

Doing Business in Australia – A Guide

November 2010



■ KEMP STRANG
MEMBER OF THE KENNEDY STRANG LEGAL GROUP

Level 16
55 Hunter Street
Sydney, NSW 2000
GPO Box 475
Sydney, NSW 2001
DX 605 Sydney

Telephone
+61 2 9225 2500
Facsimile
+61 2 9225 2599

www.kempstrang.com.au



AFFILIATED FIRMS PRACTISING SEPARATELY IN
SYDNEY • MELBOURNE • BRISBANE • ADELAIDE

Doing Business In Australia – A Guide

Contents

| | <i>Page No.</i> |
|---------------------------------------|-----------------|
| Introduction | 1 |
| Regulation Of Business | 1 |
| Business Structures | 2 |
| Foreign Investment In Australia | 5 |
| Fundraising Laws | 7 |
| Takeover Laws | 7 |
| Acquisitions – Business v Company | 7 |
| Exports And Imports | 8 |
| Intellectual Property | 8 |
| Employment And Industrial Relations | 10 |
| Contract Law | 12 |
| Anti-Trust And Competition Regulation | 12 |
| Consumer Protection | 12 |
| Product Liability | 12 |

This document is intended to provide a broad summary of the primary laws relevant to the conduct of business in Australia. This document should not be used or relied upon in substitution for specific advice concerning the application of Australian laws to particular circumstances.

Introduction

General

Australia, officially The Commonwealth of Australia, is a country in the southern hemisphere comprising the world's smallest continent of approximately 7.7 million square kilometres and a number of islands in the Southern, Indian and Pacific Oceans.

The capital of Australia is Canberra, which is located in the Australian Capital Territory.

Australia has a population of approximately 22 million which is concentrated in eight State and Territory capital cities. The national language is English.

The currency in Australia is decimal, with the dollar (A\$) as the basic unit and 100 cents to the dollar.

Australia uses the metric system for all measurement.

Form of Government

The Commonwealth of Australia, established in 1901, is a constitutional monarchy and has a parliamentary system of government. Queen Elizabeth II is the Head of State, and is represented in Australia by her Governors in each State and the Commonwealth Governor-General.

Australia is a federation of six States and two internal Territories. There is also a Federal Government.

Federal Parliament consists of the Senate (Upper House) and the House of Representatives (Lower House). The members of each House are elected by popular vote.

There are six State Governments and two Territory Governments. They have responsibility for providing services such as education, power supply, police and health care.

Local Government represents the third tier of Government, and has responsibility delegated by the States and Territories for planning and development and the provision of local services.

Legal system

In Australia, the law consists of a Constitution delineating powers between the Commonwealth, the States and the Territories, statutory law passed by the Federal and State Parliaments and Legislative Assemblies of the Territories, and common or judge-made law, originally received from English common law.

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

Regulation Of Business

The Australian Competition and Consumer Commission (ACCC)

The Australian Competition and Consumer Commission is an independent Commonwealth statutory authority. It was formed in 1995 to administer the *Trade Practices Act 1974* (Cth) (**Trade Practices Act**) and other acts.

In broad terms, the objectives of the Trade Practices Act and similar State and Territory legislation are to promote competition and fair trading and to provide for consumer protection. The Trade Practices Act covers unfair market practices, industry codes, company mergers and acquisitions, product safety, product labelling, price monitoring and the regulation of industries such as telecommunications, gas, electricity and airports.

The ACCC's primary responsibility is to ensure that individuals and businesses comply with the Commonwealth's competition, fair trading and consumer protection laws.

The Australian Prudential Regulation Authority (APRA)

The Australian Prudential Regulation Authority is the prudential regulator of the Australian financial services industry. It is a Commonwealth statutory authority, established on 1 July 1988. It oversees banks, credit unions, building societies, general insurance and reinsurance companies, life insurance, friendly societies, and most members of the superannuation industry. APRA is funded largely by the industries that it supervises.

Australian Securities & Investments Commission (ASIC)

The Australian Securities & Investments Commission is Australia's corporate, markets and financial services regulator.

ASIC is an independent Commonwealth government body. ASIC has regulated financial markets, securities, futures and corporations since January 1991. From 1998, ASIC became responsible for consumer protection in superannuation, insurance, deposit taking and, from 2002, credit. ASIC reports to the Commonwealth Parliament, the

Treasurer and the Parliamentary Secretary to the Treasurer.

ASIC administers the *Corporations Act 2001* (Cth) (**Corporations Act**), the law regulating incorporation, operations and management of companies, and the regulation of financial products and services.

ASX Limited (ASX)

ASX Limited was formed in 1987. ASX was originally a mutual organisation of stockbrokers, like its predecessor State stock exchanges. However, in 1996, its members decided to demutualise and become a listed company, which required legislation of the Federal Parliament. The change of status took place on 13 October 1998, and the following day ASX shares were listed for trading on ASX's own market.

ASX operates Australia's primary national stock exchange and facilitates trading in securities and derivatives such as shares, futures, options and warrants. It also provides market data for example, share prices and related information including stock market announcements and market education to a range of users. There are offices of the ASX in Sydney, Melbourne, Brisbane, Adelaide, Perth, Chicago and London.

Australian Taxation Office (ATO)

The Australian Taxation Office is a Commonwealth statutory authority under the Commissioner of Taxation. It is responsible for administering Australia's Federal taxation system.

