



Legal Aspects of Doing Business in Australia

A Guide for Lawyers and their Clients



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NB: Due to the extensive nature of this publication and the pace of reforms and judicial consideration there may be an absence of reference to a recent case or some references to legislation and its provisions which are no longer current, yet proclaimed, amended or repealed. The publication attempts to draw out the most significant points in the relevant legislation. Whilst all care has been taken to ensure that the most up to date information has been included, not all cases or aspects of the legislation have been considered. The material contained in this publication is in the nature of general comment only, and neither purports nor is intended, to be advice on any particular matter. No reader should act on the basis of any matter contained in this publication without considering and, if necessary, taking appropriate professional advice upon his or her own particular circumstance.

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Carter Newell Publications
Brisbane • Sydney • Melbourne

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INTRODUCTION AND OVERVIEW

This guide endeavours to address a selection of important and unique aspects of doing business in Australia, which have broad application across a wide range of industries.

It is hoped that this guide will be of assistance to overseas legal practitioners in answering some of the initial questions that arise when determining:

- what may be an appropriate business structure to use in Australia, and understanding the scheme of regulation of Australian companies;
- what corporate governance measures apply to companies listed on the Australian Securities Exchange;
- what protections are afforded to intellectual property in Australia;
- how commercial conduct is regulated in Australia in relation to competition, trade practices and consumer protection;
- how foreign investment is regulated in Australia;
- what industrial relations regime applies, for companies wishing to conduct business and employ staff in Australia; and
- how the system of land title works in Australia.

This guide provides information in a summary and overview format, current as at the 1 July 2008, for legal practitioners who may have clients interested in undertaking business in Australia.

It does not purport to be a comprehensive statement of the law in any of the topics covered, but rather it is hoped the guide will assist overseas practitioners in *asking the right questions* if they should need to further examine aspects of doing business in Australia for their clients.

Australia

The Commonwealth of Australia is a federation of six States (Queensland, New South Wales, Victoria, South Australia, Western Australia and Tasmania) and two Territories (the Northern Territory and the Australian Capital Territory), each with their own parliament and government. Within the States and the Northern Territory are local authorities or councils, so in all but the Australian Capital Territory, there are effectively three levels of government in operation. In this guide, for each topic covered, we have identified where a national regime of regulation is in place, and where separate State and Territory laws apply. Legal practitioners should, however, generally bear in mind for clients considering undertaking business in Australia, that the laws and regulations applying in one State or Territory may not be the same as in another part of the country.

In many instances, there are online resources available from the websites of regulating authorities, which can provide a good starting point for initial inquiries. Website references have been provided on a number of the topics covered.

For any specific queries that arise, Carter Newell recommends you contact our firm for advice before acting upon any information contained in this guide. Carter Newell offers expertise across a broad range of areas relevant to clients looking to establish business and invest in, or further trade ties with, Australia.

If you require any more detailed information or advice on the areas covered in this guide, or in relation to doing business in Australia generally, please contact either Patrick Mead, Bronwyn Clarkson or Cameron Jorss.

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BUSINESS STRUCTURES

When considering whether to conduct business operations in Australia, a foreign entity should, as a primary consideration, determine the business structure through which it wishes to operate. Its choice will depend on a number of factors, including whether it wishes to establish a separate operating entity in Australia, the anticipated size of its Australian operations, taxation implications, risk profile and whether it wishes to raise public funding.

Business in Australia is usually carried on through one of the following structures:

- company (private or public);
- registered Australian branch of a foreign corporation;
- partnership;
- joint venture; or
- trading trust.

Of these structures, only companies and incorporated limited partnerships have a separate legal identity. Partnerships, joint ventures and trusts do not have an identity independent of their participants and, in legal terms, are relationships rather than separate entities. They may however in some circumstances be treated as separate entities for taxation purposes.

This section reviews these operating structures in Australia and the advantages and disadvantages of using them. Particular attention is paid to Australian companies, which are the most commonly used business structure. This is due to a number of factors, including the ability to limit the liability of their shareholders and a more attractive tax rate than that for individuals.

A foreign company can operate in Australia either by establishing an Australian subsidiary company, or by establishing a branch. Most foreign companies prefer to establish a separate company in Australia, as this allows the foreign company to isolate its Australian operations in a separate entity.

Australian companies

The *Corporations Act* 2001 (Cth) ('Corporations Act') is the primary source of company regulation in Australia and is administered by the Australian Securities & Investments Commission ('ASIC'), an Australian Government body. Companies are incorporated in Australia by being registered with ASIC. The scheme of regulation for companies in Australia is a national one, so it is the same in all States and Territories. ASIC has an extensive website through which legislation and regulatory information can be accessed: www.asic.gov.au

Upon incorporation, ASIC allocates each company a nine-digit Australian Company Number ('ACN') as a unique identifier and the company becomes a separate legal entity in its own right, with powers to hold property, to sue and be sued, and to enter into contracts.

ASIC will not accept registration if the name of the company is identical to that of another registered company or is considered to be offensive or contravenes the prohibition in the Corporations Act on certain wording being used in company names. If the company has no name it will be known solely by its ACN. Companies must state their ACN on all public documents and negotiable instruments (such as cheques).

Types of Australian companies

Australian companies may be incorporated as either public or proprietary entities. Proprietary companies, commonly known as 'private' companies due to their prevalence in the small business sector and their use in personal estate planning, must have a minimum of one shareholder and a maximum of 50 (not including employee members). A private company must have a minimum of one director, who must ordinarily be resident in Australia and who may be the sole shareholder of the company. Although it is not compulsory for a private company to appoint a company secretary, if it does choose to appoint a company secretary, then he or she must be ordinarily resident in Australia. Proprietary companies are predominantly registered as 'limited by shares', although there is the ability to register the company as 'unlimited', with liability of the shareholders not being limited.

In contrast, a public company is often used when the company wishes to list on the Australian Securities Exchange ('ASX'), or when the legislation requires it to be a public company, for example, a company that is to act as the responsible entity (that is, the operator) of a managed investment scheme (such as a managed fund).

Due to their public nature, public companies are more highly regulated than their private counterparts, in terms of their internal structure, their disclosure requirements and their reporting requirements to ASIC. Key features of public companies include:

- the company must have at least three directors, at least two of whom are ordinarily reside in Australia;
- the company must have at least one company secretary who must be ordinarily resident in Australia;
- the company may be limited by shares, limited by guarantee, unlimited with share capital or, in the case of a mining company, a no liability company;
- their public capital raising and fundraising activities are less restricted than those of private companies; and
- if the company is listed, it will be subject to the corporate governance principles discussed later in this guide, and it will be subject to the ASX listing rules.

Generally speaking, the ability of public companies to raise capital from the public is offset by extra reporting and other regulatory requirements not faced by proprietary companies. For these reasons the cost of administering a public entity can be significant.

Liabilities of the company, shareholders and directors

The liability of a company is limited to its assets. A creditor of an insolvent company can apply to court to have the company wound up. The liability of shareholders to contribute to any deficiency in the company's assets in meeting the amount owing to creditors, depends on the type of company registered. If the company is limited by shares, each shareholder is liable only to the extent of the subscription price of their shares. If a shareholder has paid for their shares in full, they face no further liability. If the company is limited by guarantee, the liability of the members is limited to the amount of the guarantee given.

Liability of directors

In Australia, as in other common law jurisdictions, there is a high degree of respect for the 'corporate veil' in recognising a company as a separate legal entity, distinct from its directors and shareholders. In the ordinary course, there is no ability for a creditor to pursue a director personally for the debts of the company unless the director has provided a personal guarantee, or has incurred the debt in the director's own name.

As a 'public protection' mechanism, the Corporations Act does place certain duties upon directors as managers of companies – these include duties of honesty, diligence, disclosure in certain circumstances and duties not to permit the company to trade whilst insolvent. The duty in relation to not trading whilst insolvent is effectively a duty not to permit the company to incur debts when the directors know, or ought to know, that the company is unable to pay its debts as and when they fall due.

These 'protections' are aimed at preventing directors from *hiding* behind the company as a separate legal entity to incur debts the company cannot pay, and then leaving unsecured creditors with a worthless company to pursue.

The power to pursue a director for insolvent trading lies principally with the liquidator of a company and ASIC. Contravening directors can be liable for fines and in certain circumstances, the relevant debts incurred whilst the company was insolvent. Directors may even be imprisoned for up to five years if the directors' failure to prevent the company incurring the debt was dishonest.

For companies listed on the ASX, there are important duties of disclosure for the benefit of investors, and directors may be liable for failure by the company to comply with those disclosure requirements.

Establishing an Australian branch

Foreign companies wishing to operate in Australia need not necessarily set up a separate Australian company that requires resident directors (as mentioned earlier). They can carry on business in Australia as a branch of the foreign company, however, if the company participates in capital raising activities by either offering debentures or guarantees debentures in Australia, then it must be registered with ASIC and must comply with a number of other requirements.

Where it is required to register with ASIC, a foreign corporation must appoint a local agent who is responsible for ensuring that the foreign body complies with Australian legal requirements. The local agent must be an Australian company or a person resident in Australia, and may be held personally liable for any penalties imposed for contravention of the Corporations Act.

The foreign company must maintain a registered office within Australia (this may be the agent's office).

On registration, ASIC will allot an Australian Registered Body Number (ARBN) to the foreign company, and this number must be displayed on all public documents (including websites) and negotiable instruments of the company.

As a general rule, registered foreign companies must lodge with ASIC a copy of their annual accounts, as well as any other documents that they are required to prepare, in accordance with the laws of their place of incorporation.

Partnerships

Partnership law is governed by the various Partnership Acts enacted in each State and Territory of Australia. For example:

- in Queensland, the *Partnership Act 1891* (Qld);
- in New South Wales, the *Partnership Act 1892* (NSW);
- in Victoria, the *Partnership Act 1958* (Vic);
- in Tasmania, the *Partnership Act 1891* (Tas);
- in South Australia, the *Partnership Act 1891* (SA);
- in Western Australia, the *Partnership Act 1895* (WA);
- in the Australian Capital Territory, the *Partnership Act 1963* (ACT); and
- in the Northern Territory, the *Partnership Act 1997* (NT).

A partnership is generally formed by an association of two or more partners who decide to carry on business with a view towards making a profit. The provisions of the Partnership Acts tend to be generic and in many cases may be overridden by provisions contained in any specific agreement that has been entered into by the partners.

In Australia, the number of partners permitted to form a partnership at law is limited to 20 (except in the case of certain professional partnerships such as legal and accounting firms). Partners may be individuals or companies and may be resident in Australia or otherwise.

There is no specific requirement for registration of partnerships, although trading names are generally registered.

Strictly speaking, a partnership is not a separate legal entity, although recent changes have been made to the partnership legislation in various States and Territories by allowing the registration of an Incorporated Limited Partnership ('ILP') as a separate legal entity.

