



CONDUCTING BUSINESS IN AUSTRALIA
- AN OVERVIEW -

2011



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OVERVIEW

Despite its relatively small population, Australia offers significant investment opportunities to both foreign and local investors. Australia's stable economy and political system, sound infrastructure and highly skilled workforce make it an attractive destination for investors and a leading financial centre in the Asia-Pacific region. However, before investing in Australia, investors should appreciate the numerous and complex rules and regulations which apply to foreign investment in Australia.

This guide is designed to provide an overview of the key aspects and issues involved in conducting business in Australia to help you understand the market and prepare for your potential investments.

We trust that this guide will be useful to you and your colleagues and our team looks forward to working with you.

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About Addisons

Addisons has developed a reputation over many years for making clients' businesses more successful through the application of our legal knowledge while being commercially astute and creative. Our clients enjoy the easy access to the experience and expertise they require to resolve their business issues efficiently and effectively.

Our practice areas include corporate, mergers & acquisitions, commercial property, intellectual property & e-commerce, commercial litigation & dispute resolution, insolvency & corporate reconstructions, gambling, franchising, marketing & advertising and co-operatives.

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This guide is intended to provide a brief overview of some of the key issues for foreign investors to consider before conducting business in Australia. It is not exhaustive and only takes into account laws that are in force at 1 June 2011. None of the information provided in this guide constitutes legal advice. You should seek professional legal, tax and financial advice to suit your individual circumstances before relying on this guide or making any investment in Australia.

INTRODUCTION

The population of Australia is approximately 22 million with the majority living along the eastern and south-eastern coast in and near the major cities of Sydney, Melbourne and Brisbane. Australia is the sixth largest country, by area, in the world – being slightly smaller than the United States' contiguous forty-eight states. Given its size, flying time between certain major cities is as much as six hours. The official language is English. However, with significant levels of immigration since the 1940s, many Australians are fluent in other languages.

Australia is a federal parliamentary democracy, with six states and two mainland territories. The head of state is Queen Elizabeth II (who is represented by the Governor General) and the Prime Minister (currently Julia Gillard) is the head of government. Government and laws exist at three levels: the Commonwealth (federal) level, the state/territory level and the local/municipal level. Federal parliament consists of the Senate and the House of Representatives, being the upper house and lower house respectively. The High Court of Australia is the ultimate appeals court. There are judicial systems at both the state/territory level and the federal level, with each judicial system having responsibility for different legal issues.

In 2010, GDP was approximately US\$1.2 trillion and GDP per capita (purchasing power parity) amounted to US\$41,000. About three quarters of the labour force is engaged in the services industry.

BUSINESS STRUCTURES

There are several different options for carrying on business in Australia. These include:


- an Australian company;
- a registered foreign company;
- a joint venture;
- a partnership;
- a trust; and
- a sole trader.

The choice of business structure will depend on various factors such as the nature and size of the proposed business, tax and legal issues.

Australian companies

As in other major jurisdictions, Australian companies are separate legal entities with the right to own and transfer property, to enter into contracts and to commence, and be subject to, legal proceedings. The Corporations Act 2001 (Cth) is the principal statute dealing with Australian corporate law and sets out the rules concerning financial and securities dealings and the rights, obligations and liabilities of companies, directors, shareholders and other market participants. Common law also imposes various rules on the conduct of business and companies.

Companies are incorporated at the federal level and are not registered separately in each state and territory. However, when incorporating a company, a state or territory must be selected as the place of incorporation. The choice of state or territory is important as it can have stamp duty implications for the company in the future.



In addition to the Corporations Act and common law, an Australian company is governed by its constitution, previously referred to as its “memorandum and articles of association”. If a company does not have a constitution, it will be governed by the “replaceable rules”, which are a set of common rules for the management of companies provided in the Corporations Act.

Every Australian company is required to have at least one member, at least one director who ordinarily resides in Australia and a registered office in Australia. The number of directors will depend on the type of company. The two main types of companies in Australia are proprietary companies and public companies, for which different legal requirements apply.

Proprietary companies

Foreign companies wishing to establish a presence in Australia commonly incorporate proprietary companies as their local subsidiaries.

A proprietary company is a privately owned business which cannot engage in public fundraising activities. The maximum number of shareholders in a proprietary company is 50 (not including employee shareholders) and the minimum number of directors is one. At least one director must ordinarily reside in Australia. A proprietary company is not required to have a company secretary. However, if it does have a company secretary, that person (who may also be a director) must ordinarily reside in Australia.

Proprietary companies are exempt from some of the regulatory requirements applicable to larger companies. As a result, they can be easier and cheaper to operate. For example, proprietary companies do not have the same disclosure requirements as public companies. Guidance regarding the administration of proprietary companies limited by shares is set out in the “Small business guide” in Part 1.5 of the Corporations Act.

Public companies

Public companies are usually larger companies. Unlike proprietary companies, public companies are not limited to only 50 shareholders. Public companies are required to have a minimum of three directors, at least one company secretary and at least one shareholder.

Public companies can be listed or unlisted. Listed companies are companies whose securities may be traded on a stock exchange. There are several stock exchanges in Australia, however, the largest and most well known is the Australian Securities Exchange (**ASX**). In order to be admitted to the official list of the ASX, a company must have:

- at least 500 shareholders each holding a parcel of shares with a value of at least A\$2000; or
- at least 400 shareholders each holding a parcel of shares with a value of at least A\$2000 and shareholders unrelated to the company holding at least 25% of the total number of shares.

Companies must also comply with various other conditions in order to be admitted to the official list of the ASX. Further information can be found at www.asx.com.au.