Australia's income tax law and regulation consists primarily of the *Income Tax Assessment Act 1936* (Cth), the *Income Tax Assessment Act 1997* (Cth), and the *Taxation Administration Act 1953* (Cth), as well as ATO administrative taxation rulings and court decisions. The current income tax system involves taxation of income and capital gains of individuals and businesses. The ATO administers the process of annual self-assessment and conducts random audits to verify assessments. The ATO also collects a goods and services tax, excise on tobacco, petrol, alternative fuels and alcohol, administers the Higher Education Contribution Scheme and the Private Health Insurance Rebate, and has responsibility for the fiscal regulation of Australia's superannuation system.

Foreign Investment Review Board (FIRB)

The Foreign Investment Review Board is a non-statutory organisation formed in 1976 to provide foreign investment policy advice to the Australian Federal Government. The FIRB's principal function is to assess direct investment proposals submitted by foreign interests for investment in

Australia and to make recommendations to the Australian Federal Government on the compatibility of those proposals with Government policy and the *Foreign Acquisitions and Takeovers Act 1975* (Cth) ("**FATA**").

Substantial concessions are available to investors in Australia from The United States of America, Singapore, New Zealand, Chile, certain ASEAN member countries and Thailand under various Free Trade Agreements. Free Trade Agreements are currently under negotiation with other countries, including the United Arab Emirates, Malaysia, Korea and The People's Republic of China.

Reserve Bank of Australia (RBA)

The Reserve Bank of Australia is a Commonwealth statutory authority performing the country's central banking functions.

The RBA's main responsibility is monetary policy. Policy decisions are made by the Reserve Bank Board, with the objective of achieving low and stable inflation over the medium term. Other major roles of the RBA include maintaining financial system stability and promoting the safety and efficiency of the payments system. The RBA is an active participant in financial markets, manages Australia's foreign reserves, issues Australian currency notes and serves as banker to the Australian Government.

IP Australia

IP Australia is the Australian Government agency responsible for administering patents, trade marks, designs and Plant Breeder's Rights. IP Australia incorporates the Patent, Designs, Trade Marks and Plant Breeder's Rights (PBR) Offices. It is a prescribed agency within the Department of Innovation, Industry, Science and Research but operates independently and reports directly to the Minister.

State and Territory Revenue Offices

Each Australian State and Territory has an Office of State Revenue or similar, charged with responsibility for collecting State and Territory taxes and imposts. These include land tax, payroll tax and stamp duty (a tax on certain instruments and transactions).

Business Structures

The forms of business organisation available in Australia include sole traders, partnerships, joint ventures, trusts and companies.

Sole trader

An individual may operate a business as a sole trader. All the assets and liabilities of the business belong to the individual personally. There is no distinction made between the business assets and personal assets of the individual. The individual is personally liable in all aspects of the business.

The individual may trade under his or her own name. If the individual wishes to trade under another name, then a business name must be registered in each State and Territory in which business is carried on.

Partnership

Two or more individuals or companies may conduct a business as a partnership. A partnership is an association of individuals or entities formed for the purpose of carrying on a business venture or business activity in common with a view to profit. Unless the partnership is conducted in the name of the partners, the name under which it operates must be registered as a business name. The maximum number of partners is usually 20, however, there are exceptions, including for professional firms.

Partnerships are governed by the Partnership Acts of the States and Territories, the terms of the agreement between the partners, and the common law. A partnership is not a separate legal entity. The partners are jointly and individually liable for the debts and obligations of the business. Each partner is fully liable to third parties despite any agreement amongst the partners. In the States and Territories there is legislation permitting limited partnerships, including venture capital limited partnerships. This allows some (but not all) partners to have limited liability, but these partners are not permitted to take an active part in running the business.

Joint venture

A venture or project can be carried on by individuals or corporations as a joint venture. A joint venture is generally established for a particular project or product. Joint ventures can be incorporated (where the joint venturers each take a shareholding in a company specifically incorporated for the project), or unincorporated. Joint ventures are governed by the terms of the formal agreement between the joint venturers and by the common law. Unincorporated joint ventures are not separate legal entities. In practice, a joint venture is likely to be appropriate where the members associate themselves for a particular project such as a mining or exploration venture, particularly where they each wish to maintain their own taxation status or where there are significant start-up costs.

Trusts

A business may be carried on through a trust. A trustee owns the assets of the business and carries on the trading activities on behalf of the beneficiaries of the trust. The trustee may be an individual or a corporation. A trust however is not a separate legal person.

The type of interest which the beneficiaries have in the profits and assets of the business may vary and will depend on the terms of the trust. Traditionally, trusts have been divided into fixed trusts, unit trusts and discretionary trusts. Most larger trusts provide for the beneficiaries to hold units in them, with the entitlements being similar to those attaching to shares in a company (although there are important differences). Trusts may be private or public. Public trusts can be listed on a stock exchange, and may be required to be registered under the Corporations Act as registered managed investment schemes.

Company

A business may be conducted through a company. The company limited by shares is the most common form of business entity in Australia.

Companies have the benefit of a separate identity from its members and officers. A company is a separate legal entity capable of holding assets in its own name and can sue and be sued in its own name. The liability of the members will generally be limited to the unpaid amount on any shares held. However, a company's directors and its holding company can be personally liable for company debts incurred at a time when the company is insolvent or there are reasonable grounds for suspecting it is insolvent or would become insolvent by incurring a particular debt.

