. For employer corporations, the fines are now a maximum of $550,000 for a first offence and $825,000 for a subsequent offence. For individual employers, they are $55,000 and/or two years' imprisonment or both for a first offence and $82,500 and/or two years imprisonment or both for a subsequent offence.

The only defences in respect of the above are that either:

- it was not reasonably practicable for the employer to comply with the relevant provision; or
- the commission of the offence was due to causes over which the employer had no control and against the happening of which it was impractical for the employer to make provision.

The onus is on the employer to make out these defences.

Duties to non-employees

The *Occupational Health and Safety Act* under section 8(2) also places a duty upon employers to ensure that persons not in their employment are not exposed to risks to their health or safety while they are at the place of work. This provision would cover independent contractors or their employees, as well as visitors to the premises and in certain circumstances, trespassers.

Duties of self-employed persons

The duty to ensure the safety of all persons at a place of work extends to persons who are not employers. Pursuant to section 9 of the *Occupational Health and Safety Act*, all self-employed persons must ensure that people are not exposed to risks to their health or safety arising from the conduct of the person's undertaking while they are at the self-employed person's place of work.

Industry Codes of Practice and Australian Standards

In furthering the aims of the *Occupational Health and Safety Act*, the WorkCover Authority has also formulated certain industry Codes of Practice. These codes are not binding in law, but are admissible as evidence in proceedings alleging breach of the *Occupational Health and Safety Act*. An employer should make inquiries with the WorkCover Authority as to whether there are any applicable Codes of Practice which apply to its operations.

In addition to the Codes of Practice, there are a myriad of Australian Standards that apply to almost all work practices and industries. Whilst these are also not binding, they too are admissible as evidence in proceedings for a breach of the safety legislation. Employers should make enquiries as to which Standards may be relevant to their workplace.

Directors and Managers liabilities

Under section 26 of the *Occupational Health and Safety Act*, where a corporation contravenes the Act, each director and person concerned with management of the corporation is deemed to have contravened the same provision. The Act provides the following two defences:

- where it can be shown that the person was not in a position to influence the conduct of the corporation in relation to the contravention; or
- where it can be shown that the person, being in such a position, used all due diligence to prevent the contravention by the corporation.

As yet, it has not been determined whether liability is confined only to directors and upper management and, therefore, it is submitted that until this is settled, the word "manager" should not be so confined and could conceivably include middle and lower management, supervisors, foremen and work leaders.

To make out a defence, the onus is upon the director or "manager" to establish that they were not in a position to influence the corporation; or that they acted with all due diligence to prevent the contravention.

Under the legislation, maximum fines of $55,000 and two years' imprisonment may be made against directors and "managers" found guilty of contraventions of the Act.

"Managers" and other officers of a corporation who have responsibility for an area of work in which an accident occurs may also be prosecuted under the Act as an employee.

Obligations upon employees

The *Occupational Health and Safety Act 2000* places similar duties on employees to work safely and to ensure the safety of his or her co-workers. Under section 20 of the Act, an employee at work must take reasonable care for the health and safety of persons who are at his or her place of work. Employees are also obliged to co-operate with the employer in respect of occupational health and safety matters.

Specific obligations

Occupational Health and Safety Regulation 2001 (NSW)

The Occupational Health and Safety Regulation 2001 imposes specific duties upon employers, for example, to establish safety workgroups, to consult with employees in regard to workplace safety and to identify hazards. The Regulations must be considered with reference to the type of work being carried out at a particular workplace, although certain regulations will apply to every employer, such as those mentioned above.

The total requirements of the Regulation are too numerous to set out here. As liability under this Act is strict (that is, the onus is on the employers to establish a defence), it is necessary for employers to seek specific advice on how a particular workplace can comply with the Regulation.

10. VISA AND MIGRATION REQUIREMENTS

General

All foreigners travelling to Australia require a visa for entry. Visas available can be categorised as short stay, temporary residence or permanent residence visas. There are a variety of classes of visas to suit the particular circumstances of the visa applicant.

Each class of visa details the criteria which must be fulfilled by the applicant before the applicant can be granted that particular class of visa by the Department of Immigration, Multicultural and Indigenous Affairs (DIMIA) or the Australian Mission (Embassy, Consulate or High Commission) overseas, as the case may be. Certain types of visa applications are required to be lodged by the applicant at an Australian Mission while other types of visa application must be lodged with DIMIA in Australia.

Temporary Residence Visas

Temporary Business Visas (Short Stay)

The "Short Stay Business Visa" (subclass 456) permits entry to Australia for a period of up to 3 months for business purposes such as attending seminars, market studies, business meetings and negotiations. The visa also permits normal tourist activities. A business short stay visa prohibits employment which could be undertaken by an Australian citizen or permanent resident and formal study within Australia. The visa may be granted for single entry or multiple travel of periods up to 1 year or 5 years or the life of the applicant's passport up to 10 years. The multiple travel visa allows a maximum of 3 months stay on each entry to Australia.

