

GETTING THE DEAL THROUGH—AUSTRALIA

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JOINT VENTURES

1. Must foreign contractors enter into a joint venture with a local contractor in order to design, build and be paid for their work? Does the law require that the local contractor control the joint venture?

While there is no formal requirement in Australia for a foreign contractor to enter into joint ventures with local contractors, this occurs often in practice. A joint venture is usually constituted by a formal agreement which specifies the rights and obligations of the parties. The joint venture may be incorporated, where the shares (and the directorships) of a joint venture company are held in proportion by the parties, with rights often governed by a shareholders' agreement. It may also be unincorporated, where the parties agree by contract to a particular arrangement. Where the joint venture is unincorporated, there are no restrictions on foreign involvement.

While there is no strict requirement that a local contractor control the joint venture, foreign investment in incorporated joint ventures may be subject to the *Foreign Acquisitions and Takeovers Act 1974* (Cth), which empowers the Treasurer and the Foreign Investment Review Board to examine (and potentially reject) proposals by foreign persons (including corporations) to acquire:

- a substantial or controlling interest in a relevant corporation (broadly defined); or
- a legal or equitable interest in Australian urban land (not used for primary production), excluding leases or licences under five years.

FOREIGN PURSUIT OF THE LOCAL MARKET

2. If a foreign contractor wanted to set up an operation to pursue the local market, what are the key concerns you would counsel them to consider before they took such a step?

A foreign contractor wishing to establish a place of business or carry on business in Australia must register as a foreign company or incorporate a local subsidiary. Most foreign companies operate in Australia by establishing a local subsidiary company under the *Corporations Act 2001* (Cth).

The Australian Securities & Investments Commission (ASIC) provides newly registered companies or registered foreign companies with an Australian Company Number (ACN) or an Australian Registered Body Number (ARBN) respectively. Most companies apply for an Australian Business Number (ABN) for goods and services tax purposes.

Companies incorporated under the *Corporations Act* may either be 'proprietary' or 'public' companies. Proprietary companies are generally not subject to as many obligations as public companies in respect of reporting and disclosure, although they are restricted from raising funds from the public. A number of directors must be Australian residents (at least one Australian resident director for proprietary companies; at least two for public companies).

The requirements for registered foreign companies include:

- maintaining a registered office in Australia;
- appointing a local agent (either a person or a company) for service of notices;

- lodging a certified copy of its certificate of incorporation and constitution, and a list of current directors including names, addresses, dates and places of birth, occupations and any public company directorships;
- a list of powers of the Australian resident directors; and
- details of any charges, mortgages or similar security over any of the company's property located in Australia.

Foreign companies are prohibited from carrying on business in Australia without becoming registered. Most registered foreign companies must lodge with ASIC a copy of their annual accounts, together with any other documents that they are required to prepare under the laws of their place of incorporation. See also responses to licensing

issues (question 3), labour issues (questions 4 and 5) and tax issues (question 31).

LICENSING PROCEDURES

3. Must foreign designers and contractors be licensed locally to work and, if so, what are the consequences of working without a licence?

Some jurisdictions require generally that contractors are licensed (or registered) to carry out building work:

- Queensland: *Queensland Building Services Authority Act 1991*, sections 30, 42;
- South Australia: *Building Work Contractors Act 1995*, section 6(1); and
- Western Australia: *Builders' Registration Act 1939*, section 10.

Each jurisdiction provides mechanisms to grant, suspend or cancel registration. Where the jurisdiction requires a licence, conducting building works while failing to hold the necessary licence constitutes an offence, relief for which may include an injunction (e.g. New South Wales) or express preclusion from recovery of payment (e.g. Queensland).

Some jurisdictions require licensing only for certain types of construction (as shown in the following table).

Architects are required to be registered under the relevant *Architects Act* in force in each state and territory. In some jurisdictions, foreign architects may apply for temporary registration (e.g. New South Wales: *Architects Act 2003*, section 18).