In Australia, there are two principal types of company limited by shares:

- proprietary (denoted by the words Pty Limited or Pty Ltd), and
- public (denoted by the word Limited). A public company may, but need not, be listed on ASX.

Proprietary companies:

- must have at least one shareholder but no more than 50 non-employee shareholders;
- must have at least one director who is ordinarily resident in Australia; and
- cannot engage in any activity that would require the lodgment of a prospectus or other disclosure document (except for an offer of shares to existing shareholders or employees).

Public companies

- must have at least one shareholder;
- must have at least three directors (two of whom are ordinarily resident in Australia);
- must have at least one secretary (a secretary must be a natural person over the age of 18 years) and at least one secretary must ordinarily be resident in Australia;
- subject to securities and other applicable laws, may issue a prospectus or other disclosure document for the offer of shares, debentures or other securities; and
- must appoint an auditor.

Both proprietary and public companies must at all times have a public officer who is answerable for everything which is required to be done by a company for tax-related purposes. The public officer must be a natural person over the age of 18 years who is ordinarily resident in Australia. A public officer must be appointed within three months of a company commencing to carry on business in Australia or first deriving income in Australia. Companies must also have a registered office in Australia where communications can be sent. If the company does not occupy the premises, it must obtain the occupier's consent to use the premises as the registered office.

Australian companies are governed by the Corporations Act, their constitution and the common law.

Business names

If a person carries on business in Australia (other than in their own name or a company name), the person must register that business name with the relevant authority in the States and/or Territories in which it is carrying on business. Business names are registered independently of company names.

Registration of a company name or business name does not thereby give the registered person any proprietary right to use that name. This will depend on whether another trader in Australia has registered the name as a trade mark or service mark for similar goods or services, or has established a prior reputation in that name or a similar name.

Foreign Companies

A foreign corporation may carry on business in Australia either as an Australian branch or through an Australian subsidiary company.

To carry on business in Australia through a branch office, a foreign corporation must be registered as a foreign company with ASIC.

A foreign corporation is carrying on business in Australia if it, among other things: has a place of business in Australia (eg a permanent office); establishes or uses a share transfer office or share registration office in Australia; or administers, manages or deals with property in Australia as an agent, legal personal representative or otherwise.

A foreign corporation is not required to register as carrying on business in Australia merely because it maintains a bank account; effects a sale through an independent contractor; solicits or procures an order that becomes a binding contract only if the order is accepted outside Australia; creates evidence of a debt or creates a charge on property; services or collects any of its debts; conducts an isolated transaction that is completed within a period of 31 days and is not repeated from time to time; or invests any of its funds or holds any property.

To register with ASIC, a foreign corporation must:

- establish that the name is available for the corporation and, if in doubt, apply to have it reserved;
- appoint at least one local agent (either a natural person resident in Australia or an Australian company) who is authorised to accept notices and service of process on behalf of the foreign corporation; is responsible for ensuring compliance with the Corporations Act; and may be personally liable for penalties imposed for breaches of the Corporations Act;
- establish a registered office within Australia to which communications and notices may be sent; and
- lodge with ASIC certified copies of its current certificate of incorporation or registration (or equivalent) and its constitution; details of its directors and a memorandum stating the powers of any resident Australian directors or of the members of any Australian local board of directors; details of security interests over property located within Australia or its external territories; and details of its registered office or principal place of business in its country of origin and its registered office in Australia.

Registration as a foreign company is complete on lodgment of these documents and payment of the relevant fee.

A registered foreign company must file its annual accounts (for the total operation, not just the Australian operation) in the prescribed manner with ASIC, unless exempt. In addition, changes in particulars (eg the appointment or resignation of directors or changes to constituent documents) must be notified in the prescribed manner.

Rather than carry on business in Australia itself, a foreign corporation may instead use an Australian incorporated subsidiary which may be a proprietary or a public company. A subsidiary company can be established either through incorporation of a new company or by acquisition of an Australian company, including a shelf company (a company which has been incorporated but has not yet traded).

Foreign Investment In Australia

Foreign investment in Australia is governed by the *Foreign Acquisitions and Takeovers Act 1975 (Cth) (FATA)* and various policy guidelines. FATA applies to investment proposals by foreign persons which include:

- individuals who are not ordinarily resident in Australia;
- corporations or trusts in which a foreign interest holds 15% or more of the corporation or trust (even if the corporation or trust is not actually foreign controlled); and
- corporations where two or more foreign persons hold 40% or more of the corporation.

Contracts for the acquisition of interests requiring FIRB notification or approval should be conditional on such notification or approval being given.

Acquisitions and establishment of new businesses

Notification

The FATA requires that certain transactions proposed by foreign persons be notified to the Federal Treasurer for examination and approval prior to implementation. Accordingly, and unless a relevant exemption applies, such transactions should be made conditional on FIRB approval. Such transactions include:

- a substantial shareholding (15% by an individual, or 40% where two or more persons act together) in an Australian corporation where the total assets exceed A\$231 million;
- the takeover of offshore companies whose downstream Australian assets have a value exceeding A\$231 million or account for 50% or more of the target company's global assets; and
- acquisitions of interests in urban real estate regardless of value subject to certain exemptions (see below for more details).

These thresholds differ for US persons and are indexed annually.

Proposals by private investors to establish new businesses do not require notification or approval under the FATA or the policy.

Direct investments by foreign governments and their agencies, including proposals to establish new businesses, require approval irrespective of size.