The A 456 visa must be obtained from an Australian Mission prior to arrival in Australia. A letter from the applicant's company, explaining that the applicant will not undertake work within Australia which could be performed by an Australian permanent resident or citizen and has sufficient financial support to remain in Australia for the period of the visa may be required before this visa will be granted.

The "Business ETA" (electronic travel authority) is an electronic visa which is almost identical to the 456. However the ETA, which can be obtained on the spot by a travel agent, airline or over the Internet, is only available to nationals of certain countries. Only persons holding the following passports are eligible: Andorra, Austria, Belgium,

Brunei, Canada, Denmark, Finland, France, Germany, Greece, Hong Kong SAR, Iceland, Ireland, Italy, Japan, Liechtenstein, Luxembourg, Malaysia, Malta, Monaco, Netherlands, Norway, Portugal, Singapore, South Korea, Spain, Sweden, Switzerland, UK, USA and Vatican City.

Visitor Visas

Visitor visas are by far the most common visas issued to persons wishing to travel to Australia. A visitor visa may be granted for up to 3 months for the purpose of tourism and sightseeing, and visiting friends and relatives. Employment and formal study are prohibited.

A visitor visa can be obtained from an Australian mission prior to arrival in Australia or within Australia (by persons changing their status from another class of visa). Sponsorship by a friend or relative in Australia can sometimes be provided in support of an application.

The Visitor ETA (electronic travel authority) is an electronic version of this visa that is available to the same passport holders as the Business ETA.

Temporary Business Visas (Long Stay)

These visas are usually available to facilitate the entry into Australia of overseas personnel with skills not readily available in the local labour force. A sub-class 457 visa can be granted for a period of up to 4 years. In most cases, an applicant can re-apply for another 4 year Sub-class 457 visa at the expiration of his current visa.

Long Stay Business Visa

The "Long Stay Business Visa" (subclass 457) is available to facilitate the entry into Australia of overseas personnel with skills not readily available in the local labour force. The 457) can be granted for a period of up to 4 years. In most cases, an applicant can re-apply for another 4 year 457 visa at the expiration of his/her current visa.

The visa application process is a three stage process as follows:

1. Firstly the applicant's employer must apply for approval from DIMIA to sponsor expatriate staff. Both Australian and foreign businesses are permitted to sponsor expatriate staff.

In assessing whether the business is a suitable sponsor, DIMIA will consider a number of factors including whether the business is lawfully operating, whether it is able to pay the salaries of sponsored staff and whether the business provides employment, training and professional development opportunities to local staff.

2. Secondly, the position for which the employee has been nominated must meet both a minimum salary and minimum skills threshold. That is:

   (i) the applicant's salary must be equivalent or greater than AUD$37,820; and

   (ii) the position must fall within one of the following four groups of occupations:

   - Managers and Administrators;
   - Professionals;
   - Associate Professionals; or
   - Tradepersons & Related Workers.

3. Thirdly the visa applicant is assessed as being suitably skilled and qualified for the position and must meet character and health requirements.

Student Visas

Student visas are available to overseas applicants wishing to enter Australia for the purpose of engaging in approved study. The holder of a student visa is usually permitted to engage in part-time employment of up to 20 hours per week, in addition to approved study.

Occupational Trainee Visas

Occupational trainee visas permit foreign nationals to undergo work place based training (relevant to their qualifications and experience) at an Australian company. The purpose of the training is to enhance the applicant's skills and therefore the type of training undertaken should be relevant to the applicant's educational and/or employment background. Occupational trainee visas can be granted for up to 2 years and both full and part time work can be undertaken.

Before an application for an occupational trainee visa will be granted, the relevant Australian company must be approved as a suitable nominator by providing a detailed outline of the training and supervision to be provided. The company's current training

and employment record is assessed and it is essential that the employment opportunities for local staff are not adversely affected by granting of such a visa.

The applicant is also be required to undertake certain health and character checks.

Permanent Residence Visas

This section examines the requirements in relation to economic migration visas only. Family migration visas are also available. The Government has the power to determine the number of visas of a particular class which will be granted each year, and when this number is filled, no more visas of that class will be granted.

Applicants for economic migration visas must usually fall within one of the following categories:

Employer Nomination Scheme

The Employer Nomination Scheme is designed to facilitate permanent entry into Australia of highly skilled personnel to fill executive or specialist positions that are difficult to source from the local labour market.

The position for which the applicant is required must be assessed by DIMIA as being highly skilled. In addition, the nominating company may be required to undertake labour market testing to demonstrate that there are no suitable Australian citizens or permanent residents to fill the nominated position.

The nominating company is required to demonstrate that it is lawfully operating and provides training and professional development opportunities to local staff. In addition, The nominating company must offer the applicant a permanent position or a contract of at least 3 years duration (which does not exclude the possibility of renewal).

The applicant must demonstrate he/she has at least 3 years post qualification work experience or at least 8 years experience in their nominated position. The applicant must also have vocational level English language ability for the position nominated and be under 45 years of age, except in exceptional circumstances.

The applicant is also required to undertake various health and character checks and must provide evidence of his/her employment experience and educational qualifications.

