

4.3 Other issues related to bilateral trade and investment

4.3.1 *Issues related to Japanese exports to and investment in Australia*

4.3.1.1 Government procurement

The Australian Government procurement framework

Australian Government arrangements for resource management in the public sector are contained within the *Financial Management and Accountability Act 1997* (the FMA Act), which deals with departments and agencies, and the *Commonwealth Authorities and Companies Act 1997* (the CAC Act), which deals with independent government authorities and companies. The FMA Act provides the framework for the proper management of public money and public property by the executive arm of the Australian Government. Public money and public property are regarded as being in the custody or control of the Australian Government. The FMA Act covers all Australian Government departments and their agencies.

The Commonwealth Procurement Guidelines

The Minister for Finance and Administration, under Regulation 7(1) of the FMA Regulations, has the power to issue guidelines relating to procurement – the latest version of the *Commonwealth Procurement Guidelines* (CPGs) was issued by the Minister in January 2005.

The procurement framework created by the CPGs follows the devolved approach of the FMA Act. That is, each Australian Government department or agency is responsible for managing their procurements, in terms of the processes and the outcomes, within a centrally prescribed framework of procurement policies as issued by the Minister for Finance and Administration.

This requires agencies' Chief Executives to apply the principles of efficient, effective and ethical use of the Commonwealth resources for which they are responsible. Chief Executives mainly discharge this responsibility for procurement by ensuring that their officials have appropriate policies, procedures and guidelines in place to achieve 'Value for Money' in procurement processes, in an accountable and transparent manner and that the officials conduct procurements in an ethical manner.

'Value for Money' is the core principle governing Commonwealth procurement, and is usually assessed on price and non-price criteria, with a view to ensuring that the Government attains the best performance outcome for what it buys. Officials buying goods and services need to be satisfied that the best possible outcome has been achieved taking into account all relevant costs and benefits over the whole of the procurement cycle.

The Minister for Finance has issued procurement directions to the Commonwealth statutory authorities and companies governed under the CAC Act and covered by the AUSFTA (see below). The CPGs were redeveloped to implement changes in the Government's policies for national and international procurement.

Australian Government Procurement and Bilateral Trade Agreements

Despite not acceding to the WTO Agreement on Government Procurement, Australia is a party to bilateral trade agreements with Thailand, Singapore and the United States of America that feature a chapter on government procurement as a means of enhancing trade and reducing economic barriers.

While the structure of the government procurement chapter may vary for each agreement – depending on the trade partner – there are key features of the Australia Government Procurement Framework that Australia seeks to retain in these agreements. These include:

- responsibility for the management of procurement by the heads of agencies, in accordance with the FMA Act;
- maintaining the principles-based procurement framework, with Value for Money as the single most important principle;
- recognition of external accountability by the procuring agency to the responsible Minister, to the Australian Parliament, to the Australian National Audit Office and to other external bodies; and
- the efficient, effective and ethical use of resources.

The above have been retained in:

- Australia New Zealand Government Procurement Agreement (ANZGPA);
- Singapore-Australia Free Trade Agreement (SAFTA);
- Australia-United States Free Trade Agreement (AUSFTA); and
- Australia-Thailand Free Trade Agreement (ATFTA).

ANZGPA

While government procurement is mentioned in the Australia-New Zealand Closer Economic Relations Trade Agreement (ANZCERTA), the operational details are expressed through the separate document – the Australia New Zealand Government Procurement Agreement (ANZGPA). Value for Money is recognised as the key principle and is supported by non-discrimination requirements. The Agreement states the objective of creating and maintaining a single government procurement market to maximise opportunities for Australian and New Zealand suppliers. Although this is not a treaty-level agreement, all Australian Federal, State and Territory Governments and the New Zealand Government mutually agree to be covered by the ANZGPA.

SAFTA

The Government Procurement Chapter of SAFTA reflects Australia's principles-based government procurement framework. The Chapter details requirements for non-discrimination, equal opportunity to bid for government tenders, the preservation of confidential information and intellectual property, and recognition of industry development policies. The Chapter recognises Australia's policies for providing opportunities for indigenous persons. Only agencies governed by the FMA Act are covered.

AUSFTA

The core objective of the Government Procurement Chapter of AUSFTA is non-discriminatory access to the government procurement market of each country. The approach taken is to safeguard non-

discriminatory access through rules, procedures and transparency standards to be applied in the conduct of tendering. Implementing the Government Procurement Chapter of the AUSFTA required significant, but not fundamental, change to the procurement framework as it now exists. These changes were introduced prior to the AUSFTA coming into force on 1 January 2005 and are now promulgated through the revised CPGs.