Jurisdiction	Legislation	Purpose
Australian Capital Territory	<i>Building Act 1972</i> part 2, division 3 part 2, division 3A	Different classes of builders' licences are issued in respect of specified types of buildings—effectively covers all building work Owner–builder licences
New South Wales	<i>Home Building Act 1989</i> section 4 sections 29–32	Residential building work or specialist work such as plumbing, gas fitting or electrical work Owner–builder permits
Queensland	<i>Queensland Building Services Authority Act 1991</i> , sections 30, 42	Licence may be limited to classes of building
South Australia	<i>Building Work Contractors Act 1995</i> , section 7	Various classes of licences
Victoria	<i>House Contracts Guarantee Act 1987</i> , section 23	Approved guarantor may approve builders for the performance of domestic building work

LABOUR REQUIREMENTS

4. Are there any laws requiring a minimum amount of local labour to be employed on a particular construction project? At the end of a project will there be termination payments assessed against a foreign contractor?

There are no restrictions on the minimum amount of local labour on a project. However, any foreign national working

in Australia requires a valid visa with the appropriate work rights attached to it. At the end of a project, termination payments will be assessed against a foreign contractor if the contracts of employment are prematurely discharged by the end of the project. Also, any accrued entitlements of full-time employees, such as annual leave, may be required to be paid out.

LOCAL LABOUR LAW

5. Are there any labour laws applicable to construction and infrastructure projects?

Owing to Australia's complex industrial relations system, the labour laws applicable to a construction project may vary. If the project is undertaken by an incorporated entity (either directly by the contractor corporation or through an incorporated

special purpose vehicle), the Commonwealth *Workplace Relations Act 1996* as amended by the *Workplace Relations Amendment (WorkChoices) Act 2005* will govern the conditions of employment. Any agreements entered into under this system (including Australian Workplace Agreements (AWAs) as individual contracts, employee or union collective agreements, or employer or union greenfields agreements) must preserve the following conditions under the Australian Fair Pay and Conditions Standard:

- 38-hour maximum ordinary working week (with the right to require reasonable additional hours to be worked);
- four weeks' paid annual leave;
- ten days' paid personal or carer's leave; and
- 52 weeks' unpaid parental leave.

These are the only prescribed conditions. The standard does not include annual leave loadings, penalty rates and rest breaks. The minimum wage and minimum award rates of pay are set by the Australian Fair Pay Commission. The minimum wage was set to A\$13.47 on 1 December 2006.

The Commonwealth *Building and Construction Industry Improvement Act 2005* modifies general workplace laws by establishing penalties of up to A\$110,000 for the taking of unlawful industrial action in relation to building work on commercial sites.

Any other entity that is not incorporated (e.g. an unincorporated joint venture or a partnership) will be subject to the state industrial relations systems (except in Victoria, which is subject solely to Commonwealth laws). Each state has an award governing the building and construction industry, which

specifies in detail the various minimum hourly rates payable to different levels of employment, allowances and penalty rates available (e.g. the New South Wales Building and Construction Industry (State) Award at www.industrialrelations.nsw.gov.au/awards).

Unincorporated employers who are members of a federally registered body (such as the Master Builders Association) and thereby subject to a federal award are subject to that award until 27 March 2011. At that point, unincorporated employers will revert to the state system, unless they have made a workplace agreement under the WorkChoices system.

HEALTH AND SAFETY REGULATION

6. Are there any specific health and safety rules regulating the construction industry?

The relevant Occupational Health and Safety (OH&S) legislation in each state imposes a general duty on an employer to ensure so far as is practicable (or reasonably practicable in some jurisdictions) the health, safety and welfare at work of his or her employees. Some states have enacted specific regulations to cover construction work (e.g. New South Wales: Occupational Health and Safety Regulation 2001, chapter 8) and other hazardous processes (e.g. New South Wales: Occupational Health and Safety Regulation 2001, chapter 7).

The New South Wales regulations are the most comprehensive, and cover a wide variety of responsibilities for a contractor in addition to the general duty, including:

- a required OH&S induction training for employees;
- control of risks such as site security and formwork;

- particular provisions including:
- excavation;
- demolition;
- asbestos; and
- diving.

Specific hazardous processes covered by the New South Wales regulations include spray painting, abrasive blasting, welding, electroplating, use of molten metal, work involving lead and electrical work.

