Australia

# Doing Business In Australia

# FREQUENTLY ASKED QUESTIONS

ALFA International

The Global Legal Network

Local Relationships Worldwide

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# INTRODUCTION

Australia welcomes foreign investment. By international standards, most foreign citizens wishing to establish or invest in businesses in Australia can do so in a relatively straight forward manner. This document aims to provide a brief overview of some of the key legal considerations to be taken into account if you are considering investing in or establishing a business venture in Australia.

This document has been prepared jointly by the Australian member firms of ALFA International, the Global Legal Network. The firms' contact details are on the front of this document. Please contact any of them if you require further information or assistance with doing business in Australia.

This document is current at March 2014.

Please note that many of the laws referred to below are complex and the following summaries are very general in nature. This document is not legal advice. Please do not act in reliance upon it but always seek specific legal and other appropriate professional advice before taking action.

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## BUSINESS STRUCTURES

*Cowell Clarke*

Foreign citizens doing business in Australia can establish, own and carry on business using a variety of business structures. Those structures include:

- Sole trader – an individual typically conducting a small business with a small amount of capital investment.
- Partnership – 2 or more individuals or entities carrying on business together with a view to sharing profits. Each partner is jointly and separately liable for the liabilities of the partnership business. Establishment of a limited partnership in some circumstances is possible but is not prevalent in Australia.
- Joint venture – similar to a partnership but usually established for a particular project. Joint ventures may be unincorporated or incorporated. The rights and liabilities of each joint venturer will depend upon the terms of the joint venture agreement.
- Trust – trading trusts are widely used in Australia and are commonly a form of unit trust where the equity interests are units, which are similar to but distinct from shares in a company. Most trading trusts will have a corporate trustee.

Foreign company – a foreign company may apply to the Australian Securities & Investments Commission (**ASIC**), the body that regulates Australian corporations, to be registered in Australia as a foreign company. Foreign companies may apply for listing as publicly traded entities. Almost invariably such a listing would occur on the Australian Securities Exchange (**ASX**), which is the primary securities exchange in Australia. To be listed on ASX, a company must comply with the ASX Listing Rules and with other legislative requirements, particularly those under the *Corporations Act 2001*, which is the principal (but certainly not the only) piece of legislation governing Australian companies. A foreign company registered in Australia must have a registered office in Australia and must appoint a local agent who will be responsible for ensuring the company complies with its legal obligations in Australia. As with almost all public companies in Australia, the company will be required each year to lodge with ASIC a copy of its financial accounts and to notify ASIC from time to time regarding details of its structure including the provisions in its constitution and its office holders.

- Public company limited by shares – these companies have issued shares. A public company does not have a limit on its number of shareholders.

It must have a registered office in Australia and at least 3 directors and at least 1 company secretary. Two of the directors and the secretary must ordinarily reside in Australia. Public companies are permitted to raise funds from the public, subject to certain disclosure and compliance requirements being met. A public company may be listed on ASX. A public company is typically identified by the suffix "Limited" or the abbreviation "Ltd".

- A proprietary company limited by shares – this is the most common type of company in Australia. A proprietary limited company may if it chooses, have just one corporate or individual shareholder holding 1 issued share. At the other end of the spectrum it can have no more than 50 non-employee shareholders plus additional employee shareholders.
- Proprietary limited companies are not able to engage in public fundraising activities. It must have a registered office in Australia and at least 1 director who ordinarily resides in Australia. The company need not have a company secretary but if it does, the secretary must ordinarily reside in Australia. A proprietary limited company is typically identified by the suffix "Pty Limited" or "Pty Ltd".

Where a trading trust structure is utilised, that trust will often have a proprietary limited company as its trustee.

Subject to some foreign investment regulation (see the section below on foreign investment), there is little regulation in Australia preventing ownership of Australian business interests by foreign citizens, either directly or through interposed Australian companies or trading trusts.

Most foreign citizens will establish an Australian business presence by acquiring the equity interests in an Australian company or by acquiring the business assets which they will hold either directly or through an Australian company which they establish and own.

**Competition Law**

Australian competition law is found predominantly in the *Competition and Consumer Act 2010* and a number of pieces of State legislation. The regulatory body is the Australian Competition & Consumer Commission.

The *Competition and Consumer Act* seeks to protect consumers and to promote fair trading and competition in trade and commerce in Australia. Amongst other things, it prohibits:

- most forms of restrictive pricing agreements;
- the use of substantial market power by a party to deliberately damage a competitor or exclude other businesses from the market;
- mergers and acquisitions that have the effect or likely effect of substantially lessening competition in the market;

- misleading or deceptive conduct, frequently in the area of advertising or promotion or misrepresentation about where products are made or their price, quality and performance;
- unconscionable conduct in both consumer transactions and commercial dealings;
- contraventions by a corporation of an applicable prescribed industry code of conduct. The Franchising Code of Conduct is a typical example.

**The Australian Prudential Regulatory Authority (APRA)**

APRA sets standards and oversees regulation for the prudent management of banks and other deposit taking institutions, insurance companies and friendly societies to maximise the likelihood that they will remain financially sound and able to meet their obligations to depositors and policy holders.

## EMPLOYMENT RELATIONS

*Cornwall Stodart*

In Australia, the terms and conditions of an individual's employment are not limited to their employment contract. Common law principles, legislation, industrial instruments (such as Awards or Enterprise Agreements) and decisions of industrial tribunals all regulate the employment relationship.

This paper covers some key employment issues faced by Australian employers in the daily operation of their business (due to space constraints this summary is necessarily limited to the major areas of concern to employers.

There are additional areas of employment regulation that have not been covered in this section).

**Overview of the Australian Industrial Relations System**

Employment matters are governed by both state and federal legislation. Industrial tribunals are set up in each state (as well as federally) to regulate this legislation.