The AUSFTA obliges the Australian Government to ensure that departments and agencies listed in the Government Procurement Chapter comply with specific rules and procedures. Value for Money will remain as the core principle for government procurement and agencies will maintain control and responsibility for conducting their own procurement.

The principle of non-discrimination applies, which means that neither country may apply local preference arrangements, including price preferences, for procurements covered by the Chapter. The Chapter specifically bans offsets, defined broadly to cover any requirement built into a procurement, for such things as local content, technology transfer or export performance. However, this ban is subject to the Chapter exclusions and therefore does not apply to Australian policies supporting small and medium enterprises (SMEs). The ban on offsets will prevent government procurement being used to promote industry development, except as it applies to any form of preference to benefit SMEs, such as through requiring suppliers to engage in activities that are considered offsets and are not covered by the exclusions to the Chapter.

This will require the modification of the industry development assessment criteria of the Endorsed Supplier Arrangement program for suppliers of information technology and major office machines, and to general Australian Government policies such as the Model Industry Development Criteria (which currently may apply to contracts of \$A5 million or more).

The Government Procurement Chapter also applies to a number of bodies subject to the *Commonwealth Authorities and Companies Act 1997*.

The Chapter also stipulates thresholds, such that any procurement valued at, or above the threshold, is subject to the disciplines of the Chapter. Thresholds applying to central government entities listed as a schedule to the AUSFTA are \$A81,800 for the procurement of goods and services and \$A9,396,000 for the procurement of construction services. All Australia's States and Territories are covered by the government procurement chapter of the AUSFTA, subject to the different thresholds.

ATFTA

ATFTA provides a framework for handling government procurement, including a commitment by the parties to undertake further work to develop a comprehensive chapter by a predetermined time. The government procurement chapter states that each Government will recognise the APEC non-binding principles of transparency, value for money, open and effective competition, fair dealing, accountability and due process, and non-discrimination. The Chapter states that no later than one month after entry into force, the governments will enter into negotiations to develop a government procurement chapter.

Australian State and Territory Government Procurement

Under the Australian Constitution and Territory self-government legislation, State and Territory Governments have the power to set their own procurement frameworks in terms of processes, purchasing models and accountability. They also have the power to decide independently whether to participate in international agreements on government procurement.

4.3.1.2 Competition policy

Australia's competition policy was the subject of major reform during the 1990s. In 1995 the Council of Australian Governments established a comprehensive national framework, the National Competition Policy (NCP), broadly in line with the recommendations of a 1992 independent inquiry. The Committee made recommendations on various aspects of competition including for the Trade Practices Act 1974 (TPA) to apply to all business activities, a review of all legislation that restricts competition and providing for third party access to nationally significant infrastructure. The aim of the NCP is to promote competition to encourage businesses to use resources more effectively, reduce prices and respond better to consumer needs. NCP programs comprise a mix of policy, initiatives and measures to advance social and environmental needs.

Governments' reform objectives and targets under the NCP are subject to annual assessment by the National Competition Council (NCC). Incentives for reform are provided by annual competition payments to the States and Territories by the Commonwealth. These payments represent their share of the additional revenue raised by the Commonwealth as a result of effective competition reform, and are worth approximately \$A5 billion (over the period 1997-98 to 2005-06). The payments are reduced where the Commonwealth Government accepts recommendations from the NCC for penalties to be imposed on payments for lack of progress with NCP related reforms.

These principles and processes were instituted by three intergovernmental agreements, the 1995 Competition Principles Agreement, Conduct Code Agreement and Implementation Agreement. These agreements require governments to review the terms and operations of the agreements after five years of operation. The Council of Australian Governments considered the results of a review in November 2000 and confirmed the importance of NCP. They also agreed to undertake a further review of the intergovernmental agreements, and the NCC's assessment role, by September 2005.

Competition reforms have delivered significant benefits for Australia. Lower domestic production costs arising from NCP reforms enhance Australia's export competitiveness. The Productivity Commission estimated in its 1999 modelling that export volumes would be 3.4 per cent higher than would otherwise occur in the absence of the reforms.¹⁹

As a result of the competition review process the Australian Competition and Consumer Commission (ACCC) was formed in 1995 by the merger of the Trade Practices Commission and the Prices Surveillance Authority. As an independent regulator, the ACCC is charged with enforcing the primary piece of competition law in Australia, the TPA, and is also involved in compliance and educational activities. Private actions under the TPA are also available.