CLOSE OF OPERATIONS

7. If a foreign contractor, who has been legally working, decided to close its operations, what are the legal obstacles to closing up and leaving?

Legal obligations upon closing up operations will depend on the structure of the foreign contractor's operations. If the foreign operator has chosen to incorporate, then the company will need to be wound up in accordance with part 5.5 of the Commonwealth *Corporations Act 2001*. If the operations are unincorporated, then the obligations are likely to depend on the contractual arrangements surrounding the operations (e.g. any agreements related to joint ventures or partnerships, or employment contracts). Such an occurrence may constitute a termination event under project contracts where such projects are ongoing.

STANDARD FORMS OF CONSTRUCTION CONTRACTS

8. What standard-contract forms that apply to multinational construction projects are used?

There are several standard forms of construction contract in Australia that may apply to multinational projects, including:

- AS 2124 / 4300;

- AS 4000 / 4902;
- PC-1;
- FIDIC Suite of Contracts;
- ABIC Suite of Contracts;
- Joint Contracts Committee (JCC) 'C', 'D', 'E', 'F'; and
- NPWC3.

See the Master Builders Association of Australia website (www.masterbuilders.asn.au) for more information about the appropriate standard form contract for certain projects and where to obtain copies of the contracts.

ALLOCATION OF CONSTRUCTION RISKS

9. In typical construction contracts, who assumes the risk of material price escalation and shortages?

The allocation of risk for material price escalation and shortages will vary depending on the type of contract. The preferred contract will also vary depending on the nature of the project. In a typical 'cost-plus' contract, the risk lies with the owner. A lump sum contract will leave the contractor shouldering the burden, whereas a schedule of rates or provisional-sum style of contract lies somewhere between the two (the AS 2124, AS 4000 and NPWC3 standard contracts make provision for a schedule of rates).

COMPETITION

10. Do local laws provide any advantage to local contractors in competition with international contractors?

Generally, there are no laws that provide an advantage to local contractors in competition with international contractors. In the interests of transparency and accountability, competition between tenderers (domestic or international) for Commonwealth government tenders is governed

by an extensive policy framework under the *Financial Management and Accountability Act 1997* and the Financial Management and Accountability Regulations 1997 (Cth). States have similar procurement guidelines. Apart from parts IV, IVA and V of the Commonwealth *Trade Practices Act 1974* governing restrictive trade practices, unconscionable conduct and consumer protection, there is no specific legislative regime governing the bidding process for private tenders.

Australia has entered into free-trade agreements with the United States, Singapore, Thailand and New Zealand. These agreements provide specifically for non-discriminatory treatment and an open tender process for tenderers from these countries.

PPPS AND PFIS

11. In certain forms of construction such as PPP and PFI, where the contractor has a private obligation to long-term quality control and maintenance, how is the risk of additional future costs for quality control and maintenance considered and mitigated?

Recent projects such as the Brisbane North South Bypass Tunnel and the RailCorp New South Wales Rolling Stock PPP illustrate the harmonisation of the Australian market and an increasingly standardised approach to contractual risk allocation, driven by common project advisers and state government policy reforms. The general trend is for the design, construction, maintenance and commissioning risks to be solely borne by the concessionaire, including any additional future costs for quality control or maintenance. These risks are generally mitigated through appropriately pricing the return to the concessionaire (e.g. setting

the toll in a road project) over a long concession period (typically around 30 years).

PAYMENT OF FEES

12. How may a contractor secure payment of its fees by an owner? May the contractor place liens on the land or the property itself?

There exist relatively recent statutory provisions in multiple Australian states to provide security for payment in the construction industry. Older statutory mechanisms exist in various states that allow contractors and subcontractors to place liens or charges over property or other forms of assignment of assets. The New South Wales *Building and Construction Industry Security of Payment Act 1999* is the basis for the Victorian and Queensland Acts, and is similar to the Western Australia and Northern Territory Acts. The security of payment system effectively transfers payment risk and cash flow responsibility to principals by requiring payments to contractors to be made on an interim basis pending the final determination of those entitlements in formal dispute resolution proceedings. A contractor must submit a payment claim setting out the amounts due, to which a principal must respond either with payment within ten days or a payment schedule outlining the amount they believe is due. If the payment schedule amount is less than the payment claim, statutory adjudication will follow, with the result being enforceable as a judgment for a debt. The security of payment legislation does not apply to some residential building disputes or contracts where the consideration provided is not the value of the work performed but rather another mechanism (e.g. toll road BOT projects).