Only Venture Capital Limited Partnerships and Australian Venture Capital Funds (within the meaning of the *Venture Capital Act 2002 (Cth)*) may be registered as an ILP. ILPs have been introduced as a method to attract international venture capital investment to Australia, as international venture capitalists will be able to access the capital gains tax exemptions and 'flow through' tax treatment available under the Australian taxation legislation.

Partners are collectively and individually liable for the debts and obligations of the partnership. The primary advantage associated with partnerships as business vehicles is the fact that they are not burdened by the public disclosure and reporting requirements associated with large proprietary and public companies. In this way, partners may keep their financial records and performance more confidential.

Various States have passed legislation allowing a partnership to limit the liability of a partner to a certain amount, provided that there is at least one general partner whose liability is not limited. Although there are differences amongst the States, generally speaking, a partnership will become a limited liability partnership upon registration with the relevant State department, and the partnership must include the words a 'limited partnership' in its public documents.

For taxation purposes, a partnership will be deemed whenever there is a joint receipt of income, even if some other aspects of a formal or common law partnership, such as a partnership agreement, are not present. A partnership is not taxed as a separate entity, although it is required to lodge a partnership tax return with the Australian Taxation Office to report the taxable income or loss of the partnership. Each partner, in his or her personal tax return, must declare their respective shares of the taxable income or loss generated by the partnership.

This separate taxation treatment for each partner is seen as an advantage, as is the ability to have losses flow through to partners, which they may then off-set against their taxable income from other sources. Against this, however, is the increased risk for partners due to their being jointly and severally liable for the debts of the partnership. This joint liability does not apply to directors or shareholders of a company.

When contrasted with that of companies, the lower level of regulation of partnership relationships can be seen as both an advantage and a disadvantage: an advantage because it allows partners maximum freedom to determine their relationship with each other and the level of formality used; and a disadvantage because the reduced levels of regulation and formality can cause uncertainty as to the strict rights of the partners in the event of dispute or dissolution.

Joint ventures

A joint venture ('JV') is a common form of business association in Australia, particularly in the energy and resource industries and property development. JVs are often used on a project by project basis.

By entering into a JV arrangement with Australian entities to carry out commercial activities, foreign investors may avoid the need to incorporate an Australian subsidiary or register as a foreign corporation.

There is no legislation directly regulating JV agreements. JV agreements need to be carefully drafted so as to avoid being treated as a partnership for taxation purposes, if that is not desired. As mentioned earlier, a partnership for taxation purposes will be created where there is a joint receipt of income. In theory, under a JV the product of the JV is distributed to each of the joint venturers (as contrasted to a partnership, which involves a distribution of the profits). This allows each joint venturer to control how they turn that product into profit and to adopt differing accounting and tax treatments for the income and expenses of their part in the JV.

Often, to facilitate dealing with third parties, the title to the property of a JV may be held by a separate entity, which may also serve as the manager of the JV operation. This structure is referred to as an incorporated JV. Shares in the management company are then held by the JV parties and the relationship between the venturers is usually governed by a written shareholders' agreement. An incorporated JV company will be taxed in the same way as any other Australian company.

Trusts

Trusts are widely used by small businesses in Australia due to the potential flexibility in distributing trust income, the availability of capital gains tax concessions, the lower levels of regulation when compared with companies and the ability to segregate business assets from personal assets.

The separation of legal and beneficial ownership, as well as the taxation treatment of trusts makes this structure popular for both business succession and tax planning reasons.

In simple terms, a trading trust is a business structure where a trustee (usually a company) carries out the business on behalf of the members of the trust, with the trust being set up through a trust deed that regulates how the trustee deals with the trust property for the benefit of the beneficiaries (or some object permitted by law such as a charitable cause). In this regard, the benefit of the property does not accrue to the trustee.

In Australia, trusts are regulated by Trusts Acts in the various States and Territories, and under the rules of equity and common law. There is no provision for registration of trusts (other than public unit trading trusts), and therefore, the provisions of the trust deed primarily remain private between the trustee and beneficiaries.

Generally, there are two types of trusts used for business purposes in Australia: discretionary trusts and fixed trusts. A discretionary trust provides for maximum flexibility as it allows the trustee to determine how the trust's income and capital will be allocated from time to time amongst the beneficiaries. In contrast, the rights of beneficiaries of fixed trusts to share in the trust's income and capital are fixed under the trust deed.

In a unit trust (a type of fixed trust), the beneficial interest in the trust is divided into units, which may be transferred in similar fashion to shares in a company. The holder of a unit is entitled to a fixed share of the profit of the trust.

As a trust is not a separate legal entity in the same way a company is, business must be carried on for the trust by the trustee. The trustee will hold the assets of the trust business and trade on behalf of the beneficiaries of the trust.

Trust income is usually taxed in the hands of the beneficiaries according to their respective share of the trust income, however, some unit trusts are taxed as if they are companies. Also, where there are non-resident beneficiaries, the trustee may be taxed.

When a company acts as trustee of a trust, the company will be subject to the usual regulation of companies under the Corporations Act as with any other company.

CORPORATE GOVERNANCE IN AUSTRALIA

There are two primary sources of corporate governance regulation in Australia. The internal affairs of all Australian incorporated companies are regulated, to some extent, by the *Corporations Act 2001* (Cth) ('Corporations Act'). Overlaying this, companies whose shares are publicly traded on the Australian Securities Exchange ('ASX') – Australia's principal stock exchange – including companies that are not incorporated in Australia, must also comply with the ASX Listing Rules, which require them to comply, on an *if not, why not basis*, with the 'Principles of Good Corporate Governance and Best Practice Recommendations' (the Guidelines).

A summary of some of the most important corporate governance requirements of the Corporations Act and the Guidelines are discussed below.

Directors

A proprietary limited company, the most common form of company, must have at least one director, who must be ordinarily resident in Australia. A public company must have at least three directors, at least two of whom must ordinarily reside in Australia.

Constitution

The internal affairs of a company, including the powers of its directors, are primarily governed by the company's constitution. A company can either choose to adopt its own constitution or use the 'Replaceable Rules', which are a truncated body of rules that are set out in the Corporations Act. In either case, the company must also comply with certain other corporate governance requirements of the Corporations Act.

Corporate decision making

The directors of a company are primarily responsible for determining the manner in which a company is managed and operated. The Corporations Act, however, reserves certain decisions to the company's shareholders. These reserved matters include deciding on amendments to the company's constitution, altering the rights of shareholders, approving reductions in the company's capital or a change to the company's name and, in the case of a public company, authorising the giving of benefits to related parties (who include directors) of the company.

Related party benefits

The Corporations Act prohibits a public company (as opposed to a proprietary limited company) from giving a financial benefit to a related party of the company, unless the giving of the benefit is either approved by the company's shareholders or is exempt from the requirement to obtain shareholder approval. A related party of a company includes its directors and immediate family members, entities controlled by them and an entity that controls the company. The main exceptions to the requirement to obtain shareholder approval are if the benefit is given on arm's length terms or if it constitutes remuneration to, or a reimbursement of expenses of, the related party in their capacity as an officer or employee of the company or a related entity.

Financial reporting

All companies are required by the Corporations Act to maintain appropriate financial records that correctly record and explain the company's financial position and performance, and that would enable true and fair financial statements to be prepared and audited.

However, whether a company is required to prepare financial statements, or have them audited, depends on the size and nature of the company. The Corporations Act requires that a company must prepare a financial report and directors' report, have the financial report audited (unless exempted), and send the financial report and directors' reports to

shareholders and lodge them with Australian Securities and Investments Commission ('ASIC') if the company is:

- a 'disclosing entity' (these are typically companies whose securities are publicly traded on a recognised stock exchange);
- a public company; or
- a 'large proprietary company'.

A proprietary company will be a large proprietary company, and required to prepare a financial report and directors' report, if it satisfies two of the following:

- the consolidated revenue of the company is greater than A\$25 million; or
- the value of the company's consolidated gross assets is greater than A\$12.5 million; or
- the company and its controlled entities employ more than 50 people.

A proprietary company that is not a large proprietary company is a 'small proprietary company'.

A small proprietary company must also prepare a financial report and directors' report if directed by ASIC or if shareholders controlling more than 5% of its voting shares request it to do so. A small proprietary company controlled by a foreign company will also be required to prepare these reports unless it satisfies certain conditions.

The Corporations Act requires that a company's financial report must comply with applicable accounting standards. It also requires various matters to be addressed in the directors' report. For example, the directors' report must include a review of the entity's operations, outline any significant changes that have occurred in the entity's affairs and discuss any likely developments in the entity's operations and the expected results of those operations.

Companies that are listed on a securities exchange are also required to prepare a remuneration report that contains prescribed information relating to the remuneration of executives and directors. The required disclosures include details of the remuneration of each director and the five highest paid executives of the company. Where an element of the remuneration of those persons consists of securities in the company, certain information in relation to those arrangements, and the details of any termination payments agreed to by the company, should also be disclosed.

Audit

Unless exempted, all public and large proprietary companies must have their financial report for a financial year audited. An auditor who conducts an audit must form an opinion about certain prescribed matters, including whether:

- the financial report was prepared in accordance with the Corporations Act;
- the auditor has been given all information and assistance necessary to conduct the audit;
- the entity's financial records were sufficient; and
- the entity has kept other records and registers required to be maintained by the Corporations Act.

An auditor is also required to give a declaration as to the auditor's independence and compliance with independence requirements, which broadly:

- require auditors to avoid conflicts of interest (which in general terms will exist if the auditor is not capable of exercising objective and impartial judgement in relation to the conduct of the audit, or a reasonable person would conclude that the auditor is not capable of doing so);
- prohibit auditors from owning interests in the entities they audit (whether directly or through family members or associates);

- restrict an auditor's ability to move to an 'in-house' position with an audit client; and
- restrict an auditor from providing non-audit services to audit clients in certain circumstances.

There are also strict requirements for rotation of auditors to prevent auditors being significantly involved in the audit of a particular audit client for more than five years in succession.

An auditor is required to attend an entity's annual general meeting to answer the questions of members regarding preparation of the entity's financial reports and the conduct of the audit.

Integrity of financial reporting – certification of financial reports

The Corporations Act requires that the Chief Executive Officer and Chief Financial Officer of a listed entity make a written declaration to the board of directors stating that the financial records of the company have been properly maintained, that the annual financial statements present a true and fair view of the company's financial position, and that the financial records have been kept in accordance with the Corporations Act.

Reporting to members

All companies that are required to prepare a financial report and directors' report must, within the prescribed period after the end of their financial year (which is no more than four months), provide to their members an annual financial report comprising the financial report, directors' report and auditor's report for the relevant year. The annual report may be provided to members either in hard copy or electronically and, unless a member requests a full annual report, an entity may satisfy its reporting obligations by providing members with a concise report that contains a less comprehensive level of disclosure.

ASX best practice recommendations

Under the ASX Listing Rules, companies listed on the ASX are required to provide a statement in their annual report disclosing the extent to which they have complied with the best practice recommendations set out in the Guidelines. Where the best practice recommendations have not been followed, the ASX Listing Rules require companies to provide reasons for not doing so.