Skilled Independent Migration

This category is designed to select young, skilled applicants from a wide range of employment backgrounds. Applicants within this category are required to undertake a points test, whereby their qualifications, work experience, age and English language ability are assessed. The pass mark for Skilled Independent Migration may vary in response to changes in the economy and government policy. The pass mark is currently quite high at 120 points.

Only applicants whose occupation is listed on the Skilled Occupations List are eligible to apply. If this is the case, then applicants must apply to the relevant Australian professional authority to assess whether they meet the Australian standards (in terms of experience and qualifications) for that occupation.

Once again, the applicant must undergo health and character checks.

Business Skills Entry

The "Business Skills Entry" scheme is designed to encourage applicants who can demonstrate a successful business or investment background to migrate to Australia.

The scheme comprises 5 classes of visa: These are

- Business Talent;
- Business Owner Visa;
- Senior Executive Visa;
- Established Business in Australia; and
- Investment Linked Visa.

Due to recent changes to the law, all successful applicants will initially obtain a 2 year temporary residence visa. At the end of this 2 year period applicants will be able to apply for permanent residence if they have fulfilled their obligations in terms of undertaking their proposed business or investment activities. The only exception is Business Talent applicants who obtain permanent residence immediately.

The key requirements for all classes of visa are as follows:

- The applicant must intend to reside permanently in Australia;
- The applicant must have realistic plans to establish, or to participate in the management of a business in Australia, which will benefit the Australian

economy. In some cases, the applicant can obtain sponsorship from the relevant state government if the proposed business will be of significant benefit to the local economy. This requirement does not apply to the Investment Linked class;

- The applicant must also satisfy criteria in relation to their business background, business and personal assets, age and English language ability. Detailed documentation to evidence these criteria is usually required; and
- Applicants are required to undertake health and character checks.

The Investment Linked Visa further requires the applicant to invest between AUD$750,000 and $2 million in state or territory government bonds for a minimum of 3 years.

11. IMPORTING AND EXPORTING

Tariff Protection

Australia is a member of the World Trade Organisation (WTO) which shapes many aspects of Australia's trade laws. Within the general framework of the WTO, the Australian Government is seeking to expose Australian industry to increased competition from imports. At the same time, the WTO is being used as a forum for voicing Australian complaints on restrictive trade policies of other countries, in particular, the damage caused to Australia's traditional trading markets by the common agricultural policy of the European Union and ongoing agricultural subsidies in the United States. Australia is also a leading member of the Cairns Group, a grouping of countries with an interest in freeing world trade in agricultural products.

By world standards, Australia had, until the 1990's, maintained relatively high tariff barriers on imports of manufactured products. The average level of customs duties on manufactured products imported into Australia was significantly higher than that of Australia's major trading partners (the United States, Japan and the European Union). On the other hand, the level of Australia's duty on raw materials was less than that of its major trading partners and the level of duties on semi-manufactured products only marginally higher.

The Government is committed to the further liberalisation of trade in the area of manufactured imports. Most rates of duty have been phased down to a maximum of 5% and many goods can be imported duty free. Specific tariff reductions are planned in relation to the motor vehicle and textile, clothing and footwear industries.

The current tariff on textiles, clothing and footwear range from 5% to 17.5% (for clothing and finished textiles). Those rates will remain fixed until 1 January 2010 when further reductions will be introduced which will reduce the tariffs on all items except clothing to 5%. Clothing (and finished textiles) are due to fall to a 5% tariff in 2015.

The rate of duty for passenger motor vehicles (10% from 1 January 2005) will be phased down to 5% on 1 January 2010.

Classification of Goods and Rates of Duties

The applicable rates of duty for imported goods are specified in schedules to the *Australian Customs Tariff Act*. There can be variations in the rates of duty between different tariff items and it is important to determine the correct classification of goods.

The WTO prohibits discrimination between member States insofar as rates of duty are concerned, although preferences which were in existence at the time the WTO was formulated are permitted to continue. Australia maintains some preferential policies, particularly in relation to products that are manufactured in nominated developing countries.

Tariff Concession System

The main purpose of tariff barriers is to foster the development and expansion of domestic industries, rather than to raise revenue. It follows that where there is no domestic industry, the need to impose trade barriers in the form of customs duties disappears. Australia's Tariff Concession System permits duty free entry of imports in cases where there is no competitive domestic industry.

In order to obtain a Tariff Concession Order (TCO), it is necessary to establish that on the day the application was lodged, no substitutable goods were produced in Australia in the ordinary course of business. Substitutable goods are Australian produced goods that are put to a use that corresponds with a use to which the imported goods can be put. Should this criterion be satisfied, it will be possible to obtain a TCO and to import otherwise dutiable goods into Australia free of duty.

Certain goods are precluded by the Customs Regulations from eligibility for Tariff Concession Orders, including motor vehicles, footwear, apparel and jewellery.

Customs Valuation

The Australian valuation system is a self-assessment system under which it is the responsibility of the importer to correctly value imports. Mistakes in valuation may attract penalties.