Assessment

Applications for approval involve lodging a statutory form and certain additional information and normally take between 30 and 40 days to be dealt with. The formal notification activates a deadline so that if the Australian Treasurer does not take action against the proposal within 30 days (which may be extended by a further 90 days), the Commonwealth Government loses its ability to block or impose conditions on the transaction.

Generally, FIRB, which advises the Treasurer, deals with proposals quickly and efficiently. In most cases, a decision is made within 30 days of lodgement and approval is normally granted unless the proposal is judged to be contrary to the national interest.

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

Urban Real Estate

All acquisitions of Australian urban real estate by foreign interests should be submitted to FIRB in advance for approval, unless they fall within an exempt category.

Urban real estate means all Australian real property other than rural land (being land used wholly and exclusively for carrying on a substantial business of primary production). Proposals that require approval (unless otherwise exempt) include acquisitions of:

- residential real estate (including hobby farms and rural residential land);
- vacant land;
- developed non-residential commercial real estate valued at A\$50 million or more (or A\$5 million or more if the property is subject to heritage listing);
- accommodation facilities;
- residential and commercial leases for five years or more (provided that for the asset the subject of a

commercial lease, the same thresholds detailed above for developed commercial real estate and commercial heritage listed real estate apply);

- a profit sharing arrangement over urban land (provided that for the asset the subject of the profit sharing arrangement, the same thresholds detailed above for developed commercial real estate and commercial heritage listed real estate apply);
- shares in a company or units in a trust that holds more than half its total assets in urban land; and
- options over urban real estate.

Exempt categories

Acquisitions of real estate in Australia that are exempt include:

- acquisitions by Australian citizens living abroad;
- acquisitions of residential property as follows:
 - single block(s) of vacant land;
 - new dwelling(s); and/or
 - a second hand dwelling to be used as your principal place of residence (including if it is going to be demolished first then redeveloped),

by a temporary resident;

- acquisitions of developed commercial property valued at less than \$50 million, or \$5 million for heritage listed properties;
- acquisitions of new dwelling(s) from the developer, where the developer has pre-approval to sell those dwellings to foreign persons;
- purchases of property from the Government (Commonwealth, State or Territory, or local);
- acquisitions of property zoned residential by foreign nationals who hold permanent resident visas or hold, or who are eligible to hold, a 'special category visa' (for example, a New Zealand citizen); and
- foreign persons purchasing residential property as joint tenants, with their Australian citizen spouse.

Queensland real estate

There are additional notification requirements under the *Foreign Ownership of Land Register Act 1988* (Qld) for acquisitions of interests in Queensland real estate including

leases where the term of the lease (including any option to renew) is 25 years or more.

Special industry sectors

The following industry sectors have been listed as sensitive and foreign investment in these sectors are subject to special treatment and detailed examination by FIRB:

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

Approval

Although notifiable, share acquisitions and business purchases with assets of more than A\$231 million in non-sensitive sectors, will not be subject to detailed examination.

FIRB approval is normally only given for a specific transaction. If an approved transaction does not proceed at that time and/or the parties enter into new agreements at that time and/or at a later date, further approval must be sought from FIRB for the transaction.

Prior approval is also required to acquire options for the purchase of relevant shares, assets or property.

Fundraising Laws

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

No offers without disclosure to investors

Subject to a number of exceptions, a person must not make an offer for issue or sale of financial products unless a disclosure document (eg. a prospectus) is prepared in accordance with the requirements of the Corporations Act.

A disclosure document for financial products other than securities is called a Product Disclosure Statement. There are also restrictions on unsolicited offers of financial products and advertisements regarding offers of financial products.

Exceptions

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

These exceptions include:

- a personal offer to an investor provided the offer does not result in the number of people to whom securities of the entity have been issued exceeding 20 in any 12 month period or the amount raised by the entity by issuing securities exceeding A\$2 million in any 12 month period;
- where the amount payable on acceptance of the offer for the financial product is A\$500,000 or more or when added to amounts previously paid by a person for the same class of financial product that are held by that person add up to at least A\$500,000;
- an offer to an investor who has a gross income for each of the previous two financial years of at least A\$250,000 or has net assets of at least A\$2.5 million, certified by a qualified accountant; and
- offers to other specified sophisticated or institutional investors (including stockbrokers, certain pension and life insurance funds, and persons who control at least A\$10 million for the purpose of investment in securities).

Liability

A person may be liable in connection with an offer of financial products under a disclosure document in respect of misleading or deceptive statements in the document or accompanying documentation; omissions; or non-disclosure (via a supplementary document) of new circumstances which have arisen since the date of the disclosure document, which would have had to be disclosed had they been present at the time of issue of the disclosure document.

The offeror and its directors (and in certain circumstances, underwriters and other persons who have made statements in the disclosure document) may be liable to any person who suffers loss or damage because of the misleading or deceptive statement, omission or new circumstance. There are various liability defences under the Corporations Act, including a due diligence defence for offer documents.

Takeover Laws

The Corporations Act regulates the acquisitions of interests in Australian companies or trusts listed on ASX and unlisted Australian companies with more than 50 non-employee members.

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

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

There are a number of exceptions to the takeover prohibition. These include off-market and on-market takeover bids, court approved schemes of arrangement, rights issues, dividend reinvestment plans, share bonus plans, share issue underwritings, target shareholder approved acquisitions, selective reductions of capital and acquisitions of relevant interests in voting shares where the change in voting power is 3% or less than the voting power they held in the preceding six months (3% creep exception). In addition, ASIC has power to exempt or modify the operation of the takeover rules.