The Guidelines were first published in 2003, and were revised in the second half of 2007. The Guidelines are predicated on the assumption that there is no 'one-size fits all' model of good corporate governance and that what amounts to good corporate governance will differ from organisation to organisation, and must be tailored to the circumstances of each entity.

A complete copy of the Guidelines can be accessed through the website of the ASX: <http://www.asx.com.au/supervision/governance/index.htm> Set out below is a brief discussion of a number of the recommendations contained in the Guidelines.

Independence of directors

The Guidelines recommend that a majority of the directors and the chair of a listed company should be 'independent'. An independent director is described as a director who is independent of management and free of any business or other relationship that could interfere (or be perceived to interfere) with their exercise of unfettered judgement. It is recommended that, in the interests of independence, a procedure be established to allow directors access to independent professional advice at the company's expense. Non-executive directors should also meet regularly without management.

Term of directorship

Under the ASX Listing Rules no director (aside from a managing director) is permitted to hold office without being re-elected for more than three years. The Guidelines recommend that non-executive directors be appointed for a specific term subject to re-election and subject to the ASX Listing Rules. Reappointment of directors should not be automatic.

Audit committee

The Guidelines recommend that an entity's board should establish an audit committee, whose role is to focus on issues relevant to the integrity of the entity's financial reporting and oversee the independence of the external auditor. Consistent with international trends, it is recommended that:

- the audit committee consist of only non-executive directors;
- the majority of members be independent;
- the committee be chaired by an independent chair; and
- there be at least three committee members.

Directors' remuneration

Under the Guidelines, non-executive directors should not participate in schemes designed to remunerate executives, receive options or bonus payments, nor be provided with retirement benefits other than superannuation.

INTELLECTUAL PROPERTY

Intellectual property ('IP') rights in Australia are protected principally under federal legislation, with some additional protection provided by state-based legislation. In addition, Australia is a signatory to the 'World Trade Organisation Agreement on Trade-Related Aspects of International Property Rights' ('TRIPS'), which provides minimum standards for protection of IP.

Trademarks, patents and designs are capable of registration on federal public registers administered by IP Australia, a federal government body that governs the granting of rights in trade marks, patents and designs.

Applicants can readily conduct searches for registered trademarks, patents and designs on the IP Australia website: www.ipaustralia.gov.au

This section deals briefly with the following aspects of IP in Australia:

- trade marks;
- copyright;
- designs;
- patents;
- confidential information;
- business names;
- domain names; and
- the enforcement of IP rights in Australia.

Trade marks

Registration of a trade mark in Australia allows the owner to use, license or sell the trade mark exclusively within Australia for the goods and services for which it is registered. Registration also enables the registered owner to take action against any business whose name infringes on the trade mark.

A trade mark can be a word, phrase, letter, number, sound, smell, shape, logo, picture, aspect of packaging or a combination of these that is used to distinguish the goods and services of one trader from those of another.

It is very difficult to register trade marks that:

- denote the kind, quality, intended purpose or value of the goods or services;
- are common surnames or geographical names; or
- conflict with an earlier trade mark, or would mislead the public about the nature of the goods or services.

Applications for a trade mark

Trade mark applications are governed by IP Australia. To make an application to IP Australia, a business will need a representation of the trade mark, a list of the 'classes' the trade mark falls under, a description of the goods or services and a translation into English, if necessary.

Applications are then examined by IP Australia to see if they meet the requirements of the *Trade Marks Act 1995* (Cth). The period of time between lodging an application and its examination can be significant.

If the trade mark is accepted for registration, details of the trade mark will be advertised in the Official Journal of Trade Marks. Any person who believes that the business is not entitled to the rights of the trade mark has three months from the date of the advertisement to object to the registration of the trade mark.

If there is no opposition filed against the application, or if the opposition is unsuccessful, the trade mark will be registered when the business pays the registration fee.

IP Australia will then send the applicant a Certificate of Registration and record the details of the trade mark in the Register of Trade Marks. Once registered, a trade mark is registered for a period of ten years from the date of the application was filed and can be renewed perpetually for periods of ten years.

Copyright

Copyright automatically safeguards original works of art, literature, music, films, broadcasts and computer programs from copying and certain other uses. There is no system of registration for copyright protection in Australia as copyright protection is automatic. Material is protected from the time it is first written down, painted, drawn, filmed or recorded.

Prior to 1 January 2005, literary, dramatic, musical or artistic works were protected under the *Copyright Act 1968* (Cth) ('Copyright Act') for 50 years plus the life of the author or 50 years after publication if it was published after the death of the author.

From 1 January 2005, due to the Free Trade Agreement between Australia and the United States, literary, dramatic, musical or artistic works are now protected under the Copyright Act for 70 years plus the life of the author.

Copyright protection gives exclusive rights to license others in relation to copying the work, performing it in public, broadcasting it, publishing it and making an adaptation of the work. Rights vary according to the nature of the work. Although making copies of copyright material can infringe exclusive rights of an owner, a certain amount of copying is allowed under the fair dealing provisions of the Copyright Act.

Material may also enjoy reciprocal protection under the laws of other countries who are signatories to the 'Universal Copyright Convention'.

Ownership of copyright

The basic premise for copyright is that the author will be the owner of the copyright. This is, the person who actually makes the work and was the source of originality. A person who is merely acting as a scribe would not be considered to be the author.

The usual exceptions to this basic premise apply. If the author was an employee and the work was created in accordance with the terms of employment, then the employer will own the copyright. Alternatively, the author can assign ownership of the copyright in writing.

It is possible to have joint ownership of copyright, in which case the joint owners will share the copyright equally and as tenants in common. This is subject to any agreement between the co-owners. A co-owner can commence infringement action without joining the other co-owner although each co-owner may have to account to the other for any benefits received arising from that infringement action.

Moral rights

The Copyright Act was amended in 2000 to enable an author to exercise his or her 'moral rights' in relation to any literary, dramatic, musical or artistic work and cinematograph films created by him or her. These moral rights belong to the individual author. They cannot be transferred to another person, although the author may elect to consent to another person infringing his or her moral rights.

There are three essential moral rights bestowed by Part IX of the Copyright Act:

- the right to be attributed as the author of the work;
- the right not to have authorship of the work falsely attributed to someone else; and
- the right for the work not to be subject to derogatory treatment.

In essence, the moral rights regime is aimed at giving the individual author a 'non-commercial' benefit. Many authors will, having become aware of their moral rights, nevertheless choose not to assert those rights in a way that would upset a commercial environment. That said, an enterprise would be foolish to disregard the power the Copyright Act gives an individual author to exercise those moral rights. The easiest solution for the enterprise is to seek consent if it proposes to use the works in a manner that might otherwise constitute infringement of those moral rights.

Computer software

Computer programmes are expressly addressed in the Copyright Act and comprise a 'literary work'. Computer programmes are defined as 'a set of statements or instructions to be used directly or indirectly in a computer in order to bring about a certain result': *Copyright Act* 1968 (Cth) s 10.

Generally the copyright in relation to computer programmes is expressed in the source code. Australian cases have yet to decide as to whether the *look and feel* of the results of a computer software application would be protected by copyright.

Designs

A design relates to the features of shape, configuration, pattern or ornamentation that, when applied to a product, give the product a unique appearance. Registered designs are protected under the *Designs Act* 2003 (Cth) for a maximum period of ten years. Registration of a design gives the owner protection for the visual appearance of the product but not the feel of the product, what it is made from or how it works.

To register a design, it must be both 'new' and 'distinctive', that is, different in overall appearance to other designs already in the public domain. A party can apply to register a single design relating to many products or multiple designs in the one classification class. Registered owners of a design are able to assign their rights to others to use the design and can take legal action to stop others from using the design if the certificate of examination has been issued to the applicant.

If a design is disclosed in public before it has been registered, IP Australia may consider that it is no longer *new* and therefore not capable of registration. Minor or insignificant changes to the design are irrelevant if the overall impression is of significant similarity. Designs involving medals, Olympic symbols, representations of the Queen, flags or emblems cannot be registered.

Applications to register a design

To register a design, applicants are required to complete an application form, provide five identical copies of each view of the design and pay the application fee. Applicants may decide to complete a 'statement of newness and distinctiveness', which enables the applicant to set out the visual features that are new and distinctive. Completion of the statement is optional, but may assist IP Australia when comparing the new design with other registered designs.

An applicant may also request either to register the design or publish the design. If the applicant chooses registration, IP Australia will conduct a formalities check. If the design passes the formalities check, IP Australia will register the design (from the date the application was filed) and publish it in the Australian Official Journal of Designs and place a copy of it in the online designs database.

If an applicant chooses publication, the application will be checked and the design will be published in the Australian Official Journal of Designs and in the AU Designs Data Searching database ('ADDs'). Choosing publication of a design will not give the applicant any rights, but because it is published, it prevents others from gaining any rights to the design.

Patents

A patent is a right granted for any device, substance, method or process that is new, inventive and useful. A registered patent is legally enforceable and gives the owner the exclusive right to exploit the invention commercially for the life of the patent.

Australian patents are administered by the Patents Office of IP Australia. There are two types of patents in Australia:

- 'a standard patent' - which gives long-term protection and control over an invention for up to 20 years; and
- 'an innovation patent' - a fast, inexpensive protection option, lasting a maximum of eight years.

Artistic creations, mathematical models, plans, schemes or other purely mental processes cannot be patented.

The right to apply for a patent lies with the inventor, or a person who has derived title from the inventor, with patent applications being made to the patent office of IP Australia. As patents involve a complex registration scheme, it is recommended that a patent attorney be used when applying to register a patent.

Provisional application

An applicant may choose to file a provisional application, which helps establish a priority date for the invention. Filing a provisional application does not on its own give patent protection.

With the provisional application form, the applicant must include the appropriate fee and a provisional specification that describes the invention.

A provisional application lasts 12 months. During this time, the applicant must file:

- a complete standard patent application or a complete innovation patent application in Australia; or
- an international patent application that claims priority from the provisional application; or
- separate patent applications in one or more overseas countries that claims priority from the provisional application.

Complete applications

A complete application is for either a standard patent or innovation patent and must be accompanied by:

- a Complete Specification, which contains at least one 'claim' that defines the invention;
- the correct application form;

- a notice of entitlement form for standard patents (if applicable);and
- the appropriate fee.

A complete specification must fully describe the invention and provide IP Australia with the best method of performing the invention and 'claims' that the invention is meant to cover.

A 'claim' is a single sentence that describes the technical features of the invention. An 'independent claim' is a claim that does not refer to any other claim and describes the features that are essential to the invention. A 'dependent claim' makes explicit reference to one or more previous claims and contains features that would be desirable or optional, but not essential to the invention. An 'omnibus claim' is one that claims the most preferred form of the invention with reference to the description and/or drawings.

A standard patent can have more than one independent claim, so long as they relate to the one invention.

The complete specification can also include drawings made in black ink and an abstract that provides a summary of the key features of the invention.