Unlisted public companies are not subject to the ASX Listing Rules but, as a result, have less access to capital and less liquidity for security holders who wish to acquire or dispose of their securities.

Incorporating a company

In order for a company to conduct business in Australia, a company must be formed by registration with the Australian Securities & Investments Commission (ASIC). Registration officially brings the company into existence and allows business to be conducted under the registered name.

When lodging an application, the applicant is required to nominate:

- the type of company to be incorporated;
- the name of the company (the name must not already be registered);
- how the company will be internally managed, i.e. under its own constitution, the replaceable rules in the Corporations Act or a combination of both;
- the director/s and company secretary (if any);
- whether the company will be limited by shares or guarantee or both; and
- the principal place of business and the registered office of the company.

Once ASIC is satisfied with the application, it will register the company, issue the company a certificate of incorporation and a registration number known as the Australian Company Number (**ACN**). This can happen within a day. The ACN must be used on every public document of the company including all cheques and documents lodged with ASIC.

Subject to certain exceptions, all public companies, large proprietary companies and small proprietary companies that are controlled by foreign companies are required to lodge an audited financial report and directors' report with ASIC each financial year.

Foreign companies

As an alternative to establishing a subsidiary as a new Australian company, a foreign company may conduct business in Australia by registering itself as a foreign company in Australia (i.e. as an Australian branch).

A foreign company wishing to carry on business in Australia as a branch must register as a foreign company with ASIC. An application for registration of a foreign company must be lodged with ASIC, together with certified copies of its certificate of registration and other constituent documents.

The following information must be provided to ASIC when registering as a foreign company in Australia:

- the name of the company;
- the registered office of the company in Australia;
- the directors and secretaries of the company;
- the company's local agent (this must be a person ordinarily resident in Australia);

- any existing charges on the company's property; and
- details of the company's registration and registered office in its country of origin.

The company is registered as a foreign company when ASIC enters the foreign company's name in its register. ASIC also issues the foreign company with an Australian Registered Body Number (**ARBN**). Once registered, the foreign company is required to lodge copies of its balance sheet, cash flow statement and profit and loss statement with ASIC each calendar year (even if it is not required to prepare such documents in its place of incorporation). Foreign companies registered in Australia must also comply with various notification obligations under the Corporations Act.

Further information can be found at www.asic.gov.au.

Joint venture

A joint venture may be entered into between two or more individuals or companies. Joint ventures are often formed for a specific project or business venture but may also be formed for a continuing business relationship.

Entering into a joint venture agreement with an existing Australian entity can avoid the need to incorporate an Australian subsidiary or register as a foreign corporation. Joint ventures are governed by the terms of the joint venture agreement. Care is needed here because a foreign entity cannot "conduct business" in Australia unless it is registered in Australia.

Partnership

Partnerships may be entered into between two or more individuals or companies. Partnerships can be registered or unregistered.

An unregistered partnership does not have the same public disclosure and reporting requirements of corporations or registered partnerships. However, unregistered partnerships have unlimited liability and, generally, partners are jointly and severally liable for all debts and obligations of the business.

The liability of the members (or owners) of a company, on the other hand, are limited to the amount of their investment in the company. Further, limited liability partnerships can be established which, once registered, have a different tax profile to a simple partnership.

Trusts

A trust can be formed to operate a business in Australia. A trust is managed by a trustee who has the legal title to the trust property and carries on the business on behalf of the beneficiaries of the trust. The rights of the beneficiaries are determined by the terms of a trust deed.

A common form of trust is a discretionary trust which provides maximum flexibility for distribution of income and capital among beneficiaries.

Another form of trust is a unit trust which is most suitable for investment purposes where investors hold a number of units in the trust in proportion to their investment.

Some trusts and companies "staple" their units and shares respectively so that each unit and share must be traded together as a "stapled" security.

Sole trader

An individual may carry on a business on his or her own behalf as a sole trader. A sole trader is personally liable for all obligations incurred in the course of the business. If a sole trader wants to trade under a name that is not his or her own name, then a business name must be registered.

Directors' duties

Directors of Australian companies owe duties under the Corporations Act and common law to their company and their company's shareholders. Among the duties owed by directors are duties to:

- act in good faith and in the best interests of the company;
- act honestly;
- avoid situations where there is a conflict of interest between the company and the director;
- exercise due care and diligence; and
- prevent insolvent trading by the company.

Breaches of certain directors' duties carry serious penalties including fines, imprisonment and being prohibited from acting as a director or managing a company. For instance, a director who is reckless and fails to exercise his powers and discharge his duties in good faith in the best interests of the company can be ordered by a court to pay up to A\$200,000 and be sentenced for up to five years imprisonment or both.

TAXATION

Introduction

There are a number of different taxes levied by each of the Australian federal and state/territory governments. These include:

- (a) Federal Government: income tax, Goods and Services Tax (**GST**), Fringe Benefits Tax (**FBT**) and indirect taxes (in respect of petrol, oil, tobacco, alcohol and customs duty); and
- (b) State/Territory Governments: stamp duties, land tax, gambling taxes, employer's payroll tax and motor vehicle taxes.

The two main federal tax statutes are the Income Tax Assessment Act 1936 (Cth) and the Income Tax Assessment Act 1997 (Cth). The Australian tax system is administered by the Australian Taxation Office (**ATO**).

Tax registrations

Among the tax considerations that should be taken into account when investing or setting up business in Australia are whether any double taxation agreements are in place between Australia

and the country of origin and whether the business would be considered an Australian resident for tax purposes.