The TPA covers all business activity in the Australian economy, including government business activity, and prohibits the following anti-competitive practices under Part IV:

- anti-competitive agreements (for example, price fixing);
- misuse of substantial market power;
- exclusive dealing;

¹⁹ Productivity Commission 1999, *Impact of Competition Policy Reforms on Rural and Regional Australia*, Report No 8, AusInfo, Canberra, p. 299

- resale price maintenance; and
- anti-competitive mergers and acquisitions.

The ACCC has the power to grant immunity on public benefit grounds from legal action for certain conduct that might otherwise breach the anti-competitive practices provisions of the TPA. This process is known as authorisation.

Section 46 of the TPA prohibits a business that has a substantial degree of power in a market from taking advantage of that power for a prohibited purpose. While section 46 prohibits the misuse of substantial market power it does not prohibit the mere acquisition or possession of such power. Authorisation is not available for conduct which might contravene section 46.

Section 50 of the TPA prohibits mergers if they have the effect or likely effect of substantially lessening competition in a market. In assessing mergers, the ACCC takes into account factors including market concentration, barriers to entry and the level of import competition. Authorisation is available for mergers which might contravene section 50 but are expected to generate a benefit to the public that will outweigh the anti-competitive detriment of the merger.

Part XIB of the TPA provides industry specific prohibitions against anticompetitive conduct in the telecommunications industry. Part IIIA of the TPA provides a legislative regime to facilitate third party access to the services of certain essential facilities of national significance, such as electricity grids or natural gas pipelines. Its object is to encourage competition in related markets. Special regimes are in place for:

- telecommunications (Part XIC of the TPA);
- gas (National Third Party Access Code for Natural Gas Pipeline Systems); and
- electricity (National Electricity Code).

The TPA also includes competition regulation provisions for international liner cargo shipping (Part X) and provisions concerned with consumer protection (Part V).

International factors

Internationally, Australia's competition policy aims to ensure the promotion of competitive markets, and to ensure that market access improvements through multilateral or bilateral means are not frustrated by over or under regulation in the domestic economy. Australia has included competition policy chapters in its Free Trade Agreements with Singapore, Thailand and the United States.

Australia's competition framework also specifically takes account of international factors with respect to mergers. When assessing a merger under section 50 of the TPA, the ACCC considers the actual and potential level of import competition in the market. In deciding whether to grant authorisation to a merger, the ACCC is required to regard as a public benefit significant import substitution and a significant increase in the real value of exports. In certain circumstances Australia's merger policy extends to cover acquisitions that occur outside Australia, in which case significant import substitution and a significant increase in the real value of exports are considered.²⁰

A number of recent developments in Australia's competition policy are listed in Annex 4C.

²⁰ Matters of this nature are considered by the Australian Competition Tribunal, not the ACCC.

4.3.1.3 Sanitary and phytosanitary measures

Australia adopts a science-based, managed-risk approach to quarantine and ensures that sanitary and phytosanitary measures are the least trade-restrictive possible and are underpinned by a transparent, science-based import risk analysis process. Australia is free of many of the serious pests and diseases affecting other countries and gives a high priority to maintaining that status, which underpins many of our export industries.

Where appropriate, Australia bases its quarantine measures on international standards, including those developed by the Office International des Epizooties (OIE), the International Plant Protection Convention (IPPC) and the Codex Alimentarius Commission. However, in some cases international standards do not exist or do not deliver the level of protection required by Australia to protect its pest- and disease-free status. In such cases the Australian standard is based on a rigorous pest and disease risk analysis.

Australia's pest risk analysis process is consistent with WTO rights and obligations and specific guidelines and standards on risk analysis developed by the OIE and IPPC. All interested parties, including other countries, if they wish, are kept informed of developments via regular stakeholder notification procedures. The process is clearly documented, including through the Internet. When a number of countries request access for a similar commodity, a generic examination looking at all potential sources may be undertaken rather than on a country-by-country basis.

Australia's approach to managing pest and disease risk is set out in the *Import Risk Analysis Handbook*. It is designed to keep the risk of entry, establishment and spread of unwanted pests and diseases to an appropriately low level, while permitting trade to flow, where possible.