Acquisitions – Business v Company

Where a company operates a business, the business may be acquired by purchasing the shares in the company, or by purchasing the assets of the business. Each approach has

advantages and disadvantages, including those outlined below. Tax considerations are also significant in determining the appropriate approach in each case.

Purchase of shares

- The purchase of shares in a company may be accompanied by certain contractual benefits to which the target company is a party. These may include favourable supply contracts, exclusive or long term distribution or franchise contracts; employment contracts with key staff members; or favourable leasing contracts for premises or equipment. However, a key contract could be at risk of cancellation if the acquisition will trigger a “change of control” event entitling the other party to end the contract.
- Some States and Territories levy stamp duty on private acquisitions of shares and on business acquisitions. Generally, stamp duty payable on the acquisition of shares in a company will be less than that payable on the acquisition of the individual assets of the company. However, if the company is “land rich” higher duty may be payable.
- By acquiring all of the shares in a company, the acquirer assumes all of the company’s liabilities, whether disclosed or not, and which might include trade creditors, long term creditors, taxation, employee and superannuation contributions, employee liabilities for leave and past breaches of law. Whilst warranties and indemnities may be obtained from the vendor(s), if these warranties and indemnities are breached, costly litigation may be the only means of redress.

Purchase of assets

- The purchaser is able to elect which assets and liabilities they wish to acquire and assume.
- Any contractual arrangements must be novated to the purchaser.
- New contractual arrangements need to be negotiated and entered into with employees. The purchaser will not necessarily inherit the benefit or the burden of the target’s employee arrangements.
- Generally, where stamp duty is payable, the duty on the acquisition of the individual assets will be more than that payable on the acquisition of the shares of the company.

Exports And Imports

The importation and exportation of goods is regulated by a variety of laws in Australia, primarily the *Customs Act 1901* (Cth). The importation and exportation of all goods into and from Australia must be reported to the appropriate authorities and the importation and exportation of certain goods is either prohibited or restricted. Failure to comply with such restrictions or prohibitions may result in significant penalties being imposed.

Most goods imported into Australia are not subject to restrictions, although it is necessary to comply with customs procedures. However, certain classes of goods, such as drugs, animal products and weapons, will be subject to specific import and registration controls. In addition, quarantine restrictions apply to a wide range of agricultural, food and other similar products.

There are few regulations on exports from Australia, although it is necessary to comply with certain procedures. However, certain goods, such as wildlife, plants, heritage and hazardous materials, may be subject to additional requirements, which may include Federal Government approval, or even total prohibition. Significant transactions in cash or equivalent must be reported. Australia also has comprehensive anti-money laundering laws.

The Federal Government can consider competition from imports to be unfair in certain circumstances. Under the Australian anti-dumping legislation, which broadly follows the World Trade Organisation Anti-Dumping Agreement, local industries are entitled to protection where dumped imports are found to cause or threaten material injury. Dumping is taken to occur when the export price of products of one country is less than their “normal value” in the domestic market of the exporter.

Intellectual Property

Australia provides a comprehensive legal framework for the protection of technology and intellectual property rights. Australian law in this area is largely based upon British law. Australia is a signatory to the Agreement on the Trade-Related Aspects of Intellectual Property Rights (**TRIPS Agreement**).

Trade Marks

The *Trade Marks Act 1995* (Cth) (**Trade Marks Act**) governs the protection of registered trade marks.

Ownership of a trade mark is not defined in the Trade Marks Act, and is governed by the common law. Where a trade mark has previously been used in Australia, the owner of the mark is the first person to use that mark in relation to the product. Where the trade mark has not been

used in Australia, but an application has been made, the owner must satisfy the requirements of the Trade Marks Act. Ownership of a trade mark is only maintained if it is used, and can be removed from the register after 3 years if the trade mark has not been used by or on behalf of the owner during that period. Ownership entitles the owner to the exclusive right to use, and the exclusive right to assign use of the mark for a renewable period of ten years and the exclusive right to exclude others from use of that mark as a trade mark. The registration-based system of trade marks accords with the Nice classification system.

The Trade Marks Act provides that a registered trade mark is personal property. Accordingly it carries a value independent of the goods it identifies and is assignable. However, authorised use requires that the owner maintain either quality or financial control over the goods and services which are attributed to the mark. Unauthorised use pursuant to a licence will avail the mark to deregistration after three years.

Australia is a party to the *Paris Convention for the Protection of Industrial Property* and the *TRIPS Agreement*. In accordance with the TRIPS Agreement, each member accords to the nationals of other members, treatment no less favourable than it accords to its own nationals with regard to the protection of intellectual property. Additionally, Australia is a party to the *Madrid Protocol*. As such, a single application for the registration of a trade mark may be submitted to the appropriate Registrars of Trade Marks for registration of the trade mark in each member country.

The common law tort of passing off and section 52 of the Trade Practices Act, which prohibits misleading and deceptive conduct, offer an avenue for the protection of unregistered trade marks.

Copyright

Copyright in Australia is governed by the *Copyright Act 1968* (Cth) (**Copyright Act**).

Types of material afforded copyright protection include literary (including computer programs), musical, artistic and dramatic works. Other subject matters that may attract the protection of copyright include sound recordings, cinematographic films, sound and television and radio broadcasts and published editions of works.