If the business is considered to be an Australian resident for tax purposes, tax advice should be obtained. For example, typical requirements include the following steps:

- (a) obtain an Australian Business Number (**ABN**);
- (b) obtain a Tax File Number (**TFN**) from the ATO, which identifies the business as a taxpayer. Individuals and businesses alike are taxed through a system of income tax;
- (c) register for GST if the business plans to sell goods or services in Australia and its annual turnover is greater than the prescribed amount (currently A\$75,000);
- (d) register for the Pay-As-You-Go (**PAYG**) tax withholding system if the business plans to employ staff in Australia - the PAYG system requires an employer to deduct tax from wages or salaries of employees and remit it to the ATO on behalf of its employees;
- (e) register for FBT (fringe benefits tax) where the business plans to provide employees with non-cash benefits, e.g. the use of a company car; and
- (f) in the case of a company, register for withholding tax if it is likely to make dividend, royalty or interest payments to non-residents.

Businesses in Australia may also be subject to capital gains tax (**CGT**), customs duties, stamp duties (at the state/territory level) and land tax (at the state/territory level). The CGT rates vary between individuals and companies.

Transfer pricing

Transfer pricing issues should also be considered. Care should be taken in pricing “intercompany” transactions, i.e. transactions relating to tangible and intangible assets, services and funds between commonly controlled parties such as a parent corporation and its subsidiaries, particularly where they involve less than “arm’s length” consideration for the purposes of reducing total assessable income for tax purposes. The ATO can make a transfer pricing adjustment where satisfied that a transaction between commonly controlled companies is not at arm’s length.


Conclusion

Upon commencing business, companies must appoint a public officer and notify the ATO of the appointment. A public officer is personally responsible for ensuring that the company complies with its tax obligations.

The taxation system in Australia is extremely complex and severe penalties may apply for a contravention. Professional tax advice should be obtained before setting up a business in Australia. Further information can be found at www.ato.gov.au.

EMPLOYMENT AND INDUSTRIAL RELATIONS

Employment of workers in Australia is governed by federal and state/territory legislation, which address matters such as:

- 
- (a) annual leave;
 - (b) long service leave;
 - (c) compulsory superannuation contributions by employers;
 - (d) workers' compensation;
 - (e) occupational health and safety (**OHS**);
 - (f) discrimination;
 - (g) redundancy;
 - (h) unfair contracts; and
 - (i) unfair dismissal.

Many workers' employment is also governed by federal industrial awards or agreements in relation to such matters as minimum rates of pay, working hours, overtime rates, sick leave, annual leave and entitlements on termination of employment. The main federal statute dealing with employment law is the Fair Work Act 2009 (Cth).

The Fair Work Act requires employers to comply with enforceable minimum employment terms and conditions which are referred to as the National Employment Standards. The National Employment Standards set out 10 minimum workplace entitlements for all employees covered by the national workplace relations system.

The Fair Work Act also brought into force, with effect from 1 January 2010, a new set of modern awards which replaced existing awards in most industries. Modern awards are industry or occupation-based enforceable employment standards which set out mandatory, minimum conditions for employers and employees. Modern awards do not apply to high-income earners (i.e. those employees who are paid a guaranteed amount of at least A\$113,800 a year (indexed annually)).

Executive remuneration is also subject to regulation under the Corporations Act. Part 2D.2 of the Act prescribes the maximum permissible termination payment that may be given to a person holding a managerial or executive office in a company without shareholder approval. Further, from 1 July 2011, additional obligations will be placed on companies to:

- prohibit key management personnel from voting on remuneration matters;
- disclose details relating to the use of remuneration consultants; and
- in respect of listed companies:
 - hold a general meeting for the re-election of directors if shareholder concerns on the remuneration report are not adequately addressed over two consecutive years; and
 - prohibit key management personnel from hedging their incentive-based remuneration.

OHS requirements exist at the state/territory level and have recently been harmonised. In certain situations, the employer's obligations may extend to independent contractor arrangements. These requirements are stringent and strongly enforced and significant penalties may apply.

Further information relating to employment regulation can be found at www.fairwork.gov.au.

SECURITIES AND RAISING CAPITAL

Capital raisings and dealings in securities must be conducted in accordance with the Corporations Act. Generally, offers of securities, whether by way of a new issue of securities or a sale of existing securities, require regulated disclosure to investors, unless an exemption applies. Securities can include shares, options, debentures, bonds, derivatives and interests in managed investment schemes.

Disclosure

Disclosure to investors when capital is raised is commonly in the form of a disclosure document such as a prospectus or, in the case of a managed investment scheme, a product disclosure statement. A disclosure document must contain all the information that investors and their professional advisers would reasonably require to make an informed assessment of the rights and liabilities attaching to the securities as well as the assets and liabilities, financial position and performance, profits and losses and prospects of the entity. An offer document must not contain any information that is likely to mislead or deceive investors or omit any material information. Serious civil and criminal penalties apply for failing to adhere to the disclosure requirements under the Corporations Act.

Given the time and cost involved in preparing disclosure documents, where an exception to the disclosure requirements is available, entities will often avail themselves of that exception. A common exception is where an entity offers securities to "sophisticated investors". For these purposes, a "sophisticated investor" is a person who has net assets of at least the prescribed amount (currently A\$2.5 million) or a gross income for each of the last two financial years of at least the prescribed amount (currently A\$250,000) – in each case, as certified by a qualified accountant - or a person who is making an investment of at least A\$500,000.

Acquisitions

The Corporations Act imposes restrictions on the acquisition of voting power in certain entities (companies or managed investment schemes). Specifically, subject to certain exceptions, an entity must not increase its (including the holdings of its associates) voting shareholding in a listed company or an unlisted company with more than 50 members:

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

These restrictions also apply to acquisitions of interests in listed managed investment schemes.