Australian Legislation

Under section 51 of the Australian Constitution, the Commonwealth has power to make laws with respect to quarantine, but they are not exclusive powers, so Commonwealth and State laws on quarantine co-exist. However, under section 109 of the Constitution, if a State law is inconsistent with a Commonwealth law, the Commonwealth law prevails and the State law is invalid to the extent of the inconsistency.

Protection of Australia's human, animal and plant life requires the application of controls, established by the Commonwealth, at Australia's international borders. Commonwealth quarantine laws are contained in the *Quarantine Act 1908* and in its subordinate legislation found in the *Quarantine Proclamation 1998* and the *Quarantine Regulations 2000*.

Responsibility for human health under the *Quarantine Act 1908* lies with the Department of Health and Ageing. Biosecurity Australia regularly consults with that Department. The Quarantine Act requires the Director of Animal and Plant Quarantine to ensure that environmental factors are considered in the decision making process. A Memorandum of Understanding (MOU) is in place between Biosecurity Australia and Environment Australia to facilitate input of advice on environmental matters into the import risk analyses.

Current administrative arrangements

Groups within the Department of Agriculture, Fisheries and Forestry (DAFF) assist the Secretary of DAFF in her role as the Director of Animal and Plant Quarantine with her legal and other obligations in relation to quarantine issues. These groups are principally Biosecurity Australia, the Australian Quarantine Inspection Service (AQIS) and Product Integrity, Animal and Plant Health (PIAPH).

Biosecurity Australia's role is to develop biosecurity (quarantine) policies and review existing policies for the safe importation of live animals and plants, and animal and plant products. AQIS is responsible for the operational and service delivery aspects of quarantine and implements biosecurity border controls, issues import permits and provides export certification. PIAPH's role in quarantine is part of a broader role managing issues relating to animal health, plant health and plant protection. It incorporates the Office of the Chief Veterinary Officer of the Commonwealth and that of the Chief Plant Protection Officer. The area also leads Australia's contribution to the development of international policy and standards related to animal and plant health.

4.3.1.4 Customs procedures

The Australian Customs Service (Australian Customs) is responsible for managing Australia's customs framework. It works closely with industry to facilitate legitimate trade and travel, while detecting and deterring unlawful movement of goods and people across the Australian border. Australian Customs has responsibility for revenue collection, including Customs duties, conducting compliance checks of traders and collecting trade statistics. It was established in its present form by the *Customs Administration Act 1985*. The constitutional authority of the Australian Government to undertake customs functions is given legislative expression through the *Customs Act 1901*, the *Customs Tariff Act 1955* (most recently amended in 1995) and related legislation. Australian Customs also administers legislation on behalf of other government agencies, in relation to the movement of goods and people across the Australian border.

Australia and Japan are both signatories to the International Convention on the Harmonisation of Customs Procedures (otherwise known as the revised Kyoto Convention). The revised Kyoto Convention provides a framework for modern customs procedures. Its provisions enhance trade facilitation in a secure environment and sets minimum standards for predictability, transparency, legal processes, use of information technology and modern techniques such as risk management.

Customs clearance may be undertaken either by the merchandise owner or a customs broker; the latter must register with and be licensed by the Australian Customs Service. Since 1998, minimum documentation requirements have remained unchanged; they include an airway bill or bill of lading, invoices, and any other papers (including packing lists, insurance documents, etc.) relating to the shipment. These documents are to contain the following information:

- Invoice terms (for example, free-on-board (FOB); cost, insurance and freight (CIF))
- Monetary unit referred to on invoice
- Name and address of the seller of the goods (Consignor)

Since 1991, approximately 99 per cent of all imports have been electronically processed, with self-assessment for duty being the usual practice. Assuming correct reporting of information, all permit requirements being met and payment of duty and taxes is through electronic funds transfer, clearance of goods is almost immediate. Import permissions can be communicated electronically to Customs as part of the entry process.

A duty deferral facility is operated under a Customs licensed warehouse (underbond) system; goods may be stored until the duty is paid, and, upon Customs approval, moved between bonded premises.

Customs' new IT system, the Integrated Cargo System (ICS), will replace existing reporting and processing procedures with one integrated IT system. The ICS will significantly enhance Customs risk management assessment at the border and assist industry track cargo movements more efficiently. The ICS will be phased in to assist industry through the transition from the old to the new system.

Exporting and importing businesses, cargo handlers, cargo carriers and service providers will need to introduce new procedures and update their existing IT systems to comply with Customs' new requirements. Those businesses involved in the export chain must be ready to fulfil Customs' new requirements by October 2004. Import reporting through the ICS will commence in early 2005.