Copyright under the Copyright Act is the exclusive right to do, and authorise others to do, in Australia, specified acts in relation to works and other subject matter, for a limited term. The exclusive rights offered protection include the right to reproduce, the right to publish, the right to perform in public, the right to communicate in public and the right to adapt a work in material form. Copyright also grants a right to enter into a commercial rental arrangement in respect of a work.

As a party to the *Berne Convention* the enjoyment and exercise of copyright rights are not subject to any formality. Copyright is a chose in action, but it must be embodied in a chattel before it can exist. As such, it must have a material form. So long as the criterion for copyright can be met, no requirements need to be fulfilled to attract its protection. The Copyright Act provides that copyright is personal property transmissible by will and by devolution and operation of law.

Australian copyright lasts for the life of the author plus 70 years, in the case of most works, and (broadly speaking) 70 years from the date of publication in the case of subject matter other than works and photographs.

The Copyright Act also offers the protection of moral rights laws, which include the right of attribution, the right of integrity and the right of non-derogation.

Patents

The *Patents Act 1990* (Cth) (**Patents Act**) creates a registration-based system sustained by a process of application and examination for the granting of a patent. Any inventor, or a person entitled to be assigned the invention, may apply to protect a method, device, substance, or process which is new and inventive.

The Patents Act designates two forms of patent. These include a standard patent with a term of 20 years from the date of the patent and an innovation patent which offers a protection term of eight years from the date of the patent for those innovations which are insufficient to meet the standard patent threshold requirements.

A standard patent grant requires the complete satisfaction of the threshold requirements. However, an innovation patent application may be registered pending mere substantive analysis of the application and satisfaction of the formal requirements. Notably, an innovation patent is unenforceable against an alleged infringer unless it has been examined for substantive compliance.

Australia is a party to both the *Paris Convention for the Protection of Industrial Property* ("**Paris Convention**") and the *Patent Co-operation Treaty*. Accordingly, foreign applicants are afforded a period from the date of original application in a member country to file a corresponding application in Australia. Australia is also a party to the *1977 Treaty on the International Recognition of the Deposit of Micro-Organisms for the Purposes of Patent Procedure*.

Designs

Whilst offering a more simple and cost effective system providing designers with rights which are more easily enforceable, the *Designs Act 2003* (Cth) dictates a more

complex basis of registration. Moreover, the term of registration has been reduced from 16 to 10 years.

To satisfy the requirements for valid registration, a design must meet both the definition of 'design' and the innovation threshold which comprises the elements of 'newness' and 'distinctiveness'. 'Newness' and 'distinctiveness' will be assessed against designs publicly used within Australia or published within or outside Australia.

As a party to the *Paris Convention*, Australia allows foreign applicants 6 months from the date of an original application in a member country, in which to file an application for the same design in Australia.

Confidential information

The common law doctrine of confidential information affords protection over information disclosed in circumstances where there is an express or implied understanding that the use of that information is to be limited to certain purposes. Remedies are only enforceable for identifiable information that has legitimately been kept confidential, or disseminated only to parties to whom that duty of confidence also presides.

In the case of trade secrets, the information subject to this duty must be sufficiently developed to be commercially useful and identifiable. Mere speculation or industry practice and skill will not be subject to the duty of confidence.

Employment And Industrial Relations

Overview

Australia does not have a unitary system of workplace relations. The terms and conditions of employment are derived from federal and state industrial laws (including industrial instruments) and from the common law. Employers need to be aware of the different industrial laws that will apply in particular circumstances, especially the application of any industrial instruments such as Modern Awards. Employees can be employed under common law employment contracts or the relevant State or Federal industrial instruments (which override common law contracts), being either industrial awards (which are quasi-legislative rulings regulating specific industries and occupations) or industrial agreements (such as enterprise agreements).

As a result, in all States of Australia save for the State of Victoria, there are two layers of legislation with respect to workplace relations. The State of Victoria ceded its

industrial relations powers to the Federal Government in 1996. The "territories" (being the Northern Territory and the Australian Capital Territory) are also regulated by Federal legislation.

The vast majority of Australian employees are covered by Federal industrial laws under the *Fair Work Act 2009* (Cth) ("**FW Act**"). The FW Act commenced operation in July 2009, with full operation effective 1 January 2010. Federal employment agreements such as Australian workplace agreements, individual transitional agreements, collective agreements and notional agreements preserving state awards entered into prior to the commencement of the FW Act will continue to operate, in some cases, until 2014.

Although due to constitutional reasons the FW Act could only specifically cover "constitutional corporations" (defined to mean a foreign, trading or financial corporation), with the referral by the States (other than Western Australia) in late 2009 of some of their industrial relations powers, unincorporated associations, partnerships and not-for-profit organisations (whether they are incorporated or not) are now subject to the FW Act and Federal industrial laws. Transitional provisions apply through to 1 January 2011.

For employers not covered above, the terms and conditions of employment continue to be regulated by the applicable State industrial laws, awards and agreements. These employers would also be subject to State unfair dismissal laws and where applicable, "unfair contract" laws such as those that exist in the State of New South Wales.

The FW Act is intended to remove the complexity of the previous system under the *Workplace Relations Act 1996* (Cth) ("**WPR Act**") and to reconstitute collective bargaining as the primary method of negotiating the terms and conditions of employment for large scale employers. Unions now have a greater role under the FW Act than previously existed under the WPR Act.