The examination process

Innovation patents are not automatically examined by IP Australia. To enforce rights to an innovation within the marketplace, the patent must be certified following an examination. To request an examination, an applicant will need to complete a Request for Examination form and pay the required fee.

For standard patents, an applicant must complete a Request for Examination form and pay the required fee.

A reply to a Request for Examination usually arrives within nine months of filing the correct fee. A patent examiner will inform the applicant of any deficiencies and give the applicant time to change the application, within certain time limits.

Publication

Publication of the un-examined standard patent invention occurs approximately 18 months after the priority date in the Australian Official Journal of Patents. Publication does not guarantee a grant of the patent. The public has three months from the date of publication to start proceedings to show that the patent, if granted, would be invalid. If there are no objections or the objection is unsuccessful, the patents office will seal it and send a certificate to the applicant.

Innovation patents are published upon the grant, which occurs a short time after filing the application.

There are special rules for registering patents for computer related inventions, plants, micro-organisms and business schemes.

International patents

Applying for a patent to IP Australia will only grant protection of an invention within Australia. To protect a patent internationally, an applicant can file:

- a patent application in each country it wants protection; or
- a single international application (An application will automatically take effect in all countries that are party to the Patent Cooperation Treaty. An applicant can choose to proceed in whichever countries they want to select at a later date. There are national requirements and costs in each country, but this can be deferred for a significant period).

Confidential information

There is no statutory protection of confidential information in Australia. The law relating to confidential information has been built up over many decades and emanates from Australia's historical legal links to England. There is no registration system.

Treatment of information as 'confidential' may be the only way of protecting an idea. Although colloquial use often involves stating that confidential information is 'owned', Australian law has yet to conclude that this is the case. This is because the courts have yet to commit to the proposition that confidential information is a form of 'property'. It is essentially a question of who has the ability to control the release of the information.

The great advantage for the commercialisation process is that there is no limit to the period of protection. If the enterprise can maintain confidentiality, whether through contractual provisions, or general law principles, then it essentially holds monopoly rights in relation to use of that confidential information forever. However, release of the information into the public domain, even if done in an authorised manner, means that protection is potentially lost forever.

Business names

Various pieces of State and Territory legislation in Australia require a business to register the business's trading name if the trading name is not identical to the name of its proprietors, namely:

- in Queensland, the Office of Fair Trading regulates the registration of business names under the *Business Names Act 1962* (Qld);
- in New South Wales, the Office of Fair Trading regulates the registration of business names under the *Business Names Act 2002* (NSW);
- in Victoria, Consumer Affairs Victoria regulates the registration of business names under the *Business Names Act 1962* (Vic);
- in the ACT, the Office of Regulatory Services regulates the registration of business names under the *Business Names Act 1963* (ACT);

- in the Northern Territory, the Department of Justice regulates the registration of business names under the *Business Names Act 2007* (NT);
- in South Australia, the Office of Consumer and Business Affairs regulates the registration of business names under the *Business Names Act 1996* (SA);
- in Western Australia, the Department of Consumer and Employment Protection regulates the registration of business names under the *Business Names Act 1962* (WA);
- in Tasmania, the Office of Consumer Affairs and Fair Trading regulates the registration of business names under the *Business Names Act 1962* (Tas).

A business name is the name under which a business operates and registration identifies the owners and location of that business. Registration is compulsory in every State and Territory from which a business operates. Therefore, if a business operates in both Queensland and New South Wales, the business name is required to be registered in both States. Registration must be completed before the business starts trading.

Unlike trade marks, business names do not necessarily provide proprietary rights for the use of the business name. If a business name is identical or similar to another person's registered trade mark, the person conducting business may be held liable for infringement by the trade mark owner. Businesses need to be careful, as just because a business name has been successfully registered by the relevant authority, does not guarantee that it does not breach a current trade mark. The authorities have no obligation to check the trade mark register before registering a business name.

Business name vs company name

The difference between a business name and a company name is important. A company name must be registered with Australian Securities and Investments Commission ('ASIC'). Unlike a business name, it is the registered name of a registered company used to identify an entity. If a company wishes to trade using a name other than its registered company name, it must register that trading name as a business name.

Once again, the registration of a company name does not necessarily provide any protection to the company against a claim from the holder of a prior registered trade mark.

Business name searches

A register of all business names registered in a State or Territory is maintained by the relevant government department. Searches of the register can be conducted at the relevant department in each State or Territory responsible for administering business names or via the National Names Index maintained by ASIC, which also contains a register of all business names at: www.search.asic.gov.au/gns001.html

Domain names

To obtain a '.com.au' domain name, the applicant must:

- be an Australian entity (that is, an Australian company or the owner of a business registered in Australia);
- use the domain name for an appropriate commercial purpose;
- have a domain name that is:
 - the exact match or abbreviated name of the company or registered business name or trade mark;
 - an acronym of the business name or trade mark;
 - a product that the business manufactures, or sells, or a programme that the business administers;
 - an activity or service the business performs, facilitates or trains;
 - a venue that the business operates;
 - a profession practiced by employees or members; or
 - an event the business sponsors.

A domain name cannot be a place name in Australia. Domain names can be two to 63 letters and words can be separated by hyphens but not spaces. In Australia, a business cannot register its trade mark as a

domain name unless the trade mark is the same as its legal entity name (i.e. business or company name). The rules and policies for registration of '.com.au' domain names are governed by .au Domain Administration Limited and may be viewed at: www.ada.org.au

To register a '.com.au' domain name, an applicant can use a number of accredited Australian Registrars, a list of which is provided on: www.ada.org.au/registrars

Registration of IP in Australia that has already been registered in another jurisdiction

If a business has applied for protection of its IP in its own country or any other jurisdiction outside of Australia, it may be able to apply for protection of that IP on a priority basis in Australia (subject to the other country being a member of the World Intellectual Property Organisation Convention ('WIPO')), providing it is within the following time limits:

- patents and plant breeders – 12 months from the date of the first application in a member country;
- designs and trade marks – six months from the date of the first application in a member country.

The application in Australia will have a 'priority date' of the filing date of the original application giving the applicant protection against identical or similar registrations from that priority date.

Although it is possible to apply outside the time limits above, the benefit of the WIPO convention cannot be obtained and any earlier disclosure of the invention or design may invalidate IP rights in Australia.

Enforcement of IP rights in Australia

Defence provisions

Each piece of IP legislation sets out various defences to infringement actions. An important element throughout IP legislation is the degree of knowledge held by the alleged infringer. A common feature of the IP regimes is to notify the world at large of the ownership rights of the IP. Generally, this is for the purpose of ensuring that any alleged infringer of the IP rights has constructive notice, which may enable the enterprise to overcome any defence based on an innocent infringement.

Opposition procedures

In relation to the forms of IP that involve a formal registration process (that is, trade marks, patents and designs) there is an opportunity for a competitor to oppose the grant of registration to the applicant. This potentially enables a competitor to delay the grant of IP rights. There are, however, rules that preclude parties from running frivolous actions.

Unjustified threats

Most of the IP legislation provides for a 'counter-attack' from a party who has received a threat that it will be sued for infringement of IP rights that is unjustified. A 'threat' is not defined in the IP legislation but it seems that it can be made in any manner, whether oral or in writing. The mere notification of the existence of a right to sue for infringement of IP rights does not constitute a threat. The unjustified threats provisions emphasise the following points when dealing with a letter of demand:

- only assert actions that can be proven;
- only refer to multiple forms of IP rights if infringement can be proved of all of those IP rights; and
- only assert infringement where and when there is a will to actually institute proceedings.

Remedies available for groundless threats may include a declaration, injunction or recovery of damages.

Remedies

Each form of IP legislation sets out the remedies that are open to a person to enforce their IP rights. Those remedies include a right to be paid damages or an account of profits. Account of profits is intended to prevent unjust enrichment to the defendant, whereas damages are designed to put the plaintiff in the same position it would have held if the infringement had not occurred. Some of the IP legislation limits the remedies available where the defendant can establish that the infringement was innocent.

Limitation periods

Most of the forms of IP legislation specify the periods within which an action for infringement must have commenced (known as the 'limitation period'). In all cases the period is six years from the date in which the infringement occurred. A failure to commence an action within this period means the right to enforce the IP rights in respect of the alleged infringement act will be lost.

COMPETITION, FAIR TRADING & CONSUMER PROTECTION

The issues of competition, fair trading and consumer protection are regulated at federal, State and Territory levels within Australia. The primary source of competition and consumer protection law is the *Trade Practices Act 1974* (Cth) ('TPA'), a federal piece of legislation. In its entirety, the TPA can affect all aspects of commercial dealings, including the initial acquisition of a corporation, and then how the corporation operates its business with suppliers and consumers.

Given the far-reaching scope of the TPA, this section endeavours to create an awareness of the ways in which the TPA may affect commercial dealings in Australia. It does not seek to be a comprehensive analysis of the TPA or an exhaustive summary of its provisions.

Businesses covered by the Trade Practices Act

The power of the federal government to legislate is restricted to those issues within the 'heads of power' set out in the Australian Constitution. The implications of this restriction are reflected in the scope of the TPA, both in terms of who is covered by the Act and the transactions to which it applies.

The TPA relies primarily on two heads of constitutional power for its validity: the 'corporations power' and the 'trade or commerce across States power'. This means that the TPA only covers the business and commercial activities of:

- most corporations;
- non-corporate entities (such as partnerships, joint ventures and sole traders) whose business activities cross State borders, take place within an Australian Territory or, in respect of the unconscionable conduct provisions and consumer protection provisions, are conducted by telephone or post, or use radio or television; and
- the federal government.

It should be noted that the restrictive trade practices provisions of the TPA now apply to virtually all businesses, whether incorporated or not, by virtue of application legislation passed by State and territory governments.

Even if a business activity is not within the ambit of the TPA, the business may still be subject to the provisions of the fair trading and consumer affairs legislation enacted by each State and Territory, which substantially mirror the provisions of the TPA.

At the federal level, the principal regulating authority is the Australian Competition and Consumer Commission ('ACCC'), which has an informative and useful website: www.accc.gov.au

At State and Territory level, the fair trading legislation is regulated by the Office of Fair Trading, Consumer Affairs Commission or equivalent body.

Activities covered by the Trade Practices Act

The goal of the TPA is to enhance the welfare of Australians by promoting competition and fair trading and by providing consumer protection. It does this in three ways:

- Parts IIIA and IIIAA establish access regimes for various types of infrastructure. Australia has both a generic form of access regulation under Part III of the TPA, and industry specific schemes in respects of industries such as telecommunications, gas and electricity supply. The aim of access regulation is to prevent the owners of infrastructure facilities from exploiting the natural monopoly they hold over the services provided by the facility due to the massive infrastructure costs involved in setting up an alternative facility;
- Parts IV, IVA and IVB promote competition by prohibiting anti-competitive conduct such as exclusive dealing and price-fixing; and

- Parts V and VA contain consumer protection provisions that, among other things, imply warranties into contracts, restrict a corporation's ability to limit its liability for defective products and impose a statutory liability on manufacturers of defective products.