A key feature of the ICS is its improved security. Users and transactions will be protected by public key infrastructure (PKI). This involves the use of digital certificates, which are a proven way of providing confidentiality, authentication, non-repudiation and message integrity over open networks such as the Internet. All transactions will also be encrypted so that the data cannot be read by anyone other than the intended recipient. This technology requires individuals and businesses wishing to communicate electronically with Customs to purchase a digital certificate from a Customs approved certification authority.

An integrated system may benefit industry via choice of communication methods, streamlining the processes, reduction in costs and by providing a single window to the Australian Quarantine Inspection Service. The integrated system will also improve Customs' risk identification processes.

Schedule 4 of the *Customs Tariff Act 1995* provides for the concessional treatment of certain imported goods. It allows product samples and promotional items to be imported into Australia free of customs duty and Goods and Services Tax where they are of negligible value or, where this is not the case, they have had their commercial value removed as a result of the format in which they are presented, for example, swatch books, or by their approved mutilation, for example, articles of clothing. Currently, the value limitation for consumable promotional goods of negligible value is \$A2.

A summary of the role of Australian Customs in enforcing intellectual property rights at Australia's borders is at Annex 4D.

4.3.1.5 Technical regulations and standards²¹

General framework

The legislative, executive, and judicial powers relating to technical regulations (mandatory standards) are shared between the Commonwealth and the State and Territory Governments. Commonwealth and national regulators have responsibility for making technical regulations in pharmaceuticals, medical devices and therapeutic goods, food, product safety, agricultural and veterinary chemicals, telecommunications and radio communications, aviation, marine and road safety and measurement. State and Territory regulators are responsible for making technical regulations in areas such as food, power, water, public health, occupational health and safety, road transport and the environment. In some areas

²¹ The WTO Agreement on Technical Barriers to Trade (TBT) defines a technical regulation as a document which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. A standard is a document approved by a recognized body that provides, for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods, with which compliance is not mandatory.

under State/Territory control, such as occupational health and safety and building codes, Commonwealth and State/Territory authorities collaborate on the development of national standards and guidelines, which form the basis of relevant technical regulations in each jurisdiction.

A 1992 Commonwealth/State Agreement on Mutual Recognition allows a product that is in conformity with requirements of at least one State or Territory (i.e. legally saleable) to be sold throughout Australia. This mechanism provides a powerful vehicle to overcome most regulatory differences between jurisdictions.

Mandatory standards

At the Commonwealth level, Food Standards-Australia New Zealand (FSANZ), within the Health and Ageing portfolio, is responsible for developing and reviewing mandatory standards (i.e. technical regulations) for food available in Australia and New Zealand, and for a range of other functions, including coordinating national food surveillance and recall systems, conducting research, assessing policies on imported food, and developing codes of practice with industry. The Therapeutic Goods Administration (TGA), within the Department of Health and Ageing, is responsible for developing regulations for pharmaceuticals and therapeutic goods.

The Department of Transport and Regional Services is responsible for developing national standards (technical regulations known as Australian design rules (ADRs)) covering safety and emission requirements for vehicles. The Department also conducts test facility inspections and conformity of production assessments on laboratories and production facilities involved in the testing and manufacture of road vehicles. There are over 70 Australian design rules covering all categories of vehicles (motor cycles, passenger cars, omnibuses, light and heavy duty goods vehicles and trailers).

Australia acceded to the United Nations Economic Commission for Europe (UN/ECE) 1958 Agreement concerning the regulation of vehicles and automotive parts in February 2000. While many ADRs were already harmonized with UN/ECE Regulations, all ADRs are now being reviewed with the objective of further alignment with UN/ECE Regulations. This has now occurred with emission standards for light vehicles. In the case of heavy vehicles, the principal standard adopted is the EU Directive (which will be replaced by the ECE Regulation when it is fully harmonised). The US heavy duty standards were accepted as an alternative standard as US sourced engines are supplied to a significant proportion of the semi-trailer end of the market in Australia, and because the US standard was assessed as offering an equivalent level of emissions control as the standards under the EU Directive. The Japanese standard was not accepted as the particulate standards of the Japanese standard that applied at the time of the decision to adopt the standards under the EU Directive were considerably less stringent than either the standards under the EU Directive or US standards. The current review of emission standards underway in Australia has recognised that the Japanese long term 2005 standards will apply significantly more stringent particulate limits, and this standard is being considered for inclusion in the next round of standards.