The Australian legislation largely conforms with the terms of the WTO Agreement on customs valuation. Imported goods are valued under 1 of 9 different methods of valuation. These alternative valuation methods cannot be selected at will and must be

adopted in the sequence set out in the legislation. The first and most common is the transaction value method, being the price actually invoiced by the supplier to the importer subject to various adjustments. Alternative methods will be used where this is inappropriate, for example where goods are exported to Australia on consignment or where price is not determined on an arms length basis.

Anti-Dumping

Under Australian legislation, dumping occurs when the FOB price at which goods are exported to Australia (the "export price") falls below the price at which the same goods are sold domestically in the country of export. When this occurs, dumping duties can be imposed on those exports, provided it is also shown that the dumped goods cause or threaten material injury to Australian manufacturers of the same goods. If any dumping duties are imposed, they are payable on importation by the importer.

To ascertain whether dumping is occurring, the Customs Service compares the export price against the normal value. Generally, normal value is the price paid for like goods sold "in the ordinary course of trade" of home consumption in the country of export. Often this price will need to be adjusted in arriving at a normal value which is properly comparable with the export price. There may, for example, be specification differences between goods sold domestically and goods exported to Australia, or there may be discounts which are only available to domestic customers and must therefore be excluded in arriving at a normal value.

If there are no comparable domestic sales in the country of export, the Customs Service can determine a normal value by reference to sales by the exporting country to countries other than Australia or by using a "constructed" price. In simple terms, a constructed price is the cost to make and sell the exported goods plus a margin for profit.

If the exporter supplies no information, the Customs Service can act on the "best information available" which can include information provided by an Australian industry complainant.

The legislation also contemplates the situation (known as "sales dumping") where goods are initially sold for export at non-dumped prices but are on-sold into the Australian market at dumped prices (for example, by a subsidiary of the exporter).

If the Customs Service determines that this practice is occurring, it is empowered to disregard the actual invoiced export price in making the comparison with normal value and can use instead an export price derived by deducting profit (if any), sales tax, customs duty and other expenses from the importer's sale price in Australia.

If the Customs Service finds dumping and injury to exist, dumping duties may be imposed. The maximum amount of duty which can be imposed is the amount of the dumping margin, ie the difference between the normal value and the export price. Duty of less than the "dumping margin" may be imposed if it is considered that imposition of a lesser amount would be sufficient to prevent injury to Australian industry.

In some cases, it may be possible to avoid the imposition of dumping duties by the exporter undertaking to the Customs Service to export only at a non-injurious price level. Decisions of the Customs Service are subject to review by the Trade Measures Review Officer and (on limited grounds) by the Federal Court.

Dumping and countervailing actions are likely to remain an active part of Australia's trading environment and anti-dumping procedures have been further strengthened in the last few years.

Industry Development Requirements

Overseas firms proposing to supply certain goods, information or services to Federal, State or local Governments and telecommunications carriers should be aware of the following programs which have been implemented to encourage the development of internationally competitive activities in Australia, and which place obligations on overseas suppliers to undertake certain activities.

Information Technology

The Australian Civil Offsets Program was abolished in December 1992 and was replaced by the Fixed Terms Arrangements ("FTA") and Partnerships for Development ("PfD") Programs. These programs apply to the supply of information technology products, software and services to all levels of government.

The objective of these programs is to encourage international companies to deepen their roots in Australia. Activities recognised for these programs include:

- internationalisation of Australian products and services;

- facilitation of new market opportunities;
- research and development;
- training;
- technology transfer;
- strategic capital investment; and
- venture capital investment.

Fixed Term Arrangements

Suppliers selling between $10 million and $40 million worth of equipment, software or services to Governments and telecommunications carriers annually are expected to enter into FTAs for industry development activities.

This takes the form of a schedule of activities which the supplier agrees to undertake and which are approved under the FTA guidelines published by the Federal Government. These will be incorporated into a Memorandum of Understanding between the Federal Government, (which acts on behalf of State Governments if applicable) and a supplier or its Australian subsidiary, usually covering a 4 year period.

Suppliers are expected to undertake industry development activities which would at least equate to 15% of the projected level of government business of the firm over the 4 year period. Activities must be commercially viable and integrated into the supplier's global strategies for product development and marketing and should not lead to any price increase in the goods and services sold to the Australian Government.

Partnerships for Development

Overseas suppliers selling over $40 million annually to Federal, State and local Governments are expected to join the PfD Program.

Consistent with the FTA program, commitments entered into by firms under the PfD Program are required to focus on the 3 key areas of product development, internationalisation and export, and industry infrastructure development.

Generally, firms entering into a PfD commit to achieving within 7 years:

- expenditure on research and development equal to 5% of annual Australian turnover;

- annual exports of goods and services equivalent to 50% of imports into Australia (and for software companies, software exports equivalent to 20% of turnover in place of the 50% of imports for other suppliers); and
- an average 70% local value-added across all exports.

The PfD Program also recognises a broader range of activities.

At the conclusion of 7 years, overseas firms are expected at least to maintain their levels of research and development and export activity in percentage terms.