The provisions prohibiting anti-competitive conduct and the consumer protection provisions are discussed in greater detail below.

Anti-competitive conduct

Restrictive trade practices

The restrictive trade practices provisions of the TPA are designed to encourage fair competition between businesses by prohibiting certain types of conduct. It should be noted that conduct that is designed to injure a competitor by taking away its business is not of itself unlawful. After all, one of the TPA's primary objectives is to promote competition rather than to hinder it. Rather, the TPA is designed to prohibit conduct that it considers to be unfair, dishonest and unethical business practice.

Whilst certain types of conduct are prohibited outright, some types of conduct are subject to a competition test, with the prohibition only applying if the conduct has the effect of substantially lessening competition. In broad terms, the following types of conduct are prohibited outright:

- entering into anti-competitive agreements and exclusionary provisions, such as agreements between competitors that are designed to exclude or limit dealings with a particular supplier or customer or agreements which fix or control prices;
- a corporation who has a substantial degree of market power misusing that power to substantially damage a competitor or deter a competitor from engaging in competitive conduct; and
- refusing to supply goods or services unless the recipient agrees to also acquire goods and services from another entity (otherwise known as 'third-line forcing').

Examples of restrictive trade practices that are prohibited only if they have the effect of substantially lessening competition include:

- specifying a minimum price below which goods or services may not be resold or advertised for sale;
- merging with another corporation by acquiring its assets or shares in the entity; and
- merging with another corporation in circumstances that would give an international entity a controlling interest in an Australian corporation.

The implications of the restrictive trade practices provisions are far-reaching. For example, the third-line forcing prohibition means that a lender is prohibited from requiring borrowers to take life insurance from a nominated insurance company.

The TPA recognises that conduct that would otherwise be prohibited by the restrictive trade practices provisions may have a public benefit. Accordingly, the ACCC may authorise a merger that would result in a substantially lessening of competition if, for example, the merger would benefit the public and increase the international competitiveness of Australian industry.

It should be noted that exclusive dealing conduct will be immune from legal proceedings under the TPA upon the ACCC being notified of the conduct. That immunity will remain unless the ACCC determines that the conduct substantially lessens competition to an extent that outweighs the public benefit of the conduct. It should be noted that special provisions apply in relation to third-line forcing.

Unconscionable conduct

Unconscionable conduct is prohibited by the TPA in both commercial dealings and consumer transactions. As well as applying generally to conduct in trade or commerce, the prohibitions may apply to supply transactions for business purposes valued at A\$3 million or less and supply transactions involving goods of a type ordinarily acquired by consumers for personal, domestic or household use.

Issues of unconscionability generally arise where two parties to a transaction are in disparate bargaining positions. Conduct is generally considered to be unconscionable where the dominant party has taken advantage of an innocent party whose will is overborne to such an extent it cannot be considered to be independent and voluntary.

Although the term ‘unconscionable conduct’ is not defined in the TPA, factors usually taken into account in determining whether conduct is unconscionable include:

- the relative bargaining strengths of the parties;
- whether conditions that are not reasonably necessary for the legitimate protection of a party’s interests are imposed;
- whether the weaker party could understand the transaction documents;
- the extent to which the more dominant party is willing to negotiate the terms and conditions of the transaction documents; and
- the extent to which the parties act in good faith.

In addition to other remedies, the TPA permits a court to relieve a party from a contractual obligation on the grounds of unconscionable conduct. Accordingly, businesses need to be cognisant of differences in bargaining positions when considering a transaction and to ensure that any lack of equality does not render it unfair for the business to proceed with the transaction.

Industry codes

The regulations to the TPA may declare an industry code of practice to be a mandatory code for the industry or a voluntary code that binds the corporation. The effect of this is to give the code statutory force, with breaches of the code constituting contraventions of the TPA. This gives access to a range of remedies under the TPA, including damages. Examples of existing codes are the Franchising Code of Conduct and the Food Standards Code, which provides guidelines governing food content, safety and labelling requirements in Australia.

Consumer protection

The consumer protection provisions of the TPA are designed to ensure fair trading by protecting consumers and corporations that qualify as consumers from a range of unfair practices such as misleading and deceptive conduct and pyramid selling. They also impose responsibilities on businesses regarding product safety and information standards, such as country of origin representations.

The consumer protection provisions within the TPA can be divided into three broad categories:

- unfair practices;
- product safety and product information; and
- conditions and warranties in consumer transactions.

Unfair practices

The unfair practices provisions of the TPA are regularly relied upon in commercial litigation claims in Australia. Notably, they do not apply to financial services, which are regulated separately by Australian Securities and Investments Commission ('ASIC') under a similar statutory regime.

Of particular importance to businesses is the general prohibition on engaging, in trade or commerce, in misleading or deceptive conduct or in conduct that is likely to mislead or deceive. The scope of this prohibition is far-reaching, causing it to be one of the most widely litigated provisions of any Australian statute. Given the generality of the prohibition, it is used in all manner of circumstances both in commercial and domestic transactions to question the conduct of a corporation.

There is an extensive body of case law discussing what constitutes misleading and deceptive conduct. In simple terms, the conduct must have conveyed a misrepresentation that has led the recipient to some error or misconception. Although it is not necessary that the conduct was intentional, the conduct must have created a real and not remote chance of misleading or deceiving and must have created more than mere confusion or uncertainty in the minds of the public.

There are also specific prohibitions on a corporation, in trade or commerce, making false or misleading representations in connection with the supply or promotion of goods or services, the sale of land or regarding the nature of employment.

Certain types of conduct are also prohibited, such as pyramid selling, bait advertising, accepting payment without intending to supply, harassment and coercion, sending unsolicited credit cards or demanding payment for unsolicited goods or services.

The TPA permits a corporation to represent that goods originate in a certain country only if the goods have been 'substantially transformed' (that is, they have undergone a fundamental change in form, appearance or nature) in that country and over 50% of the costs of producing the goods were incurred in that country.

Product safety and product information

The product safety provisions of the TPA prohibit corporations from supplying goods that do not conform with a compulsory consumer product safety standard, for which a notice has been issued declaring the goods to be unsafe or which are subject to a permanent ban.

The Australian federal government may impose a moratorium on the supply of products suspected of being dangerous in order to allow an investigation into the risks associated with the products.

Where a corporation supplies goods in contravention of a product safety standard, or products do not comply with product information standards, or are deemed to be likely to cause injury to a person, the federal government may require the corporation to provide directions to consumers about the nature of the defects or dangers, procedure for disposal and other matters. The government may also impose a compulsory product recall of the goods.

If a corporation is concerned that its products may cause personal injury, the corporation may voluntarily recall the product but must notify the federal government within two days of the recall. The ACCC may impose a compulsory recall in circumstances where a corporation does not undertake a voluntary recall. In either instance, the corporation must comply with the strict procedural requirements for recalls specified in the TPA.

The TPA also allows product information standards to be prescribed. The standards set out requirements for the performance, composition, contents, methods of manufacture or processing, design, construction, finish or packaging of the goods as well as the manner in which that information is to be disclosed to consumers.

Conditions and warranties in consumer transactions

Part V, division 2 of the TPA implies certain conditions and warranties into contracts with 'consumers'. A person or corporation is a 'consumer' of goods or services if the goods or services:

- are acquired or rendered for A\$40,000 or less or, if acquired or rendered for more than A\$40,000, are of a kind ordinarily acquired for personal, domestic or household use or consumption; and
- in the case of goods, are not purchased for resale and are not used up or transformed during the course of production or manufacture or in the process of treating other goods or repairing or treating fixtures.

The TPA implies the following conditions into all consumer contracts:

- that the supplier will give clear title to the goods;
- that the goods supplied will be of merchantable quality (except to the extent defects were made known to the consumer prior to sale);
- that, where the purpose is made known at the time of the sale, the goods are fit for that purpose; and

- that the goods will correspond with any description or sample if they are supplied by description or sample.

In addition, the TPA implies the following warranties into all consumer contracts:

- that the consumer will be able to enjoy quiet possession of the goods;
- that services will be rendered with due care and skill; and
- that any materials supplied in connection with those services will be reasonably fit for the purpose for which they are supplied.

It is not possible for a business and its customers to contract out of or modify the implied conditions and warranties and any term in a contract that purports to do so is void. However, if the goods or services are not of a type ordinarily acquired for household, personal or domestic use, the business may limit its liability to:

- in the case of goods - the replacement or repair of the goods, or payment of the cost of replacing the goods or the cost of repair; and
- in the case of services - the resupply of the services or payment of the cost of supplying the services again.

Nevertheless, a business may be prevented from relying on the limitation if the consumer can show that it is not fair or reasonable for the business to rely on the limitation clause. In determining whether reliance has been fair and reasonable, factors such as the parties' relative bargaining strength and the offer of inducements during negotiations will be taken into account.

In recognising that some recreational activities are inherently dangerous and that consumers should therefore bear some of the risk flowing from a decision to engage in those activities, the TPA stipulates that waiver of liability agreements signed by consumers before engaging in recreational services are not necessarily voided merely because they purport to exclude some of the TPA's implied terms.

If a supplier breaches a condition implied by the TPA, the consumer may rescind the contract within a reasonable timeframe provided the consumer follows the notice provisions set out in the TPA. This right of rescission does not limit the consumer's other remedies.

Contracts of insurance and contracts for the transportation or storage of goods are exempted from the imputed warranty relating to the use of due care and skill in performance of the services.

Actions against manufacturers and importers

The rights against sellers of defective goods discussed previously are replicated, to a large degree, in respect of manufacturers of defective goods (or the importer if a manufacturer has no place of business in Australia). These rights only apply in relation to goods that are ordinarily acquired for personal, domestic or household use.

The TPA imposes liability on manufacturers to compensate both consumers and third parties for loss and damage to person or property occasioned by goods that:

- do not correspond with the description;
- are of unmerchantable quality;
- do not conform to sample;
- are unfit for the stated purpose; or
- do not comply with stated warranties.

Further, a manufacturer or importer will be liable for damages if it does not ensure that there is a reasonable supply of spare parts and repair facilities.

Exceptions to liability include the situation where the consumer was aware at the time of purchase that parts and repair facilities would be unavailable or limited.

If a person is injured or has property damaged by a defective product, the TPA gives the person a right to compensation by the manufacturer of the product. Goods are considered defective if their safety is not what a reasonable person would expect it to be, taking into account all of the circumstances.

The term 'manufacturer' has an extended meaning for these purposes, and includes the actual manufacturer, anyone holding themselves out to the public as the manufacturer, and the importer of the goods. A retailer or other supplier may be deemed to be the manufacturer if the actual manufacturer cannot be identified.

These provisions give a right of recourse by a consumer directly against the manufacturer where the consumer can show on the balance of probabilities that the product is defective and caused the loss, without also having to prove that the manufacturer was negligent or a contractual link to the manufacturer.