The Consumer Affairs Division of the Department of the Treasury develops national (Commonwealth) mandatory safety and information standards for selected consumer products. Mandatory product safety standards (Commonwealth) mainly based on standards developed by Standards Australia or recognised overseas standards authorities, affect several items and are enforced by the Australian Competition and Consumer Commission (ACCC).²²

²² These requirements cover: balloon blowing kits, bean bags, children's household cots, children's flotation toys and

The National Measurement Institute, which replaced the National Standards Commission and the National Measurement Laboratory on 1 July 2004, is responsible for establishing and maintaining Australia's units and standards of measurement and coordinates Australia's national measurement system.

Voluntary standards

Standards Australia (SA), the top non-governmental standards writing body, is responsible for the formulation and publication of voluntary standards. In addition to SA, there are at least 16 private sector bodies that prepare industry standards, codes, and guides. Two of these bodies, the Australian Gas Association (AGA) and the Australian Communication Industry Forum (ACIF), are accredited by SA's Standards Accreditation Board to prepare Australian Standards in specific areas. SA (1995), the Australian Communications Authority (1997), ACIF (1998), AGA (1998) and the Australian Forestry Standard Steering Committee (2001) have all accepted the Code of Good Practice annexed to the WTO Agreement on Technical Barriers to Trade.

The responsibilities of SA with respect to standards formulation are set out in a Memorandum of Understanding (MOU) with the Department of Industry, Tourism and Resources. The Australian standards prepared by SA are frequently applied in a mandatory fashion through incorporation in technical regulations.

Testing and certification

Standards enforcement is the responsibility of various regulatory agencies. Accreditation of conformity assessment bodies is handled by the National Association of Testing Authorities (NATA), and the Joint Accreditation System of Australia and New Zealand (JAS-ANZ). NATA accredits the competence of calibration and testing laboratories and inspection bodies; its responsibilities are set out in a MOU with the Department of Industry, Tourism and Resources. JAS-ANZ accredits the competence of certification bodies for the certification of management systems, products, and personnel.

The use of quality management system standards such as the ISO 9000 series and ISO 14000 series has been increasing. Between 1995 and 2000 the number of Australian companies certified to ISO 9000 increased from 8,850 to 24,700. During the same period companies certified to ISO 14000 increased from one to 1,050.

International cooperation

Under the 1996 Trans Tasman Mutual Recognition Agreement, Australia extends its 1992 domestic MRA to New Zealand. Australia also has signed treaty-status MRAs on Conformity Assessment with the EU (1998),²³ with Norway/Iceland/Liechtenstein (in force on 1 July 2000)²⁴, and with Singapore (in force on 1 June 2001)²⁵, as well as a voluntary MRA with Thailand (in force 1 July 2000).²⁶ In the context of APEC,

swimming aids, children's night-clothes, paper patterns for children's night-clothes, disposable cigarette lighters, elastic luggage straps, exercise cycles, motor cycle helmets, motor vehicle child restraints, pedal bicycles, portable fire extinguishers, protective helmets for pedal cyclists, sunglasses, toys for children under three-years old, trolley jacks, vehicle jacks, vehicle ramps and vehicle stands.

²³ This MRA covers testing and certification procedures (including final approval) for pharmaceuticals, medical equipment, telecommunications terminal equipment, low voltage electrical equipment, machinery, pressure vessels, motor vehicles and parts, and electro-magnetic compatibility.

²⁴ The coverage of this MRA is identical to the MRA with the European Union.

²⁵ This MRA covers testing and certification procedures (including final approval) for telecommunications terminal

Australia has become a party to the MRAs on Conformity Assessment of Telecommunications Equipment (in force 1 July 1999), Conformity Assessment of Electrical and Electronic Equipment (as from September 1999)²⁷ and Conformity Assessment of Foods and Food Products (in force August 1997).²⁸ Both NATA and JAS-ANZ have developed an extensive network of MRAs through international and regional fora (International Laboratory Accreditation Cooperation (ILAC), Asia-Pacific Laboratory Accreditation Cooperation (APLAC), International Accreditation Forum (IAF), and Pacific Accreditation Cooperation (PAC)). Australia has participated in the APEC Arrangements for the Exchange of Information on Toy Safety since 1997, and Food Recalls since 1999. SA is an active member of the International Standards Organisation.