Mandatory minimum SME participation requirements

Government agencies are required to ensure that tenders for ICT acquisitions with expected contract values of $20 million or more comply with mandatory minimum SME participation requirements. That is, for contracts for hardware, there must be a minimum SME participation value of 10% of the contract value and for contracts for software, there must be a minimum SME participation value of 20% of the contract value.

Endorsed Supplier Arrangements

Endorsed Supplier Arrangements ("ESA") were developed to recognise and provide benefits to suppliers to Government in the IT and major office machine and telecommunications industries. To meet the criteria for ESA, suppliers must:

- meet minimum financial criteria;
- be committed to set standards in quality and customer service;
- be committed to and in support of published government policies; and
- be committed to long term value added activity in Australia.

Industry Development Plans

Under the fully deregulated framework for the telecommunications industry from July 1, 1997, any person may be licensed to operate as a carrier but a carrier licence will not be granted unless the person has a current industry development plan approved by the Minister for Communications, Information Technology and the Arts. If the plan is approved and the licence granted, the applicant must make a summary of the plan available to the public and provide annual progress reports.

To be approved, an industry development plan must include information on:

- research and development activities in manufacture, development and supply of facilities industries;
- the carrier's strategic commercial relationships;
- the carrier's export development plans;
- the carrier's arrangements aimed at encouraging employment; and
- the period to which the plan will relate (a 12 month minimum).

The industry development plans are not intended to be a hurdle for carriers wishing to do business in Australia, but rather to set benchmarks.

Suppliers entering the Australian market should also be aware that sales to licensed carriers are treated in the same manner as sales to Government for the purposes of the PfD/FTA programs. A company participating in the PfD/FTA programs may have those activities recognised as part of its PfD/FTA commitments.

Non IT Products

Some State Governments such as Queensland still have civil offsets programs in force which relate to their civil but non-IT equipment purchases. Whether an offset policy will apply to goods or services supplied and what is involved will depend on the State or local Government concerned. Overseas suppliers are advised to contact the administrators of the relevant State or local Governments.

Model Industry Development Criteria

The Model Industry Development Criteria ("MIDC") are a benchmark designed to ensure that small and medium enterprises ("SME"s) have an appropriate opportunity to compete for federal government business.

Government departments and agencies (except the Department of Defence and the Australian Agency for International Development) are required to ask all tenderers for procurements of $5 million or more to include:

- industry development criteria and associated methodology; and
- where appropriate, opportunities for participation by SMEs.

The following six core industry development criteria are considered by government departments and agencies when determining industry development criteria in tender documentation:

- development of long-term, internationally competitive industry in Australia;
- value-added activity;
- opportunities for participation by SMEs;
- existing industry development activity and proposed new investment;
- innovation, research and development; and
- employment, training and skills development, and initiatives in regional areas.

Defence Offsets

The Australian Industry Involvement Program remains in force and overseas suppliers of defence goods or services will need to negotiate with the Department of Defence concerning the level and type of offsets required when supplying defence products.

Telecommunications Equipment

The industry development points system for suppliers of standard telephones, PABX, small business systems/key systems, cellular mobile telephones and second hand equipment has now been abolished.

Australia-United States Free Trade Agreement

On 13 August 2004, the Australian Federal Parliament enacted legislation commiting to the Australia-United States Free Trade Agreement (AUSFTA). It is expected that the AUSFTA will be implemented in early 2005.

The AUSFTA deals with government procurement guidelines and procedures and allows Australian suppliers to compete in the US procurement market for the first time. Australia has reserved the right to maintain its Australian Industry Involvement Program for defence procurement and to continue with procurement policies which assist SMEs.

The AUSFTA bans offsets for local content, technology transfer or export performance. Although this ban will not affect policies which assist SMEs, it will prevent government procurement being used to require suppliers to engage in certain activities in order to promote industry development. Most of the programs described above will need to be amended as a result.

Government Incentive Schemes for Exporting

Governments at both the Federal and State levels aim to foster economic growth and improve Australia's balance of payments position through assistance to selected business enterprises. This may be provided by direct grants or loans, concessions available under taxation legislation or through administrative, research and educational assistance.

Direct Grants and Concessions

The Federal Government provides bounties to certain Australian manufacturing industries so as to improve their competitive position as compared with similar imported products. Bounties are generally made upon recommendations from the Productivity Commission and followed by legislation enacted by Parliament. Bounties are usually provided for a limited number of years and the rate of the bounty is usually reduced each year. Bounties apply for a limited number of product categories. Bounties for the production of books, machine tools, shipbuilding and computers have now been abolished.

Export Market D evelopment Grants

Through the Export Market Development Grants (EMDG) scheme, the Australian Trade Commission provides an incentive to Australian exporters of goods, services, industrial property rights and know-how that are substantially of Australian origin.

Under the scheme, taxable cash grants are available to subsidise certain expenditures incurred primarily for the purpose of creating or seeking opportunities or creating or increasing demand for export sales of eligible goods, services, industrial property rights or know-how.

Classes of eligible expenditure include overseas market research, certain overseas transport costs, establishment and maintenance of overseas sales representatives, advertisements (such as brochures) for overseas distribution, overseas promotion such as trade fairs and exhibitions, costs involved in training overseas grants in Australia, and costs related to quotation and tenders for overseas export business.