Exceptions to this rule include where an entity increases its shareholding in a company by no more than 3% every six months, where the acquisition is approved by the target's shareholders or where an entity makes a takeover bid for the company.

Listed entities are also subject to the ASX Listing Rules which impose further requirements on their management and conduct. A listed entity is required to comply with continuous disclosure obligations involving the immediate disclosure of any information concerning it that a reasonable person would expect to have a material effect on the price or value of the entity's securities.

An entity (whether foreign or local) that controls 5% or more of the securities in an Australian listed entity is required to lodge a substantial shareholder (or security holder) notice with the listed entity and the ASX and further notices whenever its shareholding increases or decreases by 1% or more. Since the global financial crisis, there has been increased focus on disclosure of dealings in securities in listed companies, especially short selling. For instance, regulations exist for the reporting of short selling transactions to market operators (e.g. the ASX).

FOREIGN INVESTMENT

Certain types of foreign investment proposals need to be notified to a division of the Australian government known as the Foreign Investment Review Board (**FIRB**) for prior approval in accordance with the Foreign Acquisitions and Takeovers Act 1975 (Cth). These include:

- (a) acquisitions of substantial interests (as defined below) in an Australian business where the value of its gross assets is, or the proposal values it above, \$231 million. For US (and, at a date to be announced, New Zealand) investors, different exemption thresholds apply: A\$231 million for investments in prescribed sensitive sectors or A\$1,005 million in any other case. These monetary thresholds are subject to annual indexation;
- (b) direct investments by foreign governments and their agencies, including proposals to establish new businesses, irrespective of size;
- (c) portfolio investments in the media of 5% or more and all non-portfolio investments irrespective of size;
- (d) takeovers of offshore companies whose Australian subsidiaries or gross assets exceed A\$231 million. For US (and, at a date to be announced, New Zealand) investors, a threshold of A\$1,005 million applies, except for offshore takeovers involving prescribed sensitive sectors where the A\$231 million threshold applies;
- (e) acquisitions of interests in Australian urban land (including interests that arise via leases, financing and profit sharing arrangements) that involve:
 - developed non-residential commercial real estate, where the property is:
 - subject to heritage listing, valued at \$5 million or more and the acquirer is not a US investor;
 - is not subject to heritage listing, valued at A\$50 million or more, or A\$1,005 million for US investors;
 - vacant non-residential land irrespective of value;
 - residential real estate irrespective of value; or

- shares or units in Australian urban land corporations or trust estates, irrespective of value; and
- (f) proposals where any doubt exists as to whether they are notifiable. (Funding arrangements that include debt instruments having quasi-equity characteristics will be treated as direct foreign investment.)

Investors should be aware that “urban land” (referred to in paragraph (e) above) has a very wide definition. It includes all land situated in Australia other than land that is used wholly and exclusively for carrying on a business of primary production.

A “substantial interest” occurs when a single foreigner (and any associates) has 15 % or more or when several foreigners (and any associates) have 40% or more in aggregate, of the ownership of a corporation, business or trust.

For the purposes of the above requirements, a “US investor” is a national or permanent resident of the United States of America, a US enterprise or a branch of an entity located in the United States of America and carrying on business activities there. Further information can be found at www.frb.gov.au.

COMPETITION AND CONSUMER PROTECTION

The Competition and Consumer Act 2010 (Cth) (**CCA**) (formerly known as the Trade Practices Act 1974 (Cth)) deals with almost all aspects of commercial dealings, including dealings with (and between) suppliers, wholesalers, retailers, competitors and customers.

Specifically, the CCA deals with:


- (a) various types of restrictive trade practices and anti-competitive behaviour, including cartel conduct; and
- (b) consumer protection.

The CCA is enforced by the Australian Competition and Consumer Commission (**ACCC**).

Restrictive trade practices, including cartel conduct

Broadly speaking, the restrictive trade practices provisions prohibit the following market conduct:

- (a) contracts, arrangements and understandings that contain a cartel provision;
- (b) other contracts, arrangements or understandings that substantially lessen competition (but do not contain a cartel provision);
- (c) exclusionary provisions;
- (d) misuse of market power;
- (e) exclusive dealing, including third line forcing; and
- (f) resale price maintenance.



Companies must be especially mindful of the cartel provisions of the CCA. A cartel provision in a contract, arrangement or understanding is a provision:

- fixing prices;
- restricting outputs in the production and supply chain;
- allocating customers, suppliers or territories; or
- involving bid-rigging,

between parties that are, or would otherwise be, in competition with each other.

The ACCC has the power to authorise certain arrangements which would otherwise breach the anti-competitive provisions of the CCA. In certain circumstances, it may be advisable for companies to take advantage of the authorisation and notification provisions under the CCA to mitigate the risk of investigation and prosecution.

Consumer protection

Schedule 1 of the CCA, known as the Australian Consumer Law (**ACL**), contains a range of consumer protection provisions including those which are aimed at ensuring accuracy in advertising. Other provisions within the ACL relate to the fairness of contracts with consumers, direct selling and multi-level marketing business arrangements and product recalls. Each state and territory has adopted the ACL as a law of its respective jurisdiction. This means that the same consumer protection provisions apply across Australia.

Specifically, the ACL:


- (a) prohibits misleading and deceptive conduct;
- (b) prohibits unfair terms in standard form consumer contracts;
- (c) provides statutory consumer guarantees for consumers against suppliers and manufacturers;
- (d) provides for product liability and recall schemes; and
- (e) regulates direct selling and multi-level marketing businesses.

The CCA also provides for industry codes of practice and the regulation of industries such as franchising, telecommunications, gas, electricity and airports.

In addition, manufacturers' liability can apply to importers of products into Australia under the CCA.