Under the AUSFTA, Australia has made several commitments concerning the standards, technical regulations and conformity assessment procedures of the central government that affect trade in all goods. Australia has affirmed its existing rights and obligations under the WTO Technical Barriers to Trade (TBT) Agreement and agreed to use, to the maximum extent possible, international standards. Both parties agreed to give positive consideration to accepting, as equivalent, each other's technical regulations, provided they are satisfied that they adequately fulfil the objectives of their own regulations. They agreed to facilitate the acceptance of each other's conformity assessment procedures and to exchange and publish relevant information to ensure that their processes are transparent. Australia and the United States also agreed to establish a mechanism to address issues raised by either Party relating to the development, adoption, application or enforcement of standards, technical regulations or conformity assessment procedures.

Australia actively participates in discussions in, and makes submissions to, the WTO TBT Committee on issues such as the principles for good practice for the acceptance of the results of accreditation and conformity assessment, the development of international standards, and the relationship between the TBT Committee and international standardization bodies. Australia provides various forms of technical assistance in relation to standards and conformance in the Asia-Pacific region.

4.3.1.6 Electronic commerce

The growth of e-commerce in Australia, and the transformation of businesses through information and communications technology primarily have been private sector driven. The Australian Government has encouraged business and consumer confidence by putting into place a light handed regulatory framework for the information economy. The Government has removed unnecessary barriers to e-commerce and provided greater certainty for business and consumers who wish to conduct electronic transactions.

Paperless Trading

While the elimination of paper from international trade has brought with it certain legal, policy and technical challenges for both private and public sector entities, it has also brought with it a number of benefits, such as reduced costs, enhanced security and certainty and streamlined transactions.

equipment, electrical and electronic equipment, and medicinal products.

²⁶ This MRA with Thailand covers test reports for automotive products for use in certification procedures.

²⁷ This MRA, which encompasses test results on covering cord and cordless telecommunication equipment, eliminates the need for separate conformity testing of exported products in each market.

²⁸ APEC (2000).

In a practical sense, progress towards paperless trading can be enhanced through close consultation between Government agencies with a stake in international trade at both domestic and international levels. Australia's position is that it is crucial that international standards and best practices are adopted, including those that apply to data harmonisation, interoperability, data format, authentication and Internet protocols.

The Australian Government considers that the consistent use of agreed standards and a culture of collaboration between agencies can only increase the quality of services and reduce the costs of service provision.

Electronic Transactions

The underlying rationale for the Australian Government's approach to electronic commerce is that business transacted electronically should be treated the same as 'paper-based' commerce. The *Electronic Transactions Act 1999* (the ETA) is a Commonwealth Act (although similar legislation operates in all States and Territories) which is based upon the recommendations of the Electronic Commerce Expert Group and the Model Law on Electronic Commerce developed by the United Nations Commission on International Trade Law.

The ETA facilitates the use of electronic commerce in Australia by removing existing legal impediments that may prevent a person from using electronic communications to satisfy their legal obligations under Commonwealth law. The Act provides businesses and the community with the option of using electronic communications when dealing with government departments and agencies, including entering into contracts. The ETA ensures that electronic communications are a legally valid means of providing information, documents or a signature to Commonwealth Government agencies. The Act is technologically neutral, which means that paper documents and electronic communications are treated equally.

The primary objective of the Act is to enable individuals to use electronic communications to satisfy what would otherwise be their legal obligations, including a requirement to:

- give information in writing (section 9);
- provide a signature (section 10);
- produce a document (section 11); and
- record or retain information (section 12).

The ETA requires Commonwealth agencies to accept electronic communications when a member of the business community or public chooses to communicate in that manner. This is consistent with the Australian Government's commitment to deliver appropriate services online. The ETA does allow agencies to specify certain requirements for electronic communications. These requirements must be complied with for an electronic communication to be legally valid.

Electronic Authentication

The Australian Government encourages private sector and public sector adoption of authentication technologies to build confidence in e-commerce. The key element of authentication in an e-commerce environment is the process of establishing the legitimacy of online assertions, be it identity or other attributes. Authentication helps provide certainty in the identity of the other party to an electronic transaction and this level of assurance is particularly important when funds or sensitive information are

involved as it reduces the level of risk in the transaction. Electronic signatures are a form of electronic authentication. The Australian Government has enabled the use of electronic signatures through the ETA.