Since 1 January 2010, the predominant industrial relations system has been the federal one, with a system of Awards and 10 National Employment Standards (**NES**) that regulate the minimum terms and conditions of virtually all private sector employees.

**Minimum Conditions of Employment**

The key features of the federal system are the NES and Awards. In the federal system, statutory terms and conditions are prescribed by:

- The NES – These comprise 10 employment standards that *must be* complied with in all circumstances. They apply to all national system employers and are not negotiable.

The standards cover hours of work, flexible working arrangements, paid and unpaid leave (including parental leave, annual leave, personal/carer's leave, compassionate leave and community service leave), public holidays, notice of termination (generally and on redundancy) and information to be provided to an employee at the commencement of their employment.

- Awards cover a broad spectrum of industries and occupations, but only apply to employees whose duties are covered by the work classifications in a particular Award.

  Determining which Award applies and the appropriate classification can be a complex process. Awards set minimum terms and conditions in excess of the NES and prescribe the minimum wages for each work classification. Like the NES, Award terms must be complied with. However, it is possible to vary the application of the terms of an Award either through an Individual Flexibility Agreement or an Enterprise Agreement (which would apply to all employees or a particular group of employees), provided that the employees are '*Better Off Overall*'. Enterprise Agreements need to be negotiated with employees (and in some cases, unions) and approved by the Fair Work Commission (**FWC**). They must also comply with strict procedural requirements. Once approved, Enterprise Agreements generally override the application of the Award.

  Making Enterprise Agreements can be a complex process and legal advice should be obtained.

Employers are required to maintain time and wages records that are subject to inspection by unions (in limited circumstances) and the Fair Work Ombudsman. Employers must also provide employees with payslips that give certain statutory information prior to the money being paid.

The legislation contains a series of enforcement measures (including prosecutions for breach of the legislation, Awards or enterprise agreements, fines and claims for underpayment of wages), which can be pursued by the Fair Work Ombudsman, individuals and unions.

While prosecutions are generally undertaken and fines imposed on the employer, in some circumstances they may be brought personally against its directors and managers, if they have aided and abetted a breach.

**Contracts of Employment**

In addition to the statutory regime, all employees are covered by a contract of employment.

A contract of employment can be oral or written (however for certainty, written contracts are strongly recommended) and are made up of a combination of express and implied terms. While a contract of employment cannot override the statutory conditions, additional provisions may be included in a contract of employment to protect the employer.

These include a contractual notice period, the ability to suspend an employee, and provisions protecting confidential information, trade secrets, intellectual property and post employment conduct (including solicitation of business).

Every employee should have a written contractual provision for notice in order to avoid '*reasonable notice*' claims, which can result in pay in lieu of notice (12 months' pay in lieu of notice is not uncommon in the case of long standing senior employees).

For employees who are not covered by an Award (normally senior/managerial employees), it is particularly important to have a written contract of employment, because apart from the NES, this will be the only document regulating the employee's terms of employment.

**Anti-Discrimination**

State and federal legislation prohibits a wide variety of discrimination and sexual and racial harassment in employment. The legislation also covers a range of other contractual relationships including contractors, the provision of goods and services and education. This is a complex and highly litigated area of law.

**Occupational Health and Safety Legislation**

State and federal occupational health and safety legislation imposes a general (non delegable) duty upon employers to provide a safe work environment and to ensure the health and safety of employees, contractors, members of the public and volunteers.

A breach of the duty can result in, among other things, criminal prosecutions and substantial penalties. In some circumstances, not only can the employer be prosecuted, but a director and/or senior manager can also be personally liable.

Recently, many states and territories have adopted harmonised work health and safety legislation which imposes positive duties on directors and/or senior managers to exercise due diligence in ensuring the health and safety of their workplace and increased penalties.

A number of workplace bullying cases have received considerable publicity in recent years. Some states have made certain types of intentional bullying a criminal offence. All employers should have an anti-bullying policy and complaints procedure (incorporating a training regime) in order to minimise the potential of this type of claim and the adverse impact that bullying has in the workplace.

**Workers' Compensation**

Australia has enacted protective legislation with respect to persons injured at work. State and federal legislation requires employers to maintain workers' compensation insurance for employees and other workers (including some contractors) who are deemed employees for the purposes of the legislation. The insurance is intended to cover the cost of compensating an employee who is injured at work.

While the general principles of workers' compensation are the same, the actual legislative regime varies from state to state and specific advice should be obtained relative to the state in which the injured worker is located.

**Superannuation**

Employers must make compulsory superannuation (which is similar to a pension fund) contributions on behalf of their employees, or alternatively, pay a superannuation guarantee charge. The standard minimum superannuation rate is 9% but a number of employers have negotiated higher rates with their employees or unions. The minimum superannuation rate will be increased to 9.25% on 1 July 2013 and will increase by an additional 0.25% each year thereafter until it reaches 12%.

**Taxation**

Employers are required to deduct tax from employees' wages and pay it to the Australian Tax Office. A similar requirement is also imposed on employers with respect to certain types of contractors who may be deemed employees for the purposes of the income tax legislation.

**Termination of Employment**

Termination of employment is regulated by legislation, industrial instruments (including Awards and Enterprise Agreements), common law principles and employment contracts. These sources specify circumstances when an employee can be terminated and how termination should be carried out. A variety of claims can result from a termination of employment, depending on whether the basis of the claim is statutory or contractual.

This is a highly regulated and litigated area and specific legal advice should always be obtained prior to terminating employment.

**Summary**

Employment relationships and workplace relations generally, are highly regulated in Australia. In some industries, employees are very quick to litigate matters (particularly if the workforce is unionised).