Enforcement of the Trade Practices Act

The introduction of the TPA has been accompanied by the establishment of three bodies to enforce the TPA and to advise the federal government on competition policy:

- ACCC - the ACCC is an independent statutory body established in 1995 to administer and enforce the TPA. One of its primary powers and responsibilities is the investigation and prosecution of breaches of the consumer protection and competition provisions of the TPA. See: www.accc.gov.au
- National Competition Council ('NCC') - the NCC is charged with the primary responsibility of advising State and Territory government agencies in the implementation of national competition policy and bureaucratic infrastructure. See: www.ncc.gov.au
- Australian Competition Tribunal - this tribunal is an independent statutory body responsible for reviewing decisions made by the ACCC. It is operated and staffed through the Federal Court of Australia. See: www.competitiontribunal.gov.au

Breaches of the TPA may carry fines of up to A\$10 million for corporations, or A\$500,000 for individuals, or may be the subject of damages awards or injunctive relief.

In March 2005, pecuniary penalties totalling A\$23.305 million were ordered by the Federal Court after the ACCC instituted proceedings against 16 respondents for price-fixing conduct in a regional petrol market. Of those penalties, a A\$5 million penalty was imposed on one respondent alone, with the director of another respondent receiving a penalty of A\$200,000.

In January 2006, the Federal Court imposed a penalty of A\$8.5 million against a national supermarket chain in respect of price fixing and misuse of market power.

Australia's telecommunications giant, Telstra Limited, received a competition notice from the ACCC in March 2005 following the ACCC's investigation into Telstra's pricing of high speed internet services to other wholesale providers competing with Telstra under the telecommunications access regime. As part of its agreement with the ACCC, Telstra reduced its wholesale digital subscriber line ('DSL') pricing and agreed to rebate A\$6.5 million to its affected wholesale customers.

These examples demonstrate the scope of the TPA and some of the action that the ACCC may take regarding contraventions. In addition to the imposition of penalties, the TPA may also affect the contractual deal struck between parties. For example, if unconscionable conduct can be shown, a party may be relieved of its contractual obligations. Likewise, the consumer protection provisions limit, and in some instances exclude, a business's ability to limit its liability for providing goods or services. Therefore, it is important that all businesses are aware of the TPA and how it affects their business.

FOREIGN INVESTMENT IN AUSTRALIA

Australia has focused on developing a business environment suitable for growth and investment. In particular, the federal government has adopted a foreign investment policy aimed at welcoming investment in Australian businesses' and property, recognising the economic advantages of encouraging foreign investment in Australia. A summary of Australia's foreign investment policy can be found on the www.firb.gov.au website.

Community concerns about foreign ownership of Australian assets are addressed through the operation of the *Foreign Acquisitions and Takeovers Act 1975* (Cth) ('FATA'). The FATA requires proposed acquisitions of Australian assets by 'foreign interests' to be notified to the Foreign Investment Review Board ('FIRB') if they fall within a specified category or are valued above a specified monetary threshold.

Who is a foreign person?

As stated in section 4 of the FATA, with certain exceptions, a 'foreign person' means:

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

A person will be regarded as having a substantial interest in a corporation if the person controls at least 15% of the voting power or hold interests in at least 15% of the issued shares; or the person, together with other persons, controls at least 40% of the voting power or hold interests in at least 40% of the issued shares, unless the Federal Treasurer is satisfied that the person, whether alone or together with associates, is not in a position to determine company policy.

The thresholds for determining a substantial interest in a trust estate is 15% of the beneficial interest in the capital or income of the trust for a single person and an aggregate of 40% for the person and his or her associates. If the trust is a discretionary trust, each potential beneficiary is taken to be beneficially entitled to receive the maximum amount that the trustee is empowered to distribute to them.

The interests of an associate of a natural person, not ordinarily resident in Australia or a foreign corporation noted above, will be taken into account when determining their interest in the corporation or trust, as the case may be.

Role of Foreign Investment Review Board

The role of the FIRB is to examine the foreign acquisition proposal, and then make a recommendation to the federal government as to whether the proposal is suitable for approval under Australia's foreign investment policy. The Federal Treasurer may then either approve the proposed acquisition, or block the proposed acquisition if they determine it to be contrary to the national interest. Applicants are usually advised of the FIRB's decision within 40 days of making the application, although this time may be extended by up to 90 days.

Investments requiring approval

Notifications depend on the type of investment proposed, the monetary value of the investment and the nationality of the investor. Specific restrictions are in force in industries considered sensitive, such as the media, telecommunications and transport industries. The policy encourages foreign investment in real estate that increases the supply of new housing to maintain greater stability of house prices, whilst discouraging speculative investment.

As a result of the Australia-United States Free Trade Agreement ('AUSFTA'), which came into effect on 1 January 2005, separate thresholds apply for acquisitions by United States ('US') investors.

The following types of investment require prior FIRB approval:

- acquisitions of substantial interests in existing Australian businesses that have assets worth at least A\$100 million or which are valued at over A\$100 million (or A\$913 million for US investors);
- proposals to establish new businesses worth A\$10 million or more (other than proposals by US investors);
- portfolio investments in the media of 5% or more and all non-portfolio investments;
- takeovers of offshore companies whose Australian subsidiaries or gross assets exceed A\$200 million and represent less than 50% of its global assets (or A\$913 million for US Investors);
- acquisitions in urban land that is developed non-residential commercial real estate, where the property is:
 - subject to heritage listing, is valued at A\$5 million or more and the acquirer is not a US investor; or
 - not subject to heritage listing, valued at A\$50 million or more (or A\$913 million for US investors);
 - acquisitions of urban land that is an accommodation facility, vacant real estate or residential real estate, or shares or units in an Australian urban land corporation or trust estate, irrespective of value; and
 - direct investments by foreign governments and their agencies, irrespective of size.

Australia – United States Free Trade Agreement

The introduction of the AUSFTA agreement in 1 January 2005 has resulted in separate thresholds applying for acquisitions by US investors.

In accordance with the Investment Chapter of the AUSFTA, the Australian government has been required to make certain changes to the way direct US foreign investment proposals are scrutinised.

The importance of US investment and trade in Australia

The US is one of Australia's most important economic partners. As an example, merchandise exports for 2007 reached A\$10 billion, and merchandise imports reached A\$23.7 billion. Further, the two-way trading between Australia and the US grew by 8%, to over A\$48 billion, in 2006-2007 (Australian Government - Department of Foreign Affairs and Trade (2008) *Australia United States Trade Agreement website*. Retrieved July 1 2008 from http://www.dfat.gov.au/trade/negotiations/us_fta/index.html).

What has changed for US investors?

Prior to the introduction of the AUSFTA, investment proposals up to A\$50 million (in areas other than nominated sensitive sectors such as banking, the media and transportation infrastructure) did not need to be notified to the FIRB, and proposals up to A\$100 million were approved without detailed examination.

Investments of larger amounts were generally subject to extensive application and examination processes.

Today, the notification thresholds for US Investors are much higher than those for non-US investors. The current notification thresholds are:

Proposed acquisition	Previously, notification if:	Currently, notification if:
Existing Australian business	Asset cost is greater than A\$50 million	Asset cost is greater than A\$913 million
New business	Total investment greater than A\$10 million	No notification required (except in certain circumstances*)
Developed non residential commercial property	Value greater than A\$50 million	Value greater than A\$913 million

* See (Foreign Investment Review Board (2008). *Monetary thresholds except US website*. Retrieved July 1 2008 from http://www.firb.gov.au/content/monetary_thresholds.asp).

The FIRB will continue to review the following proposed US investments (among others):

- all direct and indirect investments of 5% or more in Australia's media sector;
- all investment in Australian businesses with assets exceeding A\$105 million for prescribed sensitive areas, including media and transport;
- direct investments by foreign governments or their agencies;
- all direct investment in Australian land, and indirect investment in Australian companies or trusts holding land, where the relevant land asset is:
 - residential property;
 - commercial land valued over A\$913 million;
 - vacant land (regardless of value);

- accommodation facilities (regardless of value); or
- shares or units in Australian urban land corporations or trust estates, irrespective of value.

National treatment and most-favoured nation status

The AUSFTA also requires both Australia and the US to treat investors of the other country as either:

- investors from their own country (national treatment); or
- investors from a country holding the most favourable investor status (most favoured nation treatment).

It should be noted that the AUSFTA contains exemptions for various sectors with respect to national and most-favoured nation treatment.

Increased investment

A reduction in the threshold levels previously applicable to US investment has increased interest and investment by American companies in Australia. Approved proposed investment from the US nearly doubled from A\$23.4 billion in 2005-06 to A\$45.3 billion in 2006-07 (Foreign Investment Review Board (2008). *Foreign Investment Review Board Report 2006-07 website*. Retrieved July 1 2008 from <http://www.fir.gov.au/content/Publications/AnnualReports/2006-2007/index.asp>).

Implications

The raising of the FIRB dollar value notification threshold will result in a reduction of the number of US investments proposals requiring examination and approval.

The removal of the cost and uncertainty associated with the notification and screening provisions of the pre-AUSFTA foreign investment regime should theoretically amount to a reduction of the risk premium previously placed on investment in Australia. Potential exists for great savings for both US companies investing in Australia, and Australian companies seeking injections of capital from US sources.

Withholding tax

The Australian taxation regime is complicated and this section does not attempt to provide a comprehensive summary of that regime. However, foreign investors should be aware of the non-resident withholding tax regime and its implications for investing in Australia.

Non-resident withholding tax ('NRWT') is applied when a non-resident becomes entitled to a payment of unfranked dividends, interest or royalties. For these purposes, a non-resident is an investor who has:

- advised the investment body of non-resident status; or
- authorised payment to be made to an address outside Australia and its territories; or
- provided a non-Australian address for the service of notices or statements.

The payor of the dividend, interest or royalty is required to withhold and remit to the Australian Taxation Office NRWT on the gross amount at the rate of 30% for dividends, 10% for interest and 30% for royalties. These rates are subject to the rates specified in Australia's Double Taxation Agreements ('DTA'), which generally reduce the applicable rate for dividends and royalties to 15%. The withholding tax rate for interest varies according to the relevant DTA, with some agreements allowing a complete exemption from withholding tax. For more information regarding the various DTAs, please refer to the Australia Taxation Office ('ATO') website at www.ato.gov.au

The interest, dividend or royalty does not need to be actually paid to the non-resident to be subject to tax. If the income is re-invested, accumulated, capitalised or otherwise dealt with on behalf of the non-resident or at his or her direction, it is deemed to be paid.

NRWT on dividends, interest and royalties is a final tax with the non-resident payee having no further Australian taxation liability in respect of the income on which NRWT is paid, provided that the correct amount of tax has been withheld and paid to the ATO. Non-residents will, however, be required to lodge an Australian income tax return if they derive assessable income other than interest, dividends or royalties.