Export Insurance

The Australian Trade Commission through the Export Finance and Insurance Corporation provides insurance against commercial and political risks for exports and related overseas transactions. Commercial risks covered include bankruptcy of the buyer, indemnification against non-payment of goods by the buyer which have been accepted after the due date for payment and repudiation by the buyer under an enforceable contract.

Manufacturing in Bond

The Government announced the introduction of this program (MiB) in December 1997 in order to allow the manufacturing of goods in a Customs licensed warehouse. A firm with MiB approval will be able to import dutiable goods into a licensed warehouse free of duty and sales tax. If the goods are later re-exported, either in their original or manufactured form, no duty or sales tax liability is incurred.

12. REAL PROPERTY AND ENVIRONMENTAL LAW

Property Title System

The system of "title by registration", otherwise known as the Torrens System, originated in Australia and has subsequently been adopted in other countries as a precedent for recording interests in property. Registers are kept by the Government authorities in each Australian State and Territory. The majority of transfers, and other dealings in property are registered, and upon registration of a transfer the buyer is said to have a title to the property which is "indefeasible". This means that the registered proprietor's interest in the land will not be defeated by a defect in the title which arose prior to registration of the transfer of title, subject only to certain limited exceptions. Not all land is subject to the Torrens System, with a small percentage of titles still being subject to "Old System Title", the form of title which pre-dated the Torrens System.

There are a number of different types of land title that can be acquired. These include:

- Freehold title to individual parcels of land (including the buildings on the land) which is essentially ownership of the land itself;
- Leasehold title which is a right to possession and use of the land for the term of the lease; and
- Strata and Community titles which relate to apartments, condominiums, home units, townhouses and other group housing arrangements.

Certain registered rights may also affect the rights of a titleholder, for example:

- Easements - these are rights in favour of a third party (often an adjoining land owner) to use or restrict the use of part of the land. The most common examples are easements for drainage, electricity and rights of way; and
- Restrictive Covenants - these are arrangements which bind the owner of land not to use the land in a particular way. Often such covenants relate to building restrictions.

Building Regulations

Most laws and regulations governing construction and alteration of buildings are administered by local government. Examples include:

Building Approvals

Most relevant local government legislation in each State requires the prior approval of the local council to be given to building work and development. The relevant local government legislation deals in some detail with building standards and regulations. If a building has been erected without or in breach of the necessary approvals, the council may have the power to order rectification, or in extreme cases, demolition of the illegal work. Similar provisions apply to alterations and additions to existing buildings.

Building Certificates

In some States, local councils are authorised to issue a certificate which states either that the council's building requirements have been complied with or that the council does not propose to take any action in respect of any contravention.

Environmental Planning Legislation and Permitted Land Use ("Zoning")

All land in Australia is affected by environmental planning legislation. These planning schemes are designed to control the use of land by restricting use. Land use for dwellings will usually be zoned for "residential" purposes only, and this will in turn usually prohibit use for "commercial or industrial" purposes.

Even where land is situated within a zoning which allows commercial or industrial use, development of the land is often only allowed with the consent of the local council or other relevant authority.

Property Taxes

The major taxes on property include:

Council Rates (local government taxes) are payable on most properties in Australia. The rates are payable by the owner of the property, although this liability is sometimes passed on to tenants under the lease arrangement between the owner and that lessee.

Water and Sewerage Rates are also levied by the relevant authority for that area either independently of council rates or included in these rates where the property is in an area serviced by these facilities.

Land Tax is a State Government tax payable on the land value of a property. Land value is usually calculated on an unimproved capital value basis.

Vendor Duty, Premium Duty and Stamp Duty

Vendor Duty (NSW) From 1 June 2004, vendors or transferors of land-related property in NSW are required to pay a vendor duty of 2.25% of the dutiable value of the property (that is, the greater of GST-inclusive sale price and unencumbered value of the real property). The vendor or transferor is liable for vendor duty.

Generally, vendor duty does not apply to land-related property transactions if the land is used as the vendor's principal place of residence or as a primary production business. Other exemptions and concessions may apply for deceased estates; the first sale of new buildings, vacant land that has been substantially improved and land where the dutiable value has not increased significantly since acquisition.

Unless exempted vendor duty:

- is in addition to transfer duty payable by purchasers; and
- must be paid, if there is an agreement for sale before settlement of the agreement for sale or otherwise within 3 months of first execution of the transfer.

Premium Duty on NSW Residences

Premium property tax, which is land tax on residential land with a land value of over $1.97 million, will be abolished from the 2005 tax year. In its place, a new premium duty on the purchase of NSW residential land which exceeds $3 million in value will apply, calculated at 7% for the part of the value which exceeds $3 million.

Accordingly, if the purchase value of a residential property is $4 million, the purchaser will be liable to pay $150,490 stamp duty plus premium property duty of $79,000.

Conditions apply where residential land is used for other purposes (eg mixed development and mixed use land). Conditions also apply for parcels of vacant residential land exceeding 2 hectares.