It is important that foreign investors taking on employment obligations ascertain their rights and obligations as employers. To minimise risk (not only to a business but also to the directors and managers of a business), employers must ensure they are aware of, and meet, their obligations to employees.

## TAXATION

*Cowell Clarke*

**Income Tax including Capital Gains Tax**

Australia currently imposes income tax on the net income (i.e. gross income less allowable deductions for expenses) plus realised capital gains of all business entities and individuals. A capital gain or capital loss is the difference between what it costs to acquire an asset and what is received on disposal of the asset.

The taxable amount of a capital gain for an asset held for more than 12 months is calculated on 50% of the gain, except if an asset is owned by a company in which case no 50% discount is available. Capital gains in respect of assets acquired prior to 20 September 1985 are generally not subject to capital gains tax.

*Taxation of non-Australian residents*

Non-resident companies, trusts and individuals are subject to Australian income tax on Australian sourced income. Non-residents will generally be subject to Australian income tax on the same basis as residents and will be exempt from Australian tax on foreign sourced income. Different taxation implications may arise in relation to dividend, interest and certain royalty income and where a double tax agreement (**DTA**) (if one exists) between Australia and the relevant foreign jurisdiction provides otherwise. Australia has tax treaties with many countries in order to avoid double taxation and evasion and where the provisions of those treaties conflict with the Australian Income Tax Assessment Act, the provisions of the treaties generally prevail.

A company will be considered an Australian resident for taxation purposes if it is:

- incorporated in Australia, or
- not incorporated in Australia, carries on business in Australia and has either its central management or control in Australia, or it is controlled by Australian resident shareholders.

*Financing operations*

Certain rules operate when the ratio of debt versus equity used to finance the Australian operations exceeds specified limits (**Thin Capitalisation rules**).

The Thin Capitalisation Rules restrict the deductibility of finance expenses (e.g. interest) attributable to the Australian operations of foreign multinational investors.

These rules may apply to:

- Australian entities that are foreign controlled and foreign entities that either invest directly into Australia or operate a business through an Australian permanent establishment; and
- Australian entities that control foreign entities or operate a business through overseas permanent establishments and associate entities where interest of more than AUD250,000 in a financial year is claimed against Australian assessable income and the debt exceeds a permitted ratio of debt to foreign equity. The permissible ratio of debt to equity is generally 3:1. A ''foreign controller'' is one that has (either alone or with an associate) a 10% or more interest in the shares, voting rights or dividend entitlements of the Australian company, partnership or trust.

*Taxation of Financial Arrangements*

New legislation has been introduced reforming the taxation of financial arrangements.

Simply put, it applies to:

- business taxpayers with aggregated turnover of at least AUD100 million; and
- arrangements to which a taxpayer has a right to receive, or an obligation to provide, a financial benefit of a monetary nature.

In effect, gains and losses from financial arrangements will be recognised over the life of the financial arrangements for tax purposes, irrespective of the traditional capital or revenue considerations (generally, gains and losses from financial arrangements are on revenue account).

*Sales between a foreign entity and an Australian entity*

The transfer pricing provisions provide a legislative framework for dealing with arrangements under which profits are shifted out of Australia, primarily through the mechanism of inter-company and intra-company transfer pricing. Examples of "internal profit-shifting" include profit-shifting within the same enterprise, such as between a head office in one country and a permanent establishment (**PE**), or branch in another country, or between PEs of the enterprise in different countries. The effect of transfer pricing provisions is to ensure there is no manipulation of profits to be taxed in Australia by depressing Australian assessable income or increasing allowable deductions in Australia.

*Withholding taxes*

Withholding tax is imposed on certain payments from Australia to a foreign entity and is levied on the full amount of dividends, interest and certain royalties payable to non-residents at the following rates:

- Dividends: 15% for most treaty countries and 30% for non-treaty countries, except for dividends that are fully franked (i.e. generally have borne tax) in Australia which are not subject to withholding tax.
- Interest: 10% on the *gross* amount of interest paid (i.e. without deducting expenses incurred in deriving that interest, etc.). With some exceptions, this rate is unaffected by Australia's DTAs.
- Royalties: 10% for most treaty countries and 30% for non-treaty countries.

*Financial year end and tax rates*

Australia's financial year runs from 1 July to 30 June. Individuals and most business entities operate on this financial year for accounting and taxation purposes.

The rates of income tax for the year ending 30 June 2011 are**:**

- Companies: Resident and Non-Resident are subject to a 30% flat rate.
- Resident Individuals: From 1 July 2011 rates range from 15% to 45% depending on the level of taxable income. The 45% rate presently applies to taxable incomes above AUD180,000.

- Non-Residents: Higher rates are applied in the case of non-residents although the same top marginal rate of 45% is applied to taxable incomes above AUD180,000.

- Investment income, such as trust distributions and interest received by children under 18 years of age, is effectively taxed at the top marginal rate of 45%.

- Medicare levy: in addition to income tax, a Medicare levy of 1.5% is assessed on the taxable income of residents that exceeds AUD18,488. Medicare refers to Australia's national health system.

- Flood Levy: In addition to income tax and Medicare levy, a temporary flood and cyclone reconstruction levy will apply to payments made from 1 July 2011 to 30 June 2012 assessed at a rate of 0.5% on tax amounts between AUD50,000-AUD100,000 and 1% on tax amounts in excess of AUD100,000.

- Fringe Benefits Tax (FBT): employers are also subject to a fringe benefits tax at the rate of 46.5% on non-cash benefits provided to employees such as private use of motor vehicles and interest free housing loans.

**Capital Gains Tax (CGT) for Non-Residents**

Foreign residents are subject to CGT in Australia, generally where a capital gain is made on certain specified assets. The specified assets are referred to as "taxable Australian property."