TORT CLAIMS AND INDEMNITY

13. Do local laws permit a general contractor to be indemnified against all acts, errors and omissions arising from the work of a subcontractor, even if the general contractor is negligent?

Most construction contracts will include a condition involving a contractor indemnifying the owner against any claims arising out of the execution of the works.

Similar provisions will be included between a subcontractor and the contractor in all subcontracts. These indemnities may cover loss that is partly attributable to the negligence of the indemnified party, although it is common to exclude such loss from the indemnity. An indemnity may not cover situations where the contractor has a non-delegable duty, namely one that arises because the contractor has undertaken the care, supervision or control of a person or some property so as to assume a particular responsibility for its safety where it may be reasonably expected that due care will be exercised.

INSURANCE

14. Do local laws require the maintenance of any specific type of insurance on construction projects?

Generally in Australia, there is no requirement for the maintenance of specific insurance on construction projects. Primarily, Australian insurance law is governed by the Commonwealth *Insurance Contracts Act 1984*. Standard forms of construction contract contain clauses for the general level of insurance to be obtained.

On projects generally, a contractor will obtain insurance for the works and public

liability insurance, which are both required on all domestic building projects, and required in some jurisdictions to be registered as a builder. All employers are statutorily obliged to have workers' compensation insurance.

Most building professionals will take out professional indemnity insurance. Architects and engineers in Australia must take out this insurance.

Most companies will also take out directors' and officers' indemnity insurance.

INSOLVENCY AND BANKRUPTCY

15. If a contractor files for insolvency, or is declared insolvent, may its contract be terminated for default and a new contractor instated to prevent delay on the project?

Most standard form contracts used in Australia entitle an owner to terminate the contract or take over the work where certain events indicate the contractor is insolvent. The owner must exercise this power reasonably, and may suspend payments to the contractor until the works are complete. The owner may be entitled to appoint a new contractor to prevent delay.

CONTRACTING WITH GOVERNMENT ENTITIES

16. Have government agencies that deal with contractors ever sought refuge under sovereign immunity and avoided paying a contractor disputed amounts on that basis? If so, is there recourse in the local courts?

A government agency or corporation is unlikely to enjoy sovereign immunity where its forming statute does not indicate an intention that it forms part of the Australian Crown, or where the extent or degree of ministerial

control is limited, thereby giving the body independence and autonomy. Government ownership of a corporation is not enough to afford the corporation sovereign immunity. Even if an agency enjoys sovereign immunity, the Crown is liable under any commercial contracts, subject to Parliament providing sufficient funds to the agency.

BRIBERY

17. If it is proved that a contractor has delivered something of value or bribes to facilitate the award of a construction contract to that company, will the contract be enforceable under local law? Will that contractor suffer any other adverse consequences?

If a contractor uses bribes to facilitate a contract with government, the contract will likely be void for illegality. The Commonwealth *Trade Practices Act 1974* makes unenforceable a contract that substantially lessens competition.

A contractor may be found guilty criminally for bribing a public officer and will be subject to fines or imprisonment, or both, under various statutes or the common law in force in the Commonwealth, States and Territories.

Where a contractor attempts to bribe an official or a representative of a company, the contractor may be found liable:

- in tort for:
- interference with contractual relations;
- conspiracy;
- deceit; or
- maintenance (in some jurisdictions);
- to pay restitution; or
- for pecuniary penalties under the Commonwealth

Trade Practices Act 1974 for substantially lessening competition.

There is also a trend in PPP or PFI tenders for the public party to appoint a probity manager to ensure the transparency of the bidding process and that the bidding parties are treated fairly and are free of any conflict of interest. This arrangement was successfully employed on the recent North–South Bypass Tunnel project.