Premium property duty will apply to NSW contracts entered into on or after 1 June 2004.

Stamp Duties are imposed in all States and Territories on transfers of property and leases of property. Stamp duty is a major source of revenue for the States and is a significant transaction cost in connection with most acquisitions or transfers of property. The rates of duty vary from State to State and are generally imposed on the greater of the consideration paid or the market value of the property, whichever is higher. In each State, stamp duty is imposed on a sliding scale. The following schedule sets out the minimum and maximum rates of duty in each State and Territory and the dollar value at which the highest rate of duty commences to apply:

Stamp Duty Rates

	NSW	**VIC**	**QLD**	**SA**
Rates:	1.25% - 5.5%	1.4% - 5.5%	1.5% -3.75%	1% - 4.5%
Higher rate commences at:	($1 million)	($870,000)	($500,000)	($500.000)

	NT	**WA**	**TAS**	**ACT**
Rates:	Up to 5.4%	2% - 5.5%	1.5% - 4%	2% - 6.75%
Higher rate commences at:	($500,000)	($500,000)	($225,000)	($1 million)

The above rates of duty apply to transfer of property but may also apply to a transfer of shares in a company which is deemed to be "land rich" under the provisions of the relevant *Stamps Act*. Different stamp duty rates apply for different transactions, for example certain loan securities, leases etc.

Environmental Law

General

The main source of environmental law in Australia is the law of each State. Each State has its own legislation and regulatory agencies, with detailed controls including systems for licensing, pollution control, offences, contamination, waste disposal and biodiversity protection.

The Federal Government has restricted powers to legislate in relation to environmental matters, and has in place a regime of environmental assessment for matters of "national environmental significance" designed to operate in addition to State controls. The Federal Government has also passed laws regulating its own activities and implementing international treaties, and has supported a number of national environmental policies.

Australian environmental controls therefore arise through specific environmental legislation at both levels of government, as well as through laws relating to trade and investment, occupational health and safety, the *Corporations Act*, consumer protection and administrative law.

When investing in property, it is prudent, due to the increasing volume of environmental legislation in all States and Territories of Australia, to conduct appropriate environmental enquiries, searches and due diligence. If the property is industrial or commercial or the site history reveals such a previous use, it may be necessary to conduct an environmental audit of the property to ensure compliance with the current legislation.

The States in Australia have been consistently reviewing their environmental laws over the last few years. Although there are a number of differences, there are also some common elements between the States.

Pollution Control

All States have some system for regulating the discharge of pollutants into the air, land and waters. The relevant Environment Protection Authority or other equivalent government department in each State usually requires licensing of polluting industries and activities. The regulatory body will also set limits on the permitted discharge quantities for specific pollutants.

Hazardous Materials

Most States have regulations pertaining to the storage, use and transport of hazardous materials and waste. Organisations which generate waste usually require a government permit detailing the nature and treatment of waste on site, as do companies in the business of transporting waste or operating landfills.

The use of dangerous goods and chemicals is also strictly regulated to ensure the environmental impacts arising from such activities is minimised.

Contaminated Land

A contaminated site can raise a range of legal problems and liabilities for purchaser, lessor and lessee. Some States have developed registers which contain information on contaminated or potentially contaminated land, while some other States are in the process of developing such a register.

All State governments have powers to require land owners or occupiers to clean up contaminated land or waterways. In some States, the occupier of the land is the preferred "target" for clean up orders and can be compelled to clean up contaminated land. Some States have express statutory provisions which permit that person to recover clean up costs from the person or body that caused the contamination.

It is common practice for companies buying potentially contaminated land to undertake a site contamination audit of the relevant property before finalising the purchase, particularly in the case of industrial property. This allows the contract of purchase to be drafted to apportion responsibility for any past contamination.

Planning

Local authorities can also influence environmental outcomes through planning legislation. Most development requires some form of planning permit from a local authority. Local authorities liaise with State authorities regarding pollution emissions, and also have a major role to play in environmental impact assessment. This means that any land development will need to address environmental issues as well as other concerns for a project to proceed. Relevant considerations may include impacts on plants, animals and natural places, and protection of cultural heritage.

Enforcement and Penalties

Environmental statutes around Australia are actively enforced, with fines for offences being fixed according to the harm caused to the environment. Maximum penalties vary between States, but can be as high as $1,500,000 for corporations and $300,000 and/or 7 years imprisonment for individuals who intentionally cause serious harm to the environment.

Under Federal environmental legislation the penalties can be as high as $5,500,000 for corporations.

Company directors and managers can also be directly liable for pollution offences committed by their corporations.

The threat of enforcement of environmental laws against both directors and managers means that companies need to develop environmental management systems and programs to ensure that environmental standards and laws are complied with, and that directors are not personally sued for accidents which may occur.

Federal Environmental Legislation

The Federal Government's environmental legislation provides for Commonwealth assessment of development proposals that have the potential to impact matters of "national environmental significance". These matters include nuclear activities and activities impacting on world heritage areas or endangered species.