WORKPLACE RELATIONS

A basic understanding of the workplace relations framework is an essential element of doing business in Australia. Traditionally an interventionist system, successive governments have endeavoured to gradually shift the focus from a centralised, adversarial approach where decisions are made by a third party umpire, to a system of bargaining at the enterprise level and conciliation, with limited arbitral powers. Although this approach had been significantly progressed by legislative amendments that came into operation on 27 March 2006, a partial wind back occurred with the election of the Rudd Labor government in 24 November 2007.

As this area of regulation of workplace relations is going through a phase of continuing change and reform, and because the pace, nature and extent of the reform will tend to vary according to the political 'climate' both federally and in each of the States and Territories, we recommend any foreign entities considering acquisition of a business in Australia, or directly employing any staff, obtain specific advice as to the legislative regime in place at that time.

State and federal jurisdictions

At present, there is no single unitary industrial relations system in Australia. Although there is a federal commonwealth system regulated by the *Workplace Relations Act 1996* (Cth), each State also has its own industrial system and legislation (save for the State of Victoria, which referred many of its powers to the Commonwealth in the 1990s, such that a sole federal system operates in that State, and the Territories).

However, on 27 March 2006 the federal government's industrial relations reforms (called 'Work Choices') commenced operation. That legislation effectively gave the federal government powers over workplace relations for all trading, foreign and financial corporations employing workers in Australia. Although previously corporate employers had the choice of whether to operate under the State or federal systems, now all relevant corporate employers are automatically covered by the federal system, to the exclusion of the State systems.

These changes represented a significant shift in the dynamics of industrial relations in Australia. The State systems have very limited application – effectively to sole traders and partnerships.

Generally speaking, Work Choices was far more ‘employer friendly’, continuing the trend away from external intervention in the employment relationship towards workplace negotiation and industrial agreements. In particular, employers benefited from the limiting of union rights (including rights of entry), the limiting of the ability of employees to engage in protected industrial activity, the limiting of remedies available to employees for unfair dismissal, the lowering of the threshold that enterprise-level industrial agreements need to meet to be registered, simplifying the procedural aspects of making industrial agreements and having them registered, and providing further encouragement for individual industrial agreements, called Australian Workplace Agreements (AWAs). The previous federal government also effectively outlawed various issues that unions had been introducing into industrial agreements (such as restrictions on the use of on-hire labour in workplaces, contractual remedies for unfair dismissal claims, and compulsory bargaining fees for union representation).

With the election of the Rudd government, a new agenda has been proposed for workplace relations in Australia. Although the government has already moved to scrap AWAs (and will re-introduce an independent umpire system in the pretext of a new body called ‘Fair Work Australia’ to resolve disputes and regulate workplace relations), many elements of the Howard government reforms, such as restrictions on union rights of entry, will be retained.

Courts and tribunals

The Australian Industrial Relations Commission (‘AIRC’) is the primary ‘decision making’ body in the federal system. It exercises conciliation and arbitration powers in the resolution of industrial disputes. Its role is primarily as a facilitator and administrator focussed on the resolution of disputes. However, strictly legal matters, such as prosecution for breaches of the legislation or industrial agreements, has been dealt with by the separate judicial body, the Federal Court of Australia.

Under Work Choices the AIRC's traditional role was curtailed. It was no longer responsible for making and approving agreements. Its ability to intervene in industrial disputes was significantly restricted, unless it was provided with power to do so by the parties in their industrial agreements.

Similarly, each State (save for Victoria) also has its own State-based Industrial Relations Commission.

The Rudd government has proposed that Fair Work Australia will undertake much of the former role of the AIRC. It is proposed that the body will be a 'one stop shop', which will not only facilitate dispute resolution, but which will also investigate industrial agreement and relevant legislative breaches. It will also provide advice to parties. The government is also claiming that this new body will take a more inquisitorial approach to matters (as opposed to the adversarial approach of the AIRC) designed to promote greater accessibility and to lower costs.

Sources of employment regulation

There are effectively three aspects governing the employment relationship between an employee and employer – industrial awards, industrial agreements, and individual common law contracts.

Awards

These have traditionally formed the base level of employment regulation in Australia, underpinning the non-professional or 'blue collar' workforce. At the federal level, an award was an order of the AIRC, which set out the minimum terms and conditions of employment. It was the end product of the conciliation and (if necessary) arbitration system set up in the legislation. It is industry (as opposed to individual business) focussed. Awards are applied indefinitely until replaced or updated by another award. A union had the power to seek the making of an award whether or not the employees of the relevant companies were members, as long as those employees were eligible to become members. Normally, only employers who had been a 'party' to a dispute (creating the award), employers who were members of employer association who were parties, or employers who were 'roped in' or formally joined the award were subject to it.

At the federal level, the potential subject matter of awards had been limited to a range of 13 'allowable award matters'. These included matters such as employee classifications, hours of work, rates of pay, allowances, penalty rates, notice of termination, and dispute resolution.

State awards by way of contrast applied largely on a common-rule basis, for example, all workers performing a particular type of work were subject to the award governing that type of role. There were awards in existence for most 'blue collar' jobs.

Awards reflected the minimum or 'safety net' entitlements. They could not be contracted out of, save by a registered industrial agreement.

Under Work Choices, the former state awards continued to apply, subject to certain provisos, and to specific employers, as Notional Agreements Preserving State Awards ('NAPSA'). These NAPSA's were only to remain binding until 28 March 2009, however, they have now been extended by the Rudd government until 31 December 2009.

Although awards have always underpinned the industrial system in Australia, their importance diminished under Work Choices, but is now set to gain renewed importance, albeit in a different form.

An award simplification process was initiated by the Howard government to consolidate the number of federal awards, to remove matters not permitted to be contained within them and cut out issues no longer an 'allowable award matter'.

The Rudd government has, however, implemented a revised award 'modernisation' process, which will seek to combine awards and modify and simplify awards in accordance with 10 new award matters. These modernised awards will also presumably be given common rule application. This task is to be completed by the AIRC and the new 'modern' awards are set to come into operation on 1 January 2010.

These modern awards will be reviewed and updated over time by Fair Work Australia.

Industrial agreements

Industrial agreements, also known as enterprise or workplace agreements, take two basic forms – collective agreements ('CA') or individual agreements (previously called AWA).

A CA is negotiated at an enterprise or business level with the relevant employees. It may be negotiated with or without trade union involvement. An approval via a majority vote of employees is required before being registered and approved. Once registered, CAs take precedence over any applicable award. They have a maximum lifespan of five years although continue to operate until replaced. They automatically apply to any new employees that join the business. Managerial employees are usually excluded from their scope.

The alternative form of industrial instruments was an AWA, which was a registered individual employment agreement between an employee and their employer. Introduced to provide greater flexibility on an individual basis, once registered they also took precedence over any awards and had a maximum lifespan of five years.

Under the recent reforms, no new AWAs can be made. If employers had employees engaged under AWAs as of 1 December 2007, such employers can enter into Individual Transitional Employment Agreements ('ITEA') with certain employees. Although these are similar to AWAs, they are subject to a no-disadvantage test, as are all new industrial agreements, and must be approved by the Workplace Authority. ITEAs can only remain in place until 31 December 2009.

Most major businesses will have in place some form of industrial agreement with their workforce, setting out actual (as opposed to minimum) pay rates. They provide certainty for the specified lifespan of the agreement. Most industrial action is prohibited during their lifespan.

Common law contracts

Finally, common law employment contracts continue to play an important role. Under the common law in Australia, all employment is contractual in nature and subject to a 'contract of service'. If there is no specific written contract in place, standard terms are implied, such as the ability to terminate on reasonable notice, and the obligation to pay wages based on the hours of work performed. Although common law contracts have a prominent legal place in the Australian system, they cannot displace or derogate from the terms of an award or registered industrial agreement. Nevertheless, many employers continue to use them as a supplement, covering issues such as confidentiality, termination, restraints of trade and intellectual property.

Awards and industrial agreements generally only cover the 'blue collar' workforce. Accordingly, the majority of 'white collar' workers such as managers and many professionals will be engaged solely on private written common law contracts. In addition, under the Rudd government reforms, apart from the new National Employment Standards (which will apply for all employees), employees earning over A\$100,000 per annum as ordinary time earnings will be exempt from the award system. It is therefore envisaged that written common law employment contracts will be necessary for such employees.

Basic entitlements

The industrial legislation of each State prescribes certain minimum entitlements. In brief, these include four weeks paid annual leave per year, usually eight days paid sick leave per annum and paid long service leave (usually 13 weeks per 15 years of service with the same employer, after serving a minimum service period of between seven and ten years). Unpaid leave entitlements are also provided, including maternity leave (generally 12 months) and carer's leave. Minimum notice of termination is prescribed between one week and five weeks, subject to the length of the employee's service and the employee's age. An additional severance payment is often necessary where the employee is made redundant, up to 16 weeks subject to length of service.

Under Work Choices, severance payments played a reduced role, and entitlements such as long service leave could be contracted-out or 'traded away' under federal industrial agreements. Annual leave, personal leave (including sick leave – which increased to ten days for full time employees) and unpaid parental leave (including maternity leave) were guaranteed under the Australian Fair Pay and Conditions Standard (against which all federal industrial agreement were measured going forward).

Once again, with the introduction of the next round of reforms by the Rudd government, many entitlements will not be able to be contracted out of by most employers. In addition, modern awards and industrial agreements may not refer to such entitlements, which will form part of the National Employment Standards, and which will apply generally by force of law.

Superannuation is also payable upon the wages and salaries of all employees and introduced to provide a form of compulsory savings for retirement. An employer is currently obliged to contribute an additional 9% on top of the employee's wage or salary into a superannuation fund chosen by the employee. Accordingly, most employers will consider employee costs from the perspective of a total remuneration package, rather than on base salary.

Trade unions and freedom of association

Trade unions have traditionally played a prominent role in the Australian workplace relations system, particularly for non-professional workers. They were the primary party involved in agitating for the establishment and variation of awards and industrial agreements.

Although employers have had the ability to enter into industrial agreements with their employees directly, the majority have involved negotiation with a trade union. Any employee can call in a union or other bargaining agent to represent their interests.

Trade unions continue to enjoy various legislative powers to enter a workplace. Theoretically, that entry must generally be for the purposes of investigating a breach of an award or industrial agreement, or for the purposes of workplace health and safety. In practice, union access will often extend further. Work Choices significantly reduced the rights of unions to enter onto a work site, including provision of 24 hours notice, the obligation to comply with reasonable requests of an employer, a limitation on the number of entries per year, and more stringent penalties against militant union officers. It would seem that many of these reforms will also be continued by the Rudd government.

Trade unions have been given corporate status under federal and State legislation (save for Tasmania). Accordingly, they can sue and, more importantly, be sued. A union that engages in unlawful industrial activity, engages in secondary boycotts, or unlawfully interferes with legitimate contractual relations can therefore face civil damages. Like any association, each union has a set of rules, similar to a constitution, registered with the relevant Industrial Relations Commissions, which serves to limit their scope of operations and potential membership. Each union will rigorously defend its domain against other unions, sometimes leading to demarcation disputes.