Misleading or deceptive conduct

The CCA contains various provisions which prohibit conduct by businesses which is misleading or deceptive or which is likely to mislead or deceive. Whether or not conduct is held to be misleading or deceptive will depend on the particular circumstances of each case.



In addition to the general prohibition on misleading and deceptive conduct, there are specific prohibitions on certain types of false or misleading statements made by businesses to consumers.

Unfair contract terms

Unfair terms in standard form, non-negotiated contracts entered into with customers are now unenforceable. A contract term will be unfair if:

- (a) it would cause a significant imbalance in the parties' rights and obligations arising under the contract; and
- (b) it is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term.

Businesses need to be mindful of these provisions of the CCA if their operations involve contracting with consumers. Examples of industries where these provisions are particularly relevant are car hire, hospitality, removals and fitness.

Consumer guarantees

Under the CCA, suppliers of goods of a kind normally purchased for personal or household use or with a value of less than A\$40,000 have a legal obligation to ensure that:

- (a) the goods are of acceptable quality;
- (b) the goods are fit for the purposes specified by the supplier;
- (c) a reasonable supply of spare parts or repair facilities is available after purchase.
- (d) the goods match any description or sample given to the consumer; and
- (e) the goods will satisfy any extra promises made about them (express warranties).

Under the CCA, consumers have access to remedies – including compensation, costs, refunds and replacement – where one or more of these guarantees is breached. The severity of the remedy will depend on the seriousness of non-compliance.

In the case of overseas manufacturers, importers will be liable to customers in respect of a breach of consumer guarantees for which manufacturers would normally be responsible if the manufacturer were in Australia.

Direct selling and marketing

The CCA is a national framework that regulates unsolicited sales practices, including door-to-door selling, telephone sales and other forms of direct selling outside the retail context.

The CCA contains specific provisions as to the time of day and the manner in which businesses may interact with consumers through direct selling. The CCA also regulates the content of agreements made with consumers using direct selling.

Penalties

Companies that breach the anti-competitive provisions of the CCA can be ordered to pay pecuniary penalties of up to the greatest of:

- A\$10 million;
- three times the value of the benefit (when the value of the illegal benefit can be ascertained); or
- 10% of the annual turnover of the company and all of its related companies in the relevant period (when the value of the illegal benefit cannot be ascertained).

Additional criminal penalties may be imposed in respect of cartel conduct. The criminal penalties for cartel conduct includes up to 10 years imprisonment. For a criminal conviction, it must be proven, beyond reasonable doubt, that the prohibited arrangement was given effect to intentionally and the accused knew or believed that the prohibited arrangement contained a cartel provision.

There are also significant penalties of up to A\$1.1 million for companies and A\$220,000 for individuals that breach the consumer protection provisions under the ACL.

Further information can be found at www.accc.gov.au.

INTELLECTUAL PROPERTY

Businesses trading in Australia should consider the protection of their intellectual property, including trade marks, patents, copyright, moral rights, designs and circuit layouts, domain names, trade names, business names and confidential information.

Trade marks


If a name or logo (and in some cases, a colour, sound or smell) is being used in connection with an Australian business, trade mark registration should be considered. Although not compulsory, registration gives some protection against other people using a substantially identical or deceptively similar mark in the course of trade.

Any person can apply to register a trade mark with IP Australia. A trade mark will be registered provided that it meets the requirements of the Trade Marks Act 1995 (Cth), there are no objections to the registration of the trade mark and the registration fees are paid.

Before a new logo or brand is developed, it is prudent to conduct searches, initially of IP Australia's database, for similar trade marks.

Patents

There are two types of patents available under the Patents Act 1990 (Cth) – a standard patent which gives the owner protection for 20 years, and an innovation patent that is available for inventions that do not meet the inventive threshold which gives the owner protection for 8 years.



Patent protection requires registration with IP Australia. The cost of patenting will depend, among other things, on the type of patent being granted and the number of countries for which protection is sought.

Designs

Design registration protects the appearance or 'look' of manufactured products. This includes the shape of articles. To obtain design protection, the design must be registered with IP Australia.

Copyright

Australian copyright law is set out in the Copyright Act 1968 (Cth). There is no requirement to register a work for copyright. Copyright rights come into existence at the time that the work is put into material form.

There have been a number of recent changes to copyright legislation due to the implementation of the Australia-United States Free Trade Agreement. A significant change in the legislation is the extension of the term of protection for most copyright material by 20 years. The period of protection commences on the date of creation and expires on the date which is 70 years after the author's death.

As a result of Australia's obligations under a number of international treaties, almost all copyright work created overseas is also protected in Australia under the Copyright Act.

Business names

At present, each state and territory has its own business name laws. A business name is a name under which a business may trade. Although a new national business name scheme has been agreed in principle, the introduction of this scheme has been delayed until 2012.

The registration of a business name does not create a separate legal entity or give the owner any proprietary rights in the name. However, it will prevent other people from registering the same name, either as a business name or a company name. Most business name registrations last for three years and can be renewed.

Domain names

Given that the first contact that many consumers have with a business is through the company's website, registering a domain name in an Australian second level domain, such as .com.au, can be a good way to target Australian consumers.

There are a number of accredited second level domain name registry operators with whom a domain name can be registered. Many of the registry operators have a "who is" database which allows domain names to be searched. Registration generally provides the holder of the domain name with a two-year licence that can be renewed.

There are certain rules and requirements for the registration and administration of .au domain names which are more onerous than registering top level domain names in the .com space. These rules and requirements are administered by .au Domain Administrators (**auDA**). Where a dispute arises in respect of a .au domain name, auDA's mandatory dispute resolution policy applies, providing an alternative to litigation. Decisions made under the policy are binding on the parties.