The legislation contemplates a more active role for the Commonwealth in environment protection, which is likely to develop in coming years.

A further example of this trend is the recent amendment of the Corporations Act that imposes a requirement on all Australian companies to disclose details of their environmental performance in their annual financial reports.

Native Title

Nature of Native Title

Native title is the term used to describe certain rights held by indigenous Australians in respect of traditional land and waters. Native title rights are generally held by a group, in accordance with the group's traditional laws and customs that create a connection with those land and waters. The content of native title varies and depends on the group's traditional use of the relevant area. For example, a group claiming native title rights may seek exclusive possession, where exclusive possession reflects the traditional use. Alternatively, the rights claimed may be quite limited, for example traditional rights to hunt and fish or conduct ceremonies on the land. Native title rights can only be held by the traditional inhabitants, and are not transferable.

Native title can only exist in relation to land or waters where the claimant group has maintained, and continues to maintain, a traditional connection with the land. Native title can be extinguished by governments enacting legislation to that effect, or by granting interests in land inconsistent with native title. Native title therefore cannot exist in relation to freehold land (the most common property right in Australian urban centres), or certain land leased from the government for commercial purposes or in respect of which exclusive possession has been granted.

Native Title Claims

An Aboriginal group wishing to assert native title in an area must generally lodge a native title claim under the Commonwealth *Native Title Act 1993* ("Native Title Act"). The determination of a native title claim can be a protracted procedure taking many years, involving mediation with potentially affected third parties and government representatives.

While claims are pending finalisation, *registration* of a claim on the National Native Title Tribunal's Register of Native Title Claims grants the claimants certain procedural rights. These rights include a continued right to access the land and waters the subject of a claim, and the right to negotiate in relation to proposed activities by third parties which may impact on the native title.

Effect of Native Title

Native title interests are most likely to affect investments in vacant land and mining interests, especially (but not limited to) cases where the investment relies on a government grant or sale. For land over which native title exists, or a native title claim has been registered, procedural requirements under the NTA may need to be followed and agreements negotiated with native title parties, such as access sharing arrangements or the payment of compensation.

Native title searches may be undertaken with the relevant courts and National Native Title Tribunal, and will indicate whether a native title interest or claim has the potential to add cost or delays to a transaction.

Appendix A
Rates of Withholding Tax

Treaty Countries	Dividends (%)	Interest (%)	Royalties (%)
Argentina	10/15	12	10-15
Austria	15	10	10
Belgium	15	10	10
Canada	15	15	10
China	15	10	10
Czech Republic	5-15	10	10
Denmark	15	10	10
Fiji	20	10	15
Finland	15	10	10
France	15	10	10
Germany	15	10	10
Hungary	15	10	10
India	15	15	10-20
Indonesia	15	10	10-15
Ireland	15	10	10
Italy	15	10	10
Japan	15	10	10
Kiribati	20	10	15
Korea (South)	15	15	15
Malaysia	0-15	15	15
Malta	15	15	10
Mexico	0-15	10-15	10
Netherlands	15	10	10
New Zealand	15	10	10
Norway	15	10	10
Papua New Guinea	15-20	10	10
Philippines	15-25	10-15	15-25
Poland	15	10	10
Romania	5-15	10	10
Russia	5-15	10	10
Singapore	15 (but exempt)	10	10
Slovak Republic	15	10	10
South Africa	15	10	10
Spain	15	10	10
Sri Lanka	15	10	10
Sweden	15	10	10
Switzerland	15	10	10
Taiwan	10-15	10	12.5
Thailand	15-20	10-25	15
United Kingdom	15/5/0	10/0	5
United States	15/5/0	10/0	5
Vietnam	10	10	10
Non-Treaty Countries	30	10	30

These rates only apply to the unfranked portion of a dividend. The franked portion of a dividend is exempt from withholding tax. A special exemption also exists for dividends paid from a foreign dividend account ("FDA"). Dividends paid from a FDA are exempt from withholding tax even though they are unfranked.

In relation to interest, the rate of tax is the lower of the non-treaty rate of 10% and the treaty rate.

Appendix B
Personal Rates of Tax

Residents (post-1 July 2004)

From 1 July 2000, income tax will apply to residents as follows:

Part of Income (A$)	Tax Payable
0 -6,000	Nil
6,001 - 21,600	17% of amount over $6,000
21,601 - 58,000	30% of amount over $21,600
58,001 - 70,000	42% of amount over $58,000
70,001 up	47% of amount over $70,000

Resident individuals are liable to pay a medicare levy of 1.5% on their taxable income. For low income taxpayers a reduced levy or no levy may be payable.

An additional 1% Medicare levy surcharge applies to individuals with taxable income over $50,000, $100,000 for a couple, who do not have private medical insurance. Note that the payment threshold increases by $1,500 per dependent student or child of the taxpayer.

Non-Residents 1 July 2001 - 30 June 2002

Part of Income (A$)	Tax Payable
0 - 21,600	29%
21,601 - 58,000	30% of amount over $21,600
58,001 - 70,000	42% of amount over $58,000
70,001 up	47% of amount over $70,000

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