Broadly this means direct or indirect interests in land in Australia, and business assets of an Australian permanent establishment. For land acquisitions in Australia by non-residents, prior specific tax advice should be obtained about the appropriate structure.

**Other Taxes**

Goods & Services Tax (**GST**): is a broad consumption tax imposed at the rate of 10% on most goods and services transactions in Australia. It is similar to a value added tax, rather than a sales tax, in that it is generally refunded to all parties in the chain of production other than the final consumer.

Payroll Tax**:** is imposed by the States and Territories on business payrolls at rates varying from 4.75% to 6.85% with concessions and exemptions for businesses with small payrolls.

Stamp Duty**:** is payable to State and Territory Governments on a variety of documents and transactions including transfers of real estate interests, mortgages and a range of personal property. The rate may be up to 5.5% of the value of an asset.

Land Tax: is charged annually by State and Territory Governments on the value of land owned, with exemptions in relation to land owned and used as one's principal residence.

Death, Estate & Gift Duties: currently there are no such taxes in Australia. However, some caution needs to be exercised as capital gains tax can apply to certain gifts.

## IMMIGRATION

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**General Business Visa Options for Non-Australian Employees**

There are various visa options available for business travel to Australia. The appropriate type of visa will depend on the intended purpose and length of stay:

- Short term business visas for visits to Australia for up to three months without the right to work in Australia;
- Temporary long stay visas for up to four years which allow the visa holder to work in Australia (subclass 457);
- Employer Nomination Scheme visas for migration to Australia on a permanent basis (subclasses 186 and 187).

The following is a summary of the main requirements of each of these types of visas. Please note that these requirements frequently change and are current as at July 2013. Professional advice from a registered migration agent should be sought before applying for a visa in individual cases.

**Business Visitor Visa Options**

Business visitor visas allow the visa holder to remain in Australia for a period not exceeding three months for business purposes, such as attending a conference, training session or conducting business negotiations.

The holder of a business visitor visa must not engage in studies or training for more than three months, undertake work that can be done by an Australian citizen or permanent resident; or work in Australia.

There are five different types of Business visitor visas.

1. *Electronic Travel Authority (ETA) (subclass 601), eVisitor (subclass 651) and Visitor (subclass 600) visas*

The ETA, eVisitor and Visitor visas (depending on the country of the applicant's passport) are electronic visas which are applied for via the internet by the visa applicant, travel agent or airline. To be eligible for these types of visas, the visa applicant must be outside Australia at the time the visa is applied for and hold a passport of an eligible country for the applicable visa subclass.

2. *Business Short Stay (subclass 400) visa*

All passport holders who want to visit Australia for business purposes may apply for this visa option. Application is made by lodging a paper form with the relevant Australian mission.

Generally this type of visa does not give a right to work except in limited circumstances. For example, work may be allowed if it is highly specialised and non-ongoing; for a period of less than six weeks.

3. *APEC Business Travel Card*

The APEC Business Travel Card allows business people to make multiple short term visits to other APEC economies over a three year period. This scheme has many significant benefits including:

- only requiring a single application form;
- business people do not have to apply for individual visas or entry permits each time they wish to travel for business; and
- cardholders are able to access fast track immigration processing lanes at major airports in participating economies.

All APEC countries (except for Canada, the Russian Federation and the United States of America) fully participate in the APEC Business Travel Card scheme.

**Temporary Business (Long Stay) Visa (subclass 457)**

The subclass 457 visa is designed to assist Australian employers in addressing labour shortages, where an appropriately skilled Australian is not available, by employing genuinely skilled workers from overseas. Also, overseas employers not carrying on business in Australia can deploy their employees to work in Australia for the purposes of establishing business or fulfilling contractual obligations. Once granted, the visa allows the employee (and any dependant of the employee included in the application) to remain and work in Australia for up to 12 months or 4 years, depending on how long the sponsor company has been conducting its business.

The following requirements must be met when sponsoring an employee under a subclass 457 visa:

1. *Sponsorship*

The employer must:

- be lawfully operating a business either inside or outside of Australia;
- meet the prescribed training benchmark, if operating a business in Australia;
- attest that the employer has a strong commitment to employing local labour and non-discriminatory work practices if operating a business in Australia; and
- give certain undertakings to the Australian government.

Once approved as a standard business sponsor, the employer is able to nominate a specified number of subclass 457 visa applicants for a period of 12 months or 3 years (depending on how long the sponsor company has been conducting its business) with a specified maximum number of positions which can be sponsored.

2. *Nomination*

The employer must nominate the position to be filled. This requires the proposed position to be on a gazetted list of occupations permitted for subclass 457 visas at the time of application.

The position must provide no less favourable terms and conditions of employment to the nominee than an equivalent Australian employee would have in the same location.

This includes the requirement that the salary of the position be at market rate based on sources such as salaries of Australian employees in the same business, industrial instruments/awards and salary surveys.

Unless the application is in a category that is exempt from "labour market testing", the employer must demonstrate that attempts (such as advertising) have been made to fill the position from the Australian market before applications is made.

3. *Visa application*

The employee who is to fill the nominated position must demonstrate that s/he has the relevant qualifications and employment experience to meet the requirements of the position.

Further, the employee (and any dependant family members of the employee) must meet certain character and health requirements. Visa applicants must also make adequate arrangements for health insurance during the period of their intended stay and make a declaration about compliance with Australian values and laws.

If the salary of the position to be held by the visa applicant is less than $96,400 p.a., the visa applicant must pass an English test (unless the visa applicant holds a passport from an English speaking country). Certain occupations also require the visa applicant to obtain prior approval from a skills assessment authority.