Further information can be found at www.ipaustralia.gov.au.

FINANCIAL SERVICES REGULATION

Financial services licensing

Chapter 7 of the Corporations Act regulates financial markets and services. Providers of financial services are required to hold an Australian Financial Services Licence (**AFSL**) issued by ASIC or to be authorised representatives of an AFSL. A person provides a financial service if they provide financial product advice, deal in a financial product, make a market for a financial product, operate a registered scheme or provide a custodial or depository service.

Reforms introduced during 2010 (as part of the regulatory response to the Global Financial Crisis) now require credit ratings agencies and providers of margin lending facilities to hold AFSLs. Each financial services business is subject to its own set of specific licence conditions.

Certain exemptions from holding an AFSL are available, for example:

- for businesses carried on under a licence;
- in relation to financial services only involving the financial services provider itself, such as a company issuing shares; and
- where the financial service is regulated by an approved overseas (ie non-Australian) regulatory authority.

The definitions and rules for determining whether a particular person or activity is required to hold an AFSL, or whether an exemption applies, are relatively complex and need to be assessed on a case by case basis.

Holders of an AFSL can be subject to licence conditions such as being limited to offering financial services only to wholesale clients. An AFSL for the carrying on of one kind of financial services business will not necessarily authorise the licence-holder to carry on another kind of financial services business.

Further information can be found at www.asic.gov.au.

Financial products

The definition of “financial products” is critical to determining whether the regulatory regime under the Corporations Act applies. The concept is defined broadly to mean a facility through which a person:

- (a) makes a financial investment, where an investor gives money to another person to generate a financial return for the investor and the investor has no day-to-day control over the money, e.g. shares and options;
- (b) manages a financial risk, where a person manages the financial consequence of particular circumstances happening or avoids or limits the financial consequences of fluctuations in, or in the value of, receipts or costs (including prices and interest rates), e.g. insurance products; or

- (c) makes non-cash payments, where a person makes payments or causes payments to be made otherwise than by the physical delivery of Australian or foreign currency in the form of notes and/or coins, e.g. through card payment systems.

Offering a financial product to a retail investor will normally require the preparation of a product disclosure statement or a prospectus, and potentially also the provision of a financial services guide. The form and content of both types of documents are prescribed by the Corporations Act.

Anti-money laundering

The Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (Cth) is the main statute dealing with anti-money laundering and terrorism financing and is administered by the Australian Transaction Reports and Analysis Centre (**AUSTRAC**). Entities covered by the legislation include businesses in the financial, money service, bullion and gambling sectors. These entities are required to:

- (a) conduct risk assessments and implement system and governance arrangements to manage money laundering and terrorism financing risks;
- (b) verify the identity of their customers (e.g. “know your client” checks) and keep adequate records;
- (c) advise AUSTRAC if they have obligations under the legislation; and
- (d) report certain cash and international transactions and any suspicious activity to AUSTRAC.

Further information can be found at www.austrac.gov.au.

National consumer credit licensing

In 2010, the National Consumer Credit Protection Reform package was introduced. Amongst other things, this package sets out a comprehensive licensing regime for all providers of consumer credit and credit services and imposes responsible lending conduct requirements on licensees.

In many respects, the credit licensing regime reflects the approach adopted in respect of the AFSL licensing regime. This licensing regime is also administered and enforced by ASIC.

In broad terms, the credit licensing regime requires two broad categories of people engaged in consumer credit activities to be licensed:

- (a) credit providers (i.e. lenders and lessors); and
- (b) providers of credit services, including intermediaries such as finance brokers.

The provision of credit to consumers for residential investment purposes also falls within the regime.

Further information can be obtained at www.asic.gov.au.

PRIVACY

Businesses operating in Australia are required to comply with federal and state/territory privacy legislations and, in particular, the Privacy Act 1988 (Cth) which is administered by the Office of the Federal Privacy Commissioner.

The Privacy Act regulates the way that businesses can collect, use, retain, secure and disclose personal information and also regulates credit providers and credit reporting agencies. The Privacy Act establishes 10 national privacy principles (**NPPs**) which apply to most private sector organisations. The NPPs cover standards for the collection, use, disclosure, data quality and security, openness, access, correction, identification, anonymity, storage and data flow of personal information. The Commissioner may also authorise businesses in the private sector to create and uphold their own privacy codes. Once approved, those codes become binding on the business.

Organisations to which the Privacy Act applies must take reasonable steps to make individuals aware that they are collecting personal information about them and inform them of the purposes for which it is collecting the information. There are restrictions on how an organisation deals with personal information that it collects and when it can disclose or transfer personal information overseas.

Each state and territory in Australia has similar privacy legislation to the Privacy Act.

In addition, most states and territories have legislation which set privacy standards for handling health information in both the public and private sectors in the particular state/territory. Further information can be found at www.privacy.gov.au.

Following a recent review of Australia's privacy laws, the Government has announced an intention to make amendments to privacy laws to:

- (a) create a harmonised set of privacy principles which will replace the separate sets of public and private sector principles at the federal level;
- (b) create a comprehensive credit reporting framework;
- (c) improve health sector information flows, and give individuals new rights to control their health records, contributing to better health service delivery;
- (d) require the public and private sector to ensure the right to privacy will continue to be protected if personal information is sent overseas; and
- (e) strengthen the Privacy Commissioner's powers to conduct investigations, resolve complaints and promote compliance, contributing to more effective and stronger protection of the right to privacy.

The Government has released an exposure draft of proposed Australian Privacy Principles which are intended to replace the NPPs and their public sector counterparts (the Information Privacy Principles) with a unified set of principles.