In addition, the Australian Government provides for a consistent approach to authentication for business dealing online with Government through the Australian Government e-Authentication Framework, including the adoption of digital signature certificates for use in those transactions where higher levels of assurance is required. A certificate is a single identifier which allows a subscriber to digitally sign an electronic message with their 'private key' ensuring sender authentication, message integrity and non-repudiation. The Australian Government Information Management Office (AGIMO) has responsibility for managing the accreditation of organisations and service providers in this regard.

Privacy and Online Data Protection

The Australian Government has enacted comprehensive privacy legislation, covering both public and private sectors. The *Privacy Act 1988* is the principal piece of legislation providing protection for personal information both online and otherwise in the federal public sector and in the private sector. It also establishes the Office of the Federal Privacy Commissioner. The *Privacy Act* contains eleven Information Privacy Principles for the federal public sector and ten National Privacy Principles which apply to parts of the private sector and all health service providers. These privacy principles deal with all stages of the handling of personal information, setting out standards for the collection, use, disclosure, quality and security of personal information. They also allow for access to, and correction of, such information by the individuals concerned.

The Office of the Federal Privacy Commissioner ensures compliance with the *Privacy Act* by promoting best practice in privacy standards as well as educating and advising individuals, government agencies, business and other organisations on what steps they should take to ensure that privacy is protected. The Privacy Commissioner has broad powers to investigate complaints about breaches of privacy. The Federal Privacy Commissioner's functions and exercise of powers are set out in the *Privacy Act*.

The privacy principles applying to the public sector and private sectors in the *Privacy Act* are based on the Organisation for Economic Cooperation and Development's (OECD) Guidelines on the Protection of Privacy and Transborder Flows of Personal Data, which were developed in 1980. These guidelines govern the way personal information about individuals is collected, stored, used and disclosed. They also establish the right of individuals to gain access to, and have amended, information about them held by others.

The development of new technologies and e-commerce has raised new issues for information privacy. Increasing use of the Internet and other technologies means that personal information may be easily collected and transferred around the world. The European Union prohibits data transfers from EU countries to third countries unless the third countries put into place privacy laws that are 'equivalent' to the EU laws. Australia's view is that the OECD Guidelines provide an appropriate international model. Discussions on international privacy issues are continuing in the APEC Electronic Commerce Steering Group. Australia's *Privacy Act* contains provisions dealing with this issue. National Privacy Principle 9 of the *Privacy Act* deals with transborder dataflows of personal information.

Online content and gambling regulation

Under the *Broadcasting Services Act 1992* (BSA) and the *Interactive Gambling Act 2001* (the IGA), Parliament has established systems for regulating offensive and illegal online content and online gambling services. Schedule 5 to the BSA establishes a regulatory scheme for the management of Internet content

to restrict access to Internet content that is likely to offend a reasonable adult and to protect children from Internet content that is unsuitable for them.

The IGA targets the providers of interactive gambling services, not their potential or actual customers, by making it an offence to provide an interactive gambling service to a customer physically present in Australia. Interactive gambling services include those that are often described as ‘online casinos’ and usually involve using the Internet to play games of chance or games of mixed chance and skill. The Act applies to all interactive gambling service providers, whether based in Australia or offshore, whether Australian or foreign owned.

The *Spam Act 2003* came into force on 10 April 2004, and provides a balanced approach to permitting responsible direct marketing and other business activities while providing a strong response to spamming activities. The legislation includes a ban on the sending of commercial electronic messaging without explicit or inferred consent; civil sanctions for unlawful conduct; and a requirement for all commercial electronic messaging to contain accurate details of the sender. Australia’s anti-spam strategy includes working together with international organisations to develop global guidelines and cooperative mechanisms to combat the global spam problem. (Australia has signed a MOU with South Korea on spam.)

4.3.1.7 Transparency

Transparency is implemented throughout Australia’s laws, regulations and administrative practices. Australian laws, regulations, administrative guidelines and policies are publicly available through the Internet, as displayed on sites such as the Attorney-General’s Australian Law Online (<http://law.gov.au>) and the Australian Legal Information Institute (<http://www.austlii.edu.au>). These websites also enable access to State and Territory Government websites where the laws and other legal information published by those Governments can be found.

Transparency is also important during the course of making new laws, and amending existing laws. New federal Acts must be introduced into the Australian Parliament and proceed through both Houses of that Parliament before they can be passed and come into operation. The proceedings of the Houses of Parliament are open to the public, and are broadcast on public radio. Draft legislation is also made available to