The FW Act also aims to provide a "safety net" of industrial entitlements for all employees through the National Employment Standards and Modern Awards (discussed below).

The main features of the FW Act are:

- (a) the creation of 10 National Employment Standards (for example, leave, termination and redundancy) which will apply as minimum standards for all "national system employees" regardless of industrial instrument coverage or remuneration level;
- (b) the introduction of a "Modern Awards" system which will greatly reduce the number of industrial awards that apply in Australia;
- (c) the introduction of "good faith" bargaining in the negotiation of enterprise agreements;

- (d) the introduction of a statutory redundancy regime;
 - (e) the reinstatement of broad unfair dismissal remedies;
 - (f) the creation of new adverse action provisions applicable to both employees and independent contractors;
 - (g) the abolition of Australian workplace agreements; and
 - (h) the creation of Fair Work Australia which replaces the existing employment industrial commissions and agencies.
- (b) trade union membership, pregnancy, age, or temporary absences from work;
 - (b) making provision for equal opportunity and affirmative action in the workplace in respect of the employment of women;
 - (c) prohibiting bullying, harassment and vilification in the workplace; and
 - (d) rendering employers vicariously liable for the unlawful conduct of employees during the course of their employment.

The FW Act does not regulate workers' compensation and long service leave entitlements which continue to be dealt with in accordance with the applicable state legislation. Although predominantly superannuation entitlements are also determined in accordance with separate Federal legislation which provides that employers make mandatory superannuation contributions to a complying superannuation fund on behalf of the employee, Modern Awards may now specify the only superannuation funds permitted to be chosen by employers as their default fund.

Independent contractors play a significant role in the Australian workplace. It is important to ensure that any independent contractor arrangement is bona fide and properly categorised as a "contract for service". The *Independent Contractors Act 2006* (Cth) will apply to arrangements where one party is a "constitutional corporation" and the courts have the power to vary contracts that are deemed to be "harsh" and/or "unfair". In addition, the FW Act gives the courts the power to overturn any "sham" agreements which have been implemented to avoid employer liabilities such as superannuation and worker's compensation premiums.

A recent addition to the Federal industrial laws and effective 1 January 2011 is paid parental leave for persons meeting the eligibility requirements specified in the *Paid Parental Leave Act 2010* (Cth). Payments are in addition to existing employer paid parental leave and can be up to 18 weeks at the national minimum wage.

Equal employment opportunity

All Federal and State jurisdictions have enacted laws prohibiting discrimination on certain grounds and promoting equal opportunity in the workplace. These various laws are aimed at:

- (a) prohibiting discrimination against employees and job applicants on certain grounds including but not limited to, sex, race, disability, religion, sexuality,

Importantly, Federal and State authorities are currently conducting a widespread campaign against bullying and harassment, including through electronic social communications.

Occupational Health and Safety

State and Territory laws impose strict obligations on employers to consult with employees and maintain a safe workplace to ensure the health, safety and welfare of employees and other people in the workplace. A breach of the legislation means that the employer is exposed to liability and may risk significant financial penalties.

The managers and directors of a company may also be liable for a breach of occupational health and safety laws by the company, with fines and/or imprisonment potential penalties. The WorkCover Authority of New South Wales has successfully prosecuted an overseas based director arising from the breach by the company of the *Occupational Health and Safety Act 2000* (NSW). The fact that the director was not domiciled in New South Wales was not considered relevant by the courts.

In 2008, the Federal, State and Territory governments embarked on a process which, when implemented, will "harmonise" all existing occupational health and safety laws. The harmonisation process is well advanced and should be completed by the end of 2011. Once completed, each State and Territory is expected to incorporate "Model" legislation into its existing occupational health and safety laws. However, Western Australia has not agreed to the harmonisation process and at this stage will be likely to be the only State in Australia to fall outside of the harmonisation.

The Model Act was released in 2010 and provides for increased penalties for companies, officers and individuals while creating a separate obligation on officers of companies (as defined in the *Corporations Act 2001* (Cth)).

Contract Law

Australian contract law is derived from the English common law, rather than on any codified or statute law. The basic principle of Australian contract law is the freedom of contract, under which parties are free to contract on whatever basis they choose, within statutory law.

The formation of a contract under Australian law requires the unequivocal acceptance of a clear offer, the presence of consideration, and an intention to create legal relations. It is a good practice to record the terms of a contract in writing as Australian courts will give considerable weight to the expression of the parties' intentions evidenced in the written contract. It is noted that no special forms or procedures are required.

These broad statements of principle are affected by some important legislation, notably, the Trade Practices Act which cannot be contracted out of and may result in legislative rights which override contractual rights in certain circumstances. Contracts involving insurance, consumer credit, employment and sale of goods may also be affected by legislation.

Under Australian contract law, with certain limited exceptions, those who are not parties to a contract cannot be bound by it. This is known as the doctrine of privity of contract.

Anti-Trust And Competition Regulation

The competition provisions of the Trade Practices Act operate by prohibiting certain conduct, prohibiting other conduct where it has the purpose or effect of substantially lessening competition in a market in Australia, preventing mergers or acquisitions which have the purpose or effect of substantially lessening competition in a market in Australia requiring infrastructure owners to provide access to certain infrastructure including various telecommunications services.