ARBITRATION

18. Can a government agency commit to arbitrate disputes privately or must matters go to court?

Where a government agency is party to an arbitration agreement, it is bound by such an agreement. The *Commercial Arbitration Act* applies to a government agency, irrespective of whether it is a state or federal agency.

FOREIGN CORRUPTION

19. What are the prohibited acts that your laws limit? What may your jurisdiction's contractors do locally and abroad, and what is prohibited?

Australia is a signatory to the Organisation for Economic Cooperation and Development's Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. Australia's obligations under this convention are implemented into domestic law by the Commonwealth *Criminal Code Amendment (Bribery of Foreign Public Officials) Act 1999*. It is an offence to provide, offer to provide, or arrange for a benefit to be offered to a person if the benefit is not legitimately due to that person and the offer is made to influence a foreign public official to obtain or retain business or grant to the bribe giver a business advantage.

The offence carries a maximum imprisonment of ten years, or a court–substituted fine.

The action can be defended if the act is legal in the foreign country or if the payment was minor and made to facilitate routine government action.

FORCE MAJEURE AND ACTS OF GOD

20. Under local law, are contractors excused from the obligations of the contract if they cannot work because of events beyond its control?

Force majeure clauses generally do not find favour in the standard forms in use in Australia (with the exception of FIDIC); however, under some standard forms, the contractor will be entitled to an extension of time if completion is delayed by events beyond its control. Generally, at Australian common law, events beyond the control of either party will frustrate a contract and discharge the parties from performing their future obligations under the contract where it renders performance of the contract radically different to that which the parties contemplated at the time of formation. A contract may outline a procedure for dealing with the consequences of frustration (e.g. AS 4000). In New South Wales, South Australia and Victoria, the relevant *Frustrated Contracts Act* deals with apportionment of loss suffered by the frustration of the contract.

DISPUTE RESOLUTION MECHANISMS

21. Other than contractual international arbitration, what dispute resolution procedures are used successfully to solve construction disputes?

Parties to a construction dispute may elect to settle their dispute through alternative means, which have been successfully employed

in Australia for many years. These alternative dispute resolution mechanisms include:

- conciliation;
- mediation;
- independent expert determination; or
- mini trial before an independent convenor.

In some jurisdictions, the court may direct the parties to undergo mediation or arbitration. All state Supreme Courts have the power to refer complex and technical construction matters out of court to an independent referee who must enquire and report back to the court on technical questions of fact in a much shorter timeframe than litigation would take. This process is regularly employed in construction disputes, as they are technically intensive. Generally, either party may apply for reference out of court of these matters, but a court may do so of its own volition and against the wishes of either or both parties. Also, adjudication under security of payment legislation may be relevant for some disputes (see response to question 12).

COURTS AND TRIBUNALS

22. Are there any specialised courts or other tribunals that resolve construction disputes?

While there are no specialist building courts in Australia, New South Wales, Queensland and Victorian jurisdictions have opted for specialist 'lists' for building and construction disputes in their state Supreme Court. Each list is administered by a specialist judge and deals with disputes under building and construction contracts. These matters may be listed by application or on endorsement upon the writ.

Domestic building disputes are the exception in most state and

territory jurisdictions. Legislation has created specialist tribunals for the adjudication of disputes arising out of the construction of residential premises in a setting less formal than a court. These tribunals are given wide powers to resolve disputes and make orders involving:

- monetary compensation;
- payment of money owing;
- restitution; and
- rectification of defective work.

In some circumstances, the tribunal may also avoid or vary contractual terms or the whole contract.

There are other courts and tribunals that may be relevant to construction-related disputes, such as the Land and Environment Court (for appeals related to planning approvals) or the Dust Diseases Tribunal in New South Wales.

DISPUTE REVIEW BOARDS

23. Have dispute review boards been used with success or failure?

The use of dispute review boards in Australia to date has not been significant. The most notable projects that have employed dispute review boards are the Sydney Water Board's Ocean Outflow Project (1991) and the Western Australian Water Corporation's North Dandalup Dam Project (1995). Recent research has suggested that parties to construction contracts are not overly familiar with the process, which may explain its limited usage in Australia.