If granted, a subclass 457 visa allows the employee to remain and work in Australia for up to 12 months or 4 years (depending on how long the sponsor company has been conducting its business) subject to certain conditions, including condition 8107 which requires the holder of a subclass 457 visa to:

- work in the occupation for which they were nominated;
- work for the sponsor, or an associated entity of the sponsor, who nominated the position they are working in; and
- not cease employment for a period of more than 90 consecutive days.

If the employment of the employee with the sponsor is terminated, the sponsor must inform the Department of Immigration and Border Protection (**DIBP**) within 10 days of the date of termination. Unless the employee can apply for a new visa or find a new sponsor, the employee's subclass 457 will be cancelled.

**Employer Nomination Scheme (subclass 186)**

The Employer Nomination Scheme (**ENS**) enables an Australian employer to recruit, on a permanent basis, skilled staff from overseas or temporary residents currently in Australia.

The ENS process consists of two stages; nomination by the employer and the nominee's application for a visa.

The criteria to be met by the employer are generally similar to those for a sponsor under a subclass 457 visa.

The employer must offer the nominated employee a full-time position for at least 2 years, which does not exclude the possibility of renewal.

There are 3 streams of ENS application:

1. *Temporary Residence Transition stream*

This is for subclass 457 visa holders who have worked for their employer for at least 2 years in the nominated occupation.

2. *Direct entry stream*

This is for those who are applying from overseas or those who have worked in Australia for a short period without holding a subclass 457 visa for 2 years. Applicants in this stream must show at least 3 years of experience relevant to the nominated occupation and must produce a skills assessment by an approved assessing authority.

3. *Agreements stream*

This is for people being sponsored by an employer through a Labour Agreement, or Regional Migration Agreement, negotiated with and approved by DIBP.

Further, an applicant generally must be under 50 years of age, meet a specified level of ability in English and meet the mandatory health and character requirements.

Once the ENS visa is approved, the employee has the right to live and work in Australia on a permanent basis. The visa remains valid even if employment of the employee with the sponsor is later terminated.

## FOREIGN INVESTMENT REVIEW BOARD AND GENERAL FOREIGN INVESTMENT ISSUES

*Cornwall Stodart*

### Background to FIRB

The Foreign Investment Review Board (**FIRB**) is a non-statutory body established to advise the federal government on foreign investment policy and its administration.

The purpose of FIRB is to examine any proposal by foreign persons and governments to undertake direct investment in Australia (**Proposal**). FIRB then makes recommendations to the government on whether such Proposals are suitable for approval under the government's policy.

### FIRB is advisory

FIRB provides only an advisory service to the federal government. It is the responsibility of the federal Treasurer to decide on Proposals and the Treasurer is not obliged to accept FIRB's advice in making that decision.

### Foreign acquisitions and investment in Australia

The legal framework for foreign investment matters considered by FIRB is outlined in the *Foreign Acquisitions and Takeovers Act 1975* (**FATA** or **Act**). FATA regulates foreign persons buying certain land interests, acquiring control of certain business enterprises, or acquiring mineral rights in Australia.

Foreign governments and foreign persons proposing to invest in Australia may need to obtain prior approval before making a direct investment in Australia. Different monetary thresholds however apply to US and NZ investors.

**Approvals of acquisitions or transactions required under the Act**

The following Proposals require the prior approval of the Treasurer:

- acquisitions of substantial interests in Australian businesses with total assets of $248 million or more ($1078 million for US and NZ investors) or if the Proposal values the business at $248 million or more ($1078 million for US and NZ investors);
- takeovers of offshore companies whose Australian subsidiaries or assets are valued at $248 million or more ($1078 million for US and NZ investors), or account for more than 50 per cent of the Target's global assets;
- direct investments of any nature by foreign governments or their agencies irrespective of size;
- acquisitions of interests in Australian *urban* land (including interests that arise via leases, financing and profit sharing arrangements and the acquisition of interests in urban land corporations and trusts) that involve:
  - the acquisition of developed commercial real estate (eg hotels or motels), where the property is subject to heritage listing, valued at $5 million or more;
  - the acquisition of developed commercial real estate, where the property is not subject to heritage listing, valued at $54 million or more ($1078 million for US and NZ investors);
  - the acquisition of accommodation facilities irrespective of value;
  - the acquisition of vacant urban land irrespective of value;
  - the acquisition of residential land irrespective of value; or
  - proposals where any doubt exists as to whether they are notifiable (for example, funding arrangements that include debt instruments having quasi-equity characteristics will be treated as direct foreign investment).
- acquisitions of interests in Australian *rural* land (land wholly and exclusively used for primary production) valued at $248 million or more ($1078 million for US and NZ investors).

**Application of the Act to sensitive industry sectors**

Sensitive industry sectors have different regulatory and approval requirements for Proposals.

Those sectors include media, telecommunications, transport, military training manufacture or supply, and security technologies. Any Proposal in a particular industry sector should be examined on a case by case basis and compared against FIRB guidelines and the Treasurer's current policy. For US and NZ investors, acquisitions of interests in Australian businesses in defined sensitive sectors do not require notification unless the value of the interest to be acquired exceeds $248 million.

### Free Trade Agreements (FTAs)

The *Australia-United States Free Trade Agreement* came into effect on 1 January 2005 and modified Australia's foreign investment policy as it applies to United States investors, making it easier for investors to invest in Australia and generally easing restrictions on trade in those countries. Australia also has FTAs with Singapore (operational from 28 July 2003) and Thailand (operational from 1 January 2005) and has scoping studies underway for FTAs with ASEAN, Malaysia and China.

## DEALING WITH THE AUSTRALIAN GOVERNMENT

*Meyer Vandenberg*

The Australian Federal Government is one of Australia's largest purchasers, contracting to procure goods and services in the sum of over AUD42 billion annually.

The core principle of the Australian Government Procurement Framework is to ensure that the Australian Government achieves "value for money". There are more than 120 Australian Government departments, agencies, authorities and companies subject to this framework. For most products and services there is no single 'government market', as many agencies operate individually.