The principal forms of conduct which are prohibited absolutely are agreements between competitors on price (price-fixing); agreements between competitors to restrict supply to particular people or groups of people (collective boycotts); setting the minimum price at which goods or services can be on-sold (resale price maintenance); and some tying arrangements (third line forcing).

There is a broad range of conduct which is prohibited if it has the purpose or effect of substantially lessening competition in a market, including: any agreement, arrangement or understanding; any arrangement involving the exclusive supply of goods or services to a particular

person or group of people; arrangements involving the provision of discounts if competitors' products are not stocked; and some tying arrangements.

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

Contraventions of the Trade Practices Act are vigorously enforced by the ACCC and fines of up to the greater of A\$10 million, three times the value of the illegal benefit and 10% of the annual turnover of the company and all its related companies for companies and A\$500,000 for an individual may be imposed. These amounts apply for each individual instance of a breach so that, if there are several instances of breach, penalties can easily exceed these amounts.

Consumer Protection

Consumer protection legislation exists at both the Federal (ie. the Trade Practices Act) and State and Territory (Fair Trading Acts and Sale of Goods legislation) levels. The provisions at both levels are comparable.

The legislation protects consumers by regulating marketing activities and deeming certain warranties to be included in sales of goods or services to consumers. The consumer protection provisions include:

- Section 52, which prohibits corporations from engaging in misleading or deceptive conduct in trade or commerce.
- Part V Division 2A provides consumers with a statutory remedy directly against manufacturers of defective products. The operation of Division 2A is restricted to consumer goods.
- Part VA creates a strict liability regime for manufacturers of defective goods. Part VA is broadly based on the European Community Product Liability Directive.

Prohibited conduct also includes bait advertising, unconscionable conduct and pyramid selling.

Product Liability

Sources of liability

Australian product liability laws stem from a combination of common law and Federal and State statute law. A claimant

can commence an action for compensation or damages under the following avenues:

- Common law – fault based tort of negligence and/or contract;
- Statute - breach of the Trade Practices Act and comparable legislation in the State and Territory jurisdictions.

Notably, the Trade Practices Act includes a strict liability regime under Part VA and statutory warranties which are imposed upon manufacturers under Part V Division 2A. The State and Territory statutes parallel these legislative provisions.

Liability for fault and defect will depend upon the particular facts and the cause of action relied upon.

Onus of proof

In negligence, contract and some statutory provisions, the claimant bears the onus of proving that the product was defective. Where offences under the Trade Practices Act are strict liability, the claimant need not prove fault, but must establish that the product was not merchantable or was not fit for the intended purpose of use.

Under common law statutory actions, a claimant must establish that:

- loss or damage was suffered;
- that the relevant conduct amounted to a breach of law; and
- that the loss or damage was caused by the defendant's conduct.

Damages

Generally, the following damages will be recoverable by a successful plaintiff in a product liability action:

- general damages, inducing pain and suffering, loss of amenities and loss of expectation of life;
- special damages, including loss of income (both past and future) and expenses (both past and future) incurred in relation to treatment of an injury or repair of damage to property.

Limitation periods will apply to all causes of action pleaded in product liability litigation.

Product Recall

Product manufacturers and suppliers owe a common law duty to purchasers and users of products, to prevent a product causing harm, even post production and sale of the product. Failure to recall a product which may cause harm may amount to liability negligence. Accordingly, obligations to compensate persons suffering injury, loss and damage would arise.

Additionally, Part V Division 1A of the Trade Practices Act compulsorily directs manufacturers and suppliers to recall goods which do not comply with the prescribed safety standards, have been declared unsafe or permanently banned or which may cause injury to an individual.

Kemp Strang

Kemp Strang is a Sydney commercial law firm established over 35 years ago. We have 21 partners and a total staff of over 150. Our focus is on commercial clients and their businesses.

We operate out of offices over 5 floors at 55 Hunter Street, Sydney. The firm's website is located at www.kempstrang.com.au.

Kemp Strang provides legal skills from Sydney into New South Wales, the rest of Australia and the region, including through our affiliation with the Kennedy Strang Legal Group. The Kennedy Strang Legal Group, of which Kemp Strang is a founding member, was formed to respond to client needs for comprehensive national legal services.

The Kennedy Strang Legal Group comprises Kemp Strang (Sydney), Russell Kennedy (Melbourne), Thynne & Macartney (Brisbane) and Lynch Meyer (Adelaide).

Kemp Strang, along with the other firms in the Kennedy Strang Legal Group, is a member of the [International Alliance of Law Firms](#). The Alliance is an international network of select, business-oriented law firms. It was founded to enable clients to obtain global legal services from the Alliance's individual Members.

To best serve our clients' needs, our advice is delivered through the following key practice areas:

- Aged Care
- Agribusiness & Rural
- Anti-Money Laundering
- Banking & Finance
- Commercial
- Corporate Advisory
- Estates & Estate Litigation
- Financial Products & Services
- Franchising
- Human Resources
- IT & Intellectual Property
- Insolvency & Reconstruction
- Litigation
- Local Government & Environment
- Property & Construction
- Trade Practices

Kemp Strang is committed to providing at all times and to all clients excellent quality legal services and professional ethics of the highest order, at very competitive rates. We adopt a commercial and common sense approach.

Contacts

Daren Armstrong
Partner
Tel: +61 2 9225 2585
Email: armstrongd@kempstrang.com.au

Gavin Robertson
Partner
Tel: +61 2 9225 2501
Email: robertsong@kempstrang.com.au