MEDIATION

24. How is mediation defined and is it commonly used to resolve project disputes?

Mediation in Australia is a process involving a neutral

third party, free from perceived conflicts of interest, bringing disputing parties together for the purpose of settlement in an informal process. A mediator chairs the meetings between the parties and takes an active role in discussions and negotiations. It is commonly used in Australia to resolve project disputes under various standard contracts as an alternative or a precursor to arbitration or litigation.

CONFIDENTIALITY IN MEDIATION

25. If a party participates in mediation, will the statements made therein be absolutely confidential or are the parties at risk that their statements can be used against them?

It is common practice for statements in mediation to be confidential and therefore mitigate against the risk that statements will be used against the party making them, thereby promoting openness in mediation. A duty of confidentiality may be established by an express clause in a mediation agreement or implied by equity. The factors to determine whether such a duty is owed are that:

- the disclosure has the necessary quality of confidence;
- the information was imparted in circumstances importing an obligation of confidence; and
- the person who receives the information may not take unauthorised advantage of it.

If the confidential information is also the subject of privilege, it will be protected by that privilege. Generally speaking, statements made in good faith in an honest attempt to reach a settlement are inadmissible ('without prejudice' privilege). Legal professional privilege may also apply to any documents produced by legal

counsel for the purpose of a mediation.

ARBITRAL AWARD

26. Is there any basis upon which an arbitral award issued by a foreign or international tribunal may be rejected by your local courts?

Australia is a signatory to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, which is given force domestically by part II of the *International Arbitration Act 1974*. In summary, a court may refuse to enforce a foreign arbitral award only on the following grounds:

- incapacity of a party at the time when the agreement was made;
- invalidity of the agreement under the law to which the parties have agreed or the law of the country where the award was made;
- a party was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present its case;
- the award is beyond the scope of the arbitration agreement or the terms of submission;
- the appointment of the arbitral tribunal or the arbitration procedure was not in accordance with the agreement of the parties;
- the award has not yet become binding on the parties to the agreement or has been set aside or suspended in the country where the award was made;
- the subject matter of the arbitration is not capable of settlement by arbitration under the laws of the country in which enforcement of the award is sought; or
- enforcement of the award would be contrary to public policy of the country in which enforcement is sought.

GOVERNING LAW AND ARBITRATION PROVIDER

27. If a foreign contractor wanted to pursue work and insisted by contract upon international arbitration as the dispute resolution mechanism, which of the customary international arbitration providers is preferred and why?

The Australian Centre for International Commercial Arbitration (ACICA) is the primary provider for international arbitration in Australia. The ACICA arbitration rules are based upon the UNCITRAL Arbitration Rules and provide additional measures to ensure a swift and sophisticated arbitration process. ACICA arbitration clauses are found in many construction contracts and can be used in international as well as domestic disputes. Other common international arbitration providers are the International Court of Arbitration (ICC), Singapore International Arbitration Centre (SIAC) and London Court of International Arbitration (LCIA).

INTERNATIONAL ENVIRONMENTAL LAW

28. Is your jurisdiction party to the Stockholm Declaration of 1972? What are the local laws that provide for preservation of the environment and its wildlife while advancing infrastructure and building projects?

Australia is a party to the Stockholm Declaration of 1972 and has played an active role in the United Nations Environment Programme and the United Nations Conference on Environment and Development (the 1992 Rio de Janeiro Conference). Australian jurisdictions generally have legislation dealing with planning controls that take into account the environmental impact of

new developments, generally in consultation with the local environment plan of local councils (e.g. New South Wales: *Environmental Planning and Assessment Act 1979*). Major developments must include an environmental impact statement. Other legislation dealing with environmental and cultural heritage may provide for the preservation of buildings or natural sites of significance and thus impact on building projects (e.g. New South Wales: *Heritage Act 1977*).

OTHER INTERNATIONAL LEGAL CONSIDERATIONS

29. Are there any other legal considerations that will present a difficulty or obstacle for a foreign contractor attempting to do business?