IMMIGRATION

The Australian government operates a strict points-based immigration policy and businesses operating in Australia should ensure that their personnel have the correct visas to remain and work in Australia.

People who migrate to Australia as skilled migrants are entitled to work here, but people visiting Australia may or may not have the right to work. Employers have an obligation under the Migration Act 1958 (Cth) to check a potential employee's work entitlements to ensure that they do not face penalties due to the employment of illegal workers.

There are numerous work visas of both a temporary and permanent nature that have different selection criteria to qualify. These include employer-sponsored visas and professional and other skilled visas for persons with recognised qualifications and skills or experience in particular occupations required in Australia. There are also special temporary business visas for people to come to Australia for a business-related visit or to establish, manage or develop a new Australian business.

Companies who wish to sponsor the immigration of employees from overseas need to be specifically approved.

More information on the types of visas and employer requirements are available from the Department of Immigration and Citizenship. Further information can be found at www.immi.gov.au.

INSURANCE

It is good practice for companies to have insurance policies in place in respect of their business activities in Australia. The most common types of insurance include:

- (a) Workers compensation: this is compulsory for most businesses in Australia and covers claims for workplace-related injury or disease;
- (b) Professional indemnity: this covers any civil liability for breach of a duty owed in a professional capacity in connection with the company's business;
- (c) Public liability: this covers circumstances where a company may be found liable to a third party for death or injury, loss or damage of property or 'pure economic' loss resulting from the company's negligence;
- (d) Product liability: this covers damage or injury caused to another business or person by the product that a company is selling or a failure of that company; and
- (e) Directors and Officers: this covers claims from allegations against directors and officers of a company of wrongful acts whilst acting in their capacity as a director or officer.

It is prudent for a foreign company that wishes to conduct business in Australia to determine whether its existing insurance is sufficient to cover its Australian business activities or whether a

new insurance policy needs to be obtained. Most banks and other organisations will require that a business has appropriate insurance in place with a reputable insurer before contracting with it.

Insurers are regulated by the Australian Prudential Regulation Authority. Further information can be found at www.apra.gov.au.

SUPERANNUATION

An individual or company conducting business in Australia and who employs Australian employees needs to consider its obligations to pay superannuation contributions.

Compulsory contribution legislation requires an employer to:

- (a) pay superannuation for its eligible employees. An employee is eligible if they are aged between 18 and 70, are paid at least the prescribed amount (currently A\$450 (before tax) in a calendar month) and work full-time, part-time or on a casual basis;
- (b) contribute to the correct superannuation funds; and
- (c) pay contributions by the cut off date each quarter.

The minimum superannuation amount payable is 9% of each eligible employee's earnings base (although the Federal Government has committed to raising this rate from July 2013). Employees can direct their employer to contribute more than the statutory minimum contribution to their superannuation fund.

An employer may also have to pay superannuation for employees who are visiting Australia on an eligible temporary resident visa.

Most employees are entitled to select their own super fund, unless they are employed under certain state awards, industrial agreements or workplace agreements or they are in a particular type of defined benefit fund. Employer-nominated funds are also required to offer minimum life insurance death cover to members.

CLIMATE CHANGE LAWS

The Federal Government had intended originally to implement a Carbon Pollution Reduction Scheme that would have placed a cap on carbon pollution and allowed firms to trade carbon permits. The Government's aim was to reduce Australia's carbon pollution to 25% below 2000 levels by 2020 if the world agreed to a deal to stabilise levels of greenhouse gases in the atmosphere at 450 parts per million CO₂ equivalent or lower. Even if agreement had not been reached on a 450 parts per million target, Australia still intended to reduce its emissions by between 5% and 15% below 2000 levels by 2020. The Government was unable to pass its legislation through the Senate and has since announced that it will reconsider the issue.

Emissions reporting

The National Greenhouse and Energy Reporting Act 2007 establishes a national system requiring certain corporations (such as listed entities) to report greenhouse gas emissions and

energy consumption and production figures. Those that will need to report in respect of the financial year ending 30 June 2011 include corporations that:

- (a) emit 50 kilotonnes or more of greenhouse gases or produce or use 200 terajoules or more of energy each year; or
- (b) have operational control of facilities that emit 25 kilotonnes or more of greenhouse gases or use or produce 100 terajoules or more of energy per year.

Corporations which meet one of these thresholds are required to register with the Federal Department of Climate Change.

Climate change law and policy are still in an early stage of development in Australia and further changes are expected to affect significantly how businesses operate. Further information can be found at www.climatechange.gov.au.

PERSONAL PROPERTY SECURITIES LAW

On 14 December 2009, the Personal Property Securities Bill 2009 (Cth) and the Personal Property Securities (Consequential Amendments) Bill 2009 (Cth) received royal assent. The new legislation is expected to come into force in October 2011.

These laws will create a uniform national regime for the registration and priority of security interests in personal property. The regime will affect businesses involved in granting or taking security interests over tangible or intangible property, such as machinery and equipment, motor vehicles, licences, bank accounts and investment instruments, among others. The types of security interests that will be regulated by the new law will include fixed and floating charges, chattel mortgages, finance leases, margin loans, commercial consignments (including retention of title arrangements) and the factoring of book debts. Interests in land will continue to be regulated by state based legislation/registers.

A new online, searchable personal property securities register (**PPSR**) will be established to record all security interests that have been registered, together with details of the relevant secured parties. In line with the current law, registration of a security interest will be a key element as it will, in most cases, give priority over non-registered or subsequently registered security interests.