Value for money is considered by the Australian Government as best achieved by adopting appropriately competitive and non-discriminatory procurement processes. Australian Government officials are required to buy goods and services in an ethical, accountable and transparent manner. They must not seek gifts or other favours from potential suppliers, and are required to follow procedures and protocols designed to ensure a fair and consistent approach to procurement activities.

When selling to the Australian Government it is important that suppliers understand the customer, the associated rules and processes, and how to watch for opportunities. An overview of these matters is set out below.

### Australia-United States Free Trade Agreement (AUSFTA)

The Australia-United States Free Trade Agreement (**AUSFTA**) resulted in Australian and US businesses being granted non-discriminatory rights to bid on contracts to supply Australian Government entities, including all major procuring entities and administrative and public bodies.

Australia's procurement policies largely emanated from this agreement and benefit suppliers throughout the world.

Chapter Fifteen of the AUSFTA provides comprehensive obligations requiring each country to apply fair and transparent procurement procedures and rules and prohibiting each from discriminating against suppliers from the other country. It establishes a basic rule of "national treatment", meaning that each country's procurement rules must treat the other country's suppliers in a manner that is "no less favourable" than their domestic counterparts. The Chapter also bars discrimination against locally established suppliers on the basis of foreign affiliation or ownership and provides rules aimed at ensuring a fair and transparent procurement process.

**Opportunities**

Overseas suppliers can access information about opportunities to supply to the Australian Government on "AusTender". See www.tenders.gov.au

AusTender provides centralised publication of Australian Government business opportunities, annual procurement plans, multi-use lists and contracts awarded. AusTender's subscription service allows anyone to register the area of their business interest and receive free automatic email notifications of the latest opportunities as they are advertised. It also allows suppliers to lodge tender responses online.

Another avenue to government which may be of particular interest to international suppliers is the Defence Unsolicited Proposals Gateway. The Department of Defence receives many 'unsolicited proposals' from industry due to its unique business requirements. These proposals may range from small, off-the-shelf supply items to more complex capability solutions. Defence has therefore established this gateway to provide a single entry point for businesses and individuals to submit their proposals to Defence. See http://www.defence.gov.au/dmo/id/ic/dupg.cfm.

**Rules and Processes**

The major Australian Government agencies (but not all) are governed by the *Financial Management and Accountability Act 1997* (Cth) (**FMA Act**).

The FMA Act sets out the framework for the proper management of public money and public property by the Executive arm of the Australian Government. The regulations under the FMA Act require government officials to comply with the the Australian Government's "Commonwealth Procurement Guidelines" (**CPGs**).

There are also a number of Australian Government bodies governed by the *Commonwealth Authorities and Companies Act 1997* (Cth). These bodies are also subject to the CPGs but to a lesser degree as they do not tend to engage in substantial purchases. These requirements can be accessed on the Department of Finance and Deregulation's website www.finance.gov.au.

The CPGs articulate the Australian Government's procurement policy in detail with the core principle underpinning all activities being "value for money". The CPGs explain how value for money is to be achieved through encouraging competition (nationally and internationally) promoting the efficient, effective and ethical use of resources and ensuring that Australian Government bodies act in an accountable and transparent way.

The CPGs include a set of mandatory procurement procedures which must be followed when the value of the property or services being purchased exceeds the thresholds set by the Australian Government. These mandatory procurement procedures essentially require agencies to advertise the opportunity to the world (i.e. conduct an "open tender" process) unless specific circumstances apply.

The threshold for all non-construction procurements is AUD80,000 for FMA Act agencies and AUD400,000 for CAC Act agencies. The threshold for procurements of construction services is AUD9 million for all agencies.

Where the value of goods or services sought is below the threshold, agencies have more flexibility to decide on a procurement process appropriate to the scale, scope and relative risk of the proposed procurement. This may be an over-the-counter purchase, a limited invitation to one or more suppliers for oral or written quotes, an approach to the market through limited invitations to tender, or a public approach to the market through an open tender process.

As a consequence of the CPGs, many Australian Government agencies have set up their own "panel arrangements". A panel is an arrangement established through an open tender process, under which multiple suppliers are selected to supply agreed goods and services and enter into a "deed of standing offer" with the agency. Panels are an attractive option for many agencies because the open tender process only needs to be carried out once every few years to test the market and to establish the panel. The agency may then purchase directly from suppliers on the panel, as required. Typical services provided through panels include legal, accountancy, human resources, building and maintenance and design services.

Most Australian Government Agencies conduct purchasing decisions on an individual basis.

However, for some goods and services, the Australian Government has managed to enter into "cooperative" arrangements where agencies group together in a single approach to the market (often described as "clustering"). This aims to enable the Australian Government to achieve better terms commensurate with the aggregated value of its participation in a particular market sector. It also aims to create efficiencies for agencies and for potential suppliers including through a reduced number of approaches to the market. In Australia these arrangements have been used for the purchase of information and communications technology services with various degrees of success.

The other form of cooperative procurement is where one agency approaches the market but signals its intention to allow other agencies to join the contractual arrangement at a later date (described as "piggybacking"), for the property or services specified in the approach to the market.

Until recently, Australian law firms have needed to tender for each Australian Government agency panel. This onerous and costly process has led to the establishment of a multi-use list for legal services which can be utilised by all Australian Government Agencies.

In addition to the CPGs, each agency has a set of Chief Executive Instructions (**CEIs**), which outline, in broad terms, the duties and responsibilities of all officials involved in financial management in a department including procurement activities.

CEIs provide additional mechanisms for Chief Executives of FMA Act agencies to apply the key principles and requirements of the financial management framework to their operations.

The Department of Defence has an extensive manual detailing its procurement policies called the Defence Procurement Policy Manual. See www.defence.gov.au/dmo/gc/dppm.cfm.

**Challenging Decisions**

A supplier who is unhappy with a tender process or decision, should first ask for a debrief.

The CPGs require agencies to offer debriefing sessions to unsuccessful tenderers as a matter of course. If not, agencies will provide debriefings on request. The primary purpose of a debriefing is to enable potential suppliers to submit more competitive bids in the future and can be a valuable source of information on the strengths and weaknesses of the suppliers tender.

Comparative aspects of the winning offer, or any other offer, cannot be discussed. The purpose of a debriefing session is not to justify the selection of the successful tenderer, rather it is to give feedback on the supplier's response.

Unsuccessful tenderers also have other avenues of complaint other than courts, such as the Commonwealth Ombudsman and the Australian National Audit Office.

Chapter 15 of the AUSFTA requires both Australia and the United States to have mechanisms in place whereby unsuccessful tenderers who complain about the conduct of a tender process can obtain timely and impartial consideration of their complaint, including that each party must have at least one impartial administrative or judicial authority that is independent from its procuring entities to receive and review challenges that suppliers submit in accordance with domestic law (Article 15.11).

Despite what was agreed, Australia does not have an efficient and effective system of challenging tender processes judicially.

Whilst breaches of the financial management framework, including in relation to procurement, may attract a range of criminal, civil or administrative remedies, the process of challenging tender processes in court is quite difficult.

### More information

For more information concerning Australia's procurement processes, see the Department of Finance and Deregulation website. www.finance.gov.au.

## DISPUTE RESOLUTION AND COURT SYSTEMS

*Cowell Clarke*

### Federal System

Australia has a sophisticated court system which reflects Australia's constitutional structure as a federation. Each of Australia's 6 States and 2 Territories has its own State or Territory Supreme Court and inferior courts. The Commonwealth of Australia also has courts including the High Court of Australia, the Federal Court of Australia and the Family Court of Australia. The High Court of Australia is the ultimate court of appeal for Australian cases and is the court of first instance for determination of disputes concerning the Commonwealth constitution.

Australia's legal system is a common law system, operating on principles derived originally from English law.

Most areas of business, however, are also regulated by Commonwealth, State and/or Territory statutes. State and Territory courts are able to exercise Commonwealth jurisdiction in some areas. For example, corporations and securities law is governed by Commonwealth legislation, but litigation concerning corporations and securities disputes can be commenced in either the Federal Court of Australia or in State or Territory Supreme courts. Other areas of importance to business, such as employment and occupational health and safety are dealt with under a combination of Commonwealth and State/Territory laws.

Since some State/Territory courts can exercise Commonwealth and State/Territory jurisdiction, the choice of the most suitable court in which to initiate litigation can be an important tactical decision.

The States and Territories also has civil administrative tribunals which exercise a range of jurisdictions covering matters such as administrative law, planning, building, consumer disputes, some employment related disputes and some debt claims.

The jurisdictions vary from state to state and in many instances, legislation dictates that disputes of a certain nature must be brought in a tribunal.

### Procedures and Costs

The great majority of litigated business related disputes in Australia are heard by a judge alone without a jury.

It is only criminal and (in some states) defamation matters which are now typically tried before a jury and even then, parties can opt for trial by judge alone in those types of matters.

Representative class actions are permissible in Australia and are increasingly popular, especially, broadly speaking, in medical negligence cases and in shareholder claims against corporations and their directors. However, to date, the track record for successful class action claims is relatively limited. Exemplary or punitive damages are not frequently awarded by Australian courts. It is generally only in cases of particularly egregious or contumacious breaches or acts of negligence that courts will award exemplary damages.

While a number of plaintiff law firms offer "no win/no fee" costs arrangements, litigation on a contingency basis, in which the plaintiff's lawyer is remunerated by reference to a percentage of the damages awarded in favour of the plaintiff, is not permitted in Australia. In most jurisdictions, the "loser pays" principle applies in relation to recovery of legal costs. There are some exceptions where costs are not awarded in favour of the successful party. The tribunals referred to above typically do not make costs awards so that parties are left to bear their own costs.

### Alternative Dispute Resolution

Alternative dispute resolution methods have been well utilised in Australia and many commercial contracts will include ADR clauses.

For many years mediation has been a frequently used method of ADR in business and private matters and many Australian courts build in a compulsory, or court supervised, mediation process before a proceeding can be set down for trial.

Australia also has a well developed arbitration system and promotes itself as a regional centre for international arbitration. Australia is a signatory to the New York Convention. Resolution of a dispute by arbitration may be nominated in an ADR clause where a dispute is likely to involve parties from different jurisdictions, due to the cross border enforcement procedures for arbitral awards which are available in countries which are signatories to the New York Convention.

## FOREIGN CORRUPT PRACTICES

*Cowell Clarke*

### Australia's International Obligations

Australia is a signatory to the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (**the Convention**). The essence of the Convention is to encourage each signatory state to enact legislation necessary to criminalise the bribing of foreign public officials. Australia adopted the Convention in 1999. The relevant legislative provisions are in the *Criminal Code Amendment (Bribery of Foreign Public Officials) Act 1999* (Cth) (**the Code**), often referred to as the *Bribery Act*.

## Bribery of Foreign Public Officials

Division 70.2 (**the Division**) of the Code provides that a person (which includes a body corporate) is guilty of an offence if that person:

- promises, provides or causes to provide or offer a benefit;
- which is not legitimately due;
- with the intention of influencing another person, which may be a foreign public official (**foreign official**);
- in order to obtain or retain business or a business advantage that is not legitimately due.

The person will be guilty of an offence even if the other person is not a foreign official. All that is needed to trigger the provision is an intention to influence a foreign official.