Union membership has steadily declined in recent years in Australia. Apart from an initial surge in new membership after the introduction of Work Choices and an associated large scale campaign by the union movement against these reforms, union membership has once again fallen.

Freedom of association is still, however, an enshrined principle in Australian workplace relations legislation – the freedom to join and participate in an industrial organisation such as a trade union, or not to so join or participate, free of coercion.

Industrial action

Industrial action is prima facie unlawful in Australia. Participants, including individual workers and unions, can therefore be found liable for the damage caused. An employer is prohibited under federal legislation from paying an employee any wages during the period for which they engage in activity of that nature. Injunctions and other orders can also be obtained from both the Industrial Relations Commissions and the courts and most likely through Fair Work Australia when it is established.

In certain circumstances, however, industrial action becomes 'protected'. The main circumstances in which this happens is during a 'bargaining period', or where there is an immediate workplace health and safety risk. A bargaining period can be commenced by either party in the course of the negotiation of an industrial agreement. Both employers and employees can engage in lawful industrial activity in furtherance of their negotiating position. Under the new federal laws, the process that employees and their unions must undergo prior to taking protected industry action is lengthened and made more rigorous, including the holding of a secret ballot of employees. Employers may go before the AIRC on an expedited basis to determine issues and, where appropriate, order employees to return to work.

Certain types of industrial activity, such as secondary boycotts, industrial action taken in support of other workers (to stop industry wide activity), and industrial action that may cause irreparable harm to a business, are now outlawed.

Workplace health and safety

Each State maintains its own workplace or occupational health and safety legislation. That legislation imposes a legal obligation to ensure the workplace health and safety of an employer's workers, and that members of the public are not put at risk by the employer's business. Criminal prosecutions are pursued against employers in breach of their obligations and fines may be imposed. In most States, action can also be taken against officers of the company, which can potentially result in imprisonment, although this remains very rare in practice and will only arise in the most delinquent and reckless circumstances (and only for chronic repeat offenders).

Unfair dismissal, discrimination and workers' compensation

Under the common law, an employer may terminate the employment of a worker by providing the prescribed period of notice. However, each industrial relations commission has its own statutory remedy for unfair dismissal, where an employee can seek reinstatement or compensation for a dismissal that was substantively or procedurally harsh, unjust or unreasonable. An employer must have a valid reason for the dismissal, either from an operational or a performance perspective, have notified the employee of that reason, and have given the employee an opportunity to respond and improve prior to the action being taken. Unfair dismissal remedies are generally not available to employees serving a probationary period (generally the first three to six months of employment).

Under Work Choices, employers under the federal system (for example, most corporate employers) were exempt from statutory unfair dismissal actions if they engaged less than 100 relevant employees, or if the dismissal was for economic reasons (for example, redundancies). These changes were designed to encourage businesses to expand and engage new workers, without concern of unfair dismissal laws if termination was subsequently necessary. As such, all an employer needed to do to dismiss an employee was to provide the appropriate amount of notice. Under foreshadowed amendments to the *Workplace Relations Act 1996* (Cth), by the Rudd government, most employees earning under a prescribed statutory threshold will have statutory entitlements to recourse. This process will be overseen by Fair Work Australia.

An employer cannot treat an employee, or an applicant for employment, more or less favourably because of certain attributes such as sex, religion, age, race, marital status. Exceptions are provided for issues of workplace, health and safety and the inherent requirements of the job. Employees have not only statutory recourse for unlawful dismissal, but may also make complaints to the various anti-discrimination bodies at State or Territory level or to the federal Human Rights and Equal Opportunity Commission.

Each State has its own individual regime of compulsory workers' compensation covering both statutory compensation (payments in the event of injury through no fault of the employer) and common law damages (negligence claims).

Under the common law of Australia, all employers have a duty to devise, implement and ensure that a safe system of work is utilised by their employees.

Future directions

The Rudd government is seeking to empower Fair Work Australia with the bulk of the administration and enforcement of workplace relations law moving into the future. Although the government aims to make its processes accessible and available to people without the necessity of engaging lawyers, it will have a judicial division. Experience in Australia has also shown that most employers will still seek their own legal advice in matters coming before the body.

In addition, it is envisaged that if a truly unitary system of workplace relations law in Australia will not be created by the States referring their relevant powers to the Commonwealth, moves will be made to harmonise workplace relation laws. This is also likely to include a harmonisation of workplace health and safety laws, and possibly even a nationalisation of workers' compensation schemes.

LAND TITLE

Interests in land will commonly be involved in some way with any significant business activity in Australia – whether land is being acquired as a business or investment asset, or whether interests in land are required for business premises and operations. As the systems and law used to determine interests in land differ so widely around the world, this section provides a brief outline of the system of land tenure in place in Australia.

State by State regime

The system of title to land in Australia is essentially dealt with on a State by State basis – that is, there is no single national regime for the regulation and registration of interests in land.

The principal system of recording and regulation of interests in land that is used in each State and Territory throughout Australia is a system of land title registration. There are variations to the land title registration system used in each State and Territory, but the common essential features are:

- a public register of land maintained by each State or Territory government, which contains details of each parcel of land (known as a lot or section);
- the exact location and dimensions of each lot are described by reference to registered survey plans prepared by qualified surveyors;
- the public register shows details of each registered proprietor of the land, and details of all encumbrances over the land (such as mortgages, leases or easements);
- ownership or title in the land is evidenced by registration, so the owner need not prove a chain of ownership back to the original grant of land from the Crown;
- certainty of the details on the register is provided through a principle known as ‘indefeasibility of title’, which entitles any person to rely on the details in the register as evidence of ownership or the interest shown;

- priority of dealings in respect of land is dealt with in order of lodgement of the dealing in the register, not the date of the documents or transaction;
- each State, other than Queensland, issues duplicate (or paper) Title Deeds in the name of the registered owner of the land. In Queensland, the general position is that no duplicate Title Deed will be issued; however, a registered owner of the land can apply to the Titles Office for one to be issued; and
- the register may be searched to obtain details of the history of ownership of the land, and details of all registered encumbrances.

This system of land titling (known as the Torrens system, after the South Australian, Sir Robert Torrens, who devised it in the mid-1800s) has been very successful in creating a simple and certain manner of regulating and recording interests in land, and it has been adopted in some other countries.

All of the land in Queensland, South Australia, Tasmania and the Northern Territory is dealt with under their respective land titling systems. In New South Wales, Victoria and Western Australia there remains some small amount of unregistered land that is outside the land titling system, known as general law land (also referred to as common law land, or old system land). For that general law land, it is necessary for the owner to prove a continuous chain of title since the original grant from the Crown. There is a separate land law system in place in the relevant States to deal with general law land; however, this land is gradually being brought under the titling system.

Land that is owned by the federal government, or any State or Territory government or statutory authority, is generally referred to as 'Crown Land' or 'Unallocated State Land', and is held pursuant to relevant legislation.

Native title

Along side the land titling system, and general law relating to land, is the law of native title. Native title is a significant body of law in its own right relating to recognition of ownership of land by the traditional indigenous owners. It exists where the traditional owners can show a continuous connection with the land dating back to the date of European settlement, and provided the government has not taken any clear and unambiguous act to extinguish native title. For the certainty of freehold land owners, it has been established and confirmed by legislation and the High Court of Australia that grants of freehold land are not subject to native title, for the reason that the grant of freehold title is taken to be an act by the government to extinguish native title.

Land ownership and typical interests in land

The highest form of private ownership of land in Australia is known as an estate in 'fee simple' by grant from the Crown ('freehold' land). An estate in fee simple is held subject only to sovereign rights reserved by the Crown. Under the land titling system, the holder of the fee simple is recorded in the land title register as the registered owner. Fee simple ownership entitles the holder to complete rights of exclusive possession and occupation of the land free from interference from other parties, including the government, and also entitles the owner to grant other interests in the land.

Typical interests that may be granted or taken in relation to freehold land, and which may be recorded on the land title registers include:

- co-ownership – whether by joint tenancy or tenancy in common;
- leases – the grant of exclusive possession to another party for a specific period;
- mortgages – the creation of a security interest in the land; and
- easements – the grant of non-exclusive access to or use of the land.

Subdivision and development of land

Interests in land may be taken not only over a physical area of land, but also in respect of buildings and parts of buildings, whether divided horizontally, vertically or volumetrically, and in respect of airspace.

Subdivision and development of land is also regulated at State level and local government level – rather than under any single federal regime.

The permitted use of land, and the right to subdivide, and undertake construction or development on land is regulated in each State and Territory by a combination of:

- land title legislation and regulations;
- local authority town planning schemes and by-laws;
- State legislation relating to planning and environment; or
- State or Territory Planning and Environment Courts or Land Courts.

Issues associated with land ownership and development

For any party interested in taking an interest in land in Australia, associated issues to be aware of include:

- the obligation to pay stamp duty - a State-based tax in connection with acquisition of interests in land, and certain dealings in land interests;
- the obligation to pay registration fees on documents to be recorded in the land titling system;
- limits on foreign investment in land – see our overview earlier in this Guide;
- obligation to pay State-based land tax on land held, where value is above certain thresholds; or
- imposition of federal capital gains tax upon disposal of land where a capital gain is realised on sale of the land.

Any potential land investors should investigate these issues and taxes before proceeding, as they can have a significant affect on the overall cost of acquiring or holding land in Australia.

Property legislation for each state

Pursuant to the Australian Constitution, the power to make laws and regulate property transactions vests with each individual State and Territory.

The principal pieces of State and Territory property legislation are as set out below. However, as there are numerous Acts affecting property in each of the States and Territories, it should be borne in mind that the following list is not comprehensive and may change from time to time.

State of Queensland

- *Land Title Act 1994*
- *Land Act 1994*
- *Land Sales Act 1984*
- *Property Law Act 1974*
- *Body Corporate and Community Management Act 1997*
- *Integrated Planning Act 1997*

State of New South Wales

- *Conveyancing Act 1919*
- *Real Property Act 1900*
- *Strata Schemes Management Act 1996*
- *Strata Schemes (Freehold Development) Act 1973*
- *Land Sales Act 1964*

State of Victoria

- *Land Act 1958*
- *Property Law Act 1958*
- *Sale of Land Act 1962*
- *Transfer of Land Act 1958*

State of South Australia

- *Land and Business (Sale and Conveyancing) Act 1994*
- *Law of Property Act 1936*
- *Real Property Act 1886*
- *Strata Titles Act 1988*

State of Western Australia

- *Property Law Act 1969*
- *Sale of Land Act 1970*
- *Strata Titles Act 1985*
- *Transfer of Land Act 1893*

State of Tasmania

- *Conveyancing Act 2004*
- *Conveyancing and Law of Property Act 1884*
- *Land Titles Act 1980*
- *Strata Titles Act 1998*

Australian Capital Territory

- *Land Titles Act 1925*
- *Land Titles (Unit Titles) Act 1970*

Northern Territory

- *Land Title Act 2000*
- *Law of Property Act 2000*
- *Real Property (Unit Titles) Act 1975*

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