To be protected under the priority rules of the new regime, all existing security interests in personal property must be registered in the PPSR within the transitional registration period of 2 years from the commencement of the proposed legislation. Fixed and floating charges and mortgages already registered with ASIC will be automatically transferred to the PPSR. However, other categories of transitional securities will need to be manually identified and registered.

Further information can be found at www.ag.gov.au/pps.

REGULATORY BODIES

This section summarises the principal regulatory bodies with whom businesses in Australia come into contact regularly – a number of which have been referred to earlier in this guide.

Australian Securities & Investments Commission (**ASIC**)

ASIC is an independent commonwealth government body that regulates companies, financial markets and financial service providers to ensure that their activities are carried out honestly and transparently.

ASIC is responsible for administering legislations such as the Corporations Act and the Financial Services Reform Act 2001 (Cth) and ensuring that companies, financial service providers and their employees comply with the requirements under those Acts.

Further information can be found at www.asic.gov.au.

Australian Securities Exchange (**ASX**)

ASX is the eighth largest securities exchange in the world and is itself a public listed company.

ASX releases detailed reports on market information (such as stock prices), delivers stock market announcements and assists with market education.

Further information can be found at www.asx.com.au.

Australian Competition and Consumer Commission (**ACCC**)

The ACCC is responsible for enhancing the welfare of Australia through the promotion of competition and fair trading in the Australian marketplace and for the protection of consumers. It regulates companies and individuals to ensure compliance with the CCA. It can also regulate foreign companies conducting business or engaging in activities in Australia.

The ACCC has significant powers to make decisions or take legal action in respect of consumer protection matters and matters involving anti-competitive behaviour. It has powers to assess whether acquisitions of shares or assets may result in the lessening of competition in the market in breach of the CCA. State and territory consumer affairs agencies also enforce fair trading and consumer protection matters.

Further information can be found at www.accc.gov.au.

Also see: www.fairtrading.nsw.gov.au

www.consumer.vic.gov.au

www.docep.wa.gov.au

www.nt.gov.au/justice

www.obca.sa.gov.au

www.consumer.qld.gov.au

www.consumer.tas.gov.au

Australian Taxation Office (**ATO**)

The ATO is the statutory authority responsible for collecting revenue for the Australian government. It develops and manages the systems that control taxation, excise and superannuation. Australia's income tax law is comprised of the Income Tax Assessment Act 1936 (Cth), the Income Tax Assessment Act 1997 (Cth) and the Taxation Administration Act 1953 (Cth), as well as administrative taxation rulings and court decisions. The current income tax system includes the taxation of income and capital gains of individuals and businesses.

Fringe benefits provided to employees are subject to a separate regime under the Fringe Benefits Tax Assessment Act 1986 (Cth). Australia's goods and services taxation law is contained in A New Tax System (Goods and Services Tax) Act 1999 (Cth).

Further information can be found at www.ato.gov.au.

Australian Transaction Reports and Analysis Centre (**AUSTRAC**)

AUSTRAC is Australia's anti-money laundering and counter-terrorism financing regulator.

Incoming and outgoing monetary transactions may be subject to reporting requirements to AUSTRAC.

Specific requirements exist for a wide range of financial services providers, the gambling industry and others. The regulations are contained in the Financial Transactions Reports Act 1988 (Cth) and the Anti-Money Laundering and Counter Terrorism Financing Act 2006 (Cth).

Further information can be found at www.austrac.gov.au.

Foreign Investment Review Board (**FIRB**)

FIRB provides foreign investment policy advice to the Australian federal government. FIRB examines the proposals of foreign investors investing in Australia and advises the government whether the proposals comply with foreign investment policies and the Foreign Acquisitions and Takeovers Act 1975 (Cth). The Treasurer has the right (which is rarely exercised) to disallow a foreign investment proposal.

FIRB issues a policy document which outlines the kinds of investments for which a foreign investor will need approval. Additionally, there are some limits on the amount and types of investment a foreign investor can make, for example, purchasing shares in an Australian company or land.

Further information can be found at www.firb.gov.au.

Australian Communications and Media Authority (**ACMA**)

ACMA is the government body responsible for the regulation of broadcasting, the Internet, radio communications and telecommunications. ACMA's responsibilities include promoting self-regulation and competition in the communications industry, while protecting consumers and other users. ACMA is also responsible for enforcing Australia's anti-spam law, the Spam Act 2003 (Cth).

Further information can be found at www.acma.gov.au.

IP Australia

IP Australia is the regulatory body in respect of intellectual property in Australia. Its main purpose is to administer and keep records of registered patents, designs, trade marks and plant breeder's rights.

Members of the public are able to search the records of IP Australia for information relating to intellectual property rights, including registers of trade marks, designs and patents.

Further information can be found at www.ipaustralia.gov.au.

Therapeutic Goods Administration (TGA)

The TGA is a unit of the Australian Government Department of Health and Ageing, responsible for administering the Therapeutic Goods Act 1989 (Cth). The TGA carries out a range of assessment and monitoring activities to ensure therapeutic goods available in Australia are of an acceptable standard, with the aim of ensuring that the Australian community has access to therapeutic advances.

Therapeutic goods, which include medicines as well as medical devices, must be entered on the [Australian Register of Therapeutic Goods](#) before they can be supplied in Australia.

.au Domain Administration

auDA is a not-for-profit organisation which was formed in 1999 as the industry self-regulating body for the .au domain name. It has been formally recognised by the federal government and has the power to develop and implement domain name policy.

It is responsible for granting licences for second level domain registry operators (e.g. obtaining a .com.au, .net.au or .org.au webpage), as well as ensuring consumer protection by implementing safeguards and dealing with complaints.

Further information can be found at www.auda.org.au. Also see www.melbourneit.com.au.