A foreign official is defined in the Code and includes an employee or official of a foreign government body; a member of the executive, legislature or judiciary of a foreign country; or an employee of a public international organisation in which 2 or more countries are members – such as a United Nations body or the Red Cross.

## Defences

A person will not be guilty of an offence if the benefit conferred on or offered to the foreign official is required or permitted by the written law of the foreign official's country. A person seeking to rely upon this defence has the onus of proving that written law.

Further, a person will not be guilty of an offence if the benefit conferred on or offered to the foreign official is appropriately characterised as a facilitation payment. Pursuant to the Code, a benefit will be classified as 'facilitation' if the benefit offered or given to the official is of a minor nature and is given with the intention of expediting or securing the performance of a minor routine government action. Practically speaking, the action should be one which would have to be done in any case and the facilitation payment expedites its doing. If there is an official published government list of fees for the particular matter that specifically includes a fee for expediting a matter that will help.

Routine government action is defined in the Code and expressly excludes encouraging a decision: about whether to award or continue business with a particular person; or the terms of new or existing business arrangements. Thus any payment conferred with the intention of obtaining or retaining business will not qualify for the defence.

Once the payment is made (assuming it falls within the ambit of 'routine government action'), the person who has offered or given the benefit must appropriately record all relevant details as prescribed by the Code. The record must be retained by the person: unless and until 7 years have passed since the alleged conduct; or through no fault of the person, the record has been lost or destroyed.

**Contravention of the Division**

A person who breaches the Division and cannot make out a statutory defence will be guilty of an offence. The extent of penalties imposed will depend on whether an individual or corporation has contravened the Division.

Contravention by an individual is punishable by imprisonment for not more than 10 years; a fine not more than 10,000 penalty units (AUD1,100,000 at the date of this article); or both.

A contravention by a corporation is punishable by not more than the greatest of the following:

- 100,000 penalty units (AUD11,000,000 at the date of this article);
- If the Court can determine the value of the benefit that the body corporate, and any related body, have obtained directly or indirectly and that is reasonably attributable to the conduct constituting the offence – 3 times the value of that benefit;
- If the Court cannot determine the value of the benefit – 10% of the annual turnover of the body corporate during the period of 12 months ending at the end of the month in which the conduct constituting the offence occurred.

**International Reach of the Division**

The Division applies to any person where the conduct constituting the alleged offence occurs wholly or partly in Australia.

The Division will also apply to conduct occurring wholly outside Australia where at the time of the alleged conduct: the person was an Australian citizen or resident or in the case of a body corporate; was incorporated by or under a law of the Commonwealth or of an Australian State or Territory. Foreign directors of an Australian company who condone or permit the company to contravene the Code will be at risk of prosecution.

**Enforcement of Legislation**

The Australian Federal Police is the enforcement authority of the Code. Since being enacted, there have been no convictions for a breach of the Code. Thus, the precise judicial bite and scope of the Division is yet to be determined.

Although no convictions have yet been recorded, the recent bribery convictions of Rio Tinto executives in China and the AWB scandal have however increased awareness of foreign bribery. The enormous penalties imposed on companies and individuals under the United States *Foreign Corrupt Practices Act* in recent years have been well noted in Australian board rooms.

**Conclusion**

Individuals and corporations must ensure they comply with the Division when transacting business or proposing to deal with foreign officials. Companies will be liable for the actions of their overseas employees and also potentially their agents. Those breaching the Code risk incurring significant imprisonment, monetary penalties and reputational damage.

The Australian government and many international organisations, such as the World Bank and the major international funding agencies have strict anti-corruption policies. Breaches of those policies may lead to sanctions including black listing for future tenders or contracts.

Companies doing business in Australia should implement anti-corruption policies and implement ongoing training for their personnel.

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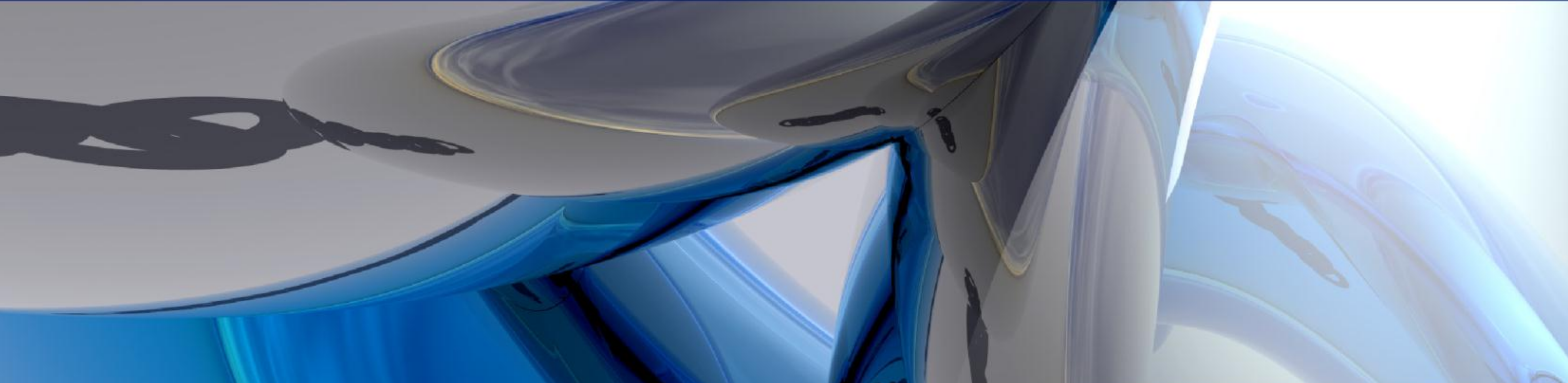

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