Australia is signatory to free-trade agreements with the United States, Singapore, Thailand and New Zealand. While these agreements remove barriers between the signatory countries with respect to competition for procurement, they may indirectly create barriers for foreign contractors from other countries unable to rely on the presumption of an open tendering procedure. It must be noted that under Australian administrative law, the ratification of a treaty (even absent incorporation into domestic legislation) may give rise to a legitimate expectation that administrators will act in conformity with the instrument. This expectation may arise from the free-trade agreements or one of the many bilateral investment treaties to which Australia is party (see question 30).

INTERNATIONAL TREATIES

30. Is your jurisdiction a signatory to any investment agreements for the protection of investments of a foreign entity in construction and infrastructure projects? If so, how does your model agreement define 'investment'?

Australia is signatory to more than 20 bilateral investment treaties with various countries. 'Investment' is generally defined broadly to mean every kind of asset, owned or controlled by investors from either country, including:

- tangible and intangible property, including rights such as mortgages, liens and other pledges;
- shares, stocks, bonds and debentures and any other form of participation in a company;
- a loan or other claim to money or a claim to performance having economic value;
- intellectual property rights, including rights with respect to copyright, patents, trademarks, trade names, industrial designs, trade secrets, know-how and goodwill;
- business concessions and any other rights required to conduct economic activity and having economic value conferred by law or under a contract, including rights to engage in agriculture, forestry, fisheries and animal husbandry, to search for, extract or exploit natural resources, and to manufacture, use and sell products; and
- activities associated with investments, such as the organisation and operation of business facilities, the acquisition, exercise and disposition of property rights including intellectual property rights, the raising of funds and the purchase and sale of foreign exchange.

TAX TREATIES

31. Has your jurisdiction entered into double taxation treaties pursuant to which a contractor is prevented from being taxed in various jurisdictions?

Australia is a party to more than 40 bilateral double taxation treaties dealing with income and, in most cases, capital gains. These treaties are all in force domestically and set out to regulate the taxing rights between the countries involved, generally following the Organisation for Economic Cooperation and Development (OECD) Model Convention with respect to Taxes on Income and on Capital. The treaties affect natural persons and companies resident in either Australia or the country with which the treaty is entered into.

CURRENCY CONTROLS

32. Are there currency controls that make it difficult or impossible to change operating funds or profits from one currency to another?

There are no general currency controls in effect that make it difficult or impossible to convert funds from one currency to another. Some international transfers of funds must be reported under the Commonwealth *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*. However, this legislation is primarily aimed at detecting tax evasion and identifying the proceeds of crime, rather than at exchange control.

REMOVAL OF PROFITS AND INVESTMENT

33. Are there any controls or laws that restrict removing profits and investments from your jurisdiction?

Any dividends, interest or royalties paid to non-residents of Australia (including non-resident

corporations) are subject to a withholding tax. The tax is withheld and remitted to the Australian Taxation Office by the payer of the money. The withholding tax rate varies according to a number of factors, including the existence of a double taxation agreement with the non-resident's home country, whether dividends have been franked, or whether an exemption to withholding tax applies. Australia also has transfer-pricing rules designed to prevent profits being artificially transferred out of the country. These rules primarily deal with inter-company and intra-company transfer pricing and conform to the Organisation for Economic Cooperation and Development's (OECD) arm's-length principle. Some international transfers of funds must be reported under the Commonwealth *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*, to detect tax evasion and identify the proceeds of crime.

CONTRACTUAL MATRIX OF INTERNATIONAL PROJECTS

34. What is the typical contractual matrix for a major international project in your jurisdiction in terms of the contractual relationships among various parties?

The typical matrix for major projects in Australia varies between traditional 'construct-only' contracts and novated design and construct contracts. Major economic PPP infrastructure projects are typically procured under BOOT/DCM-style contracts. There is generally direct contact between owners and contractors, although construction managers and managing contractors have also been used. There is a trend emerging in Australia in favour

of relationship contracting (such as partnering, or project or strategic alliances) that attempts to minimise or eliminate the adversarial nature of traditional construction projects. This evolving trend towards 'risk sharing' and 'no blame, no disputes' contracting highlights a new approach to construction contracting in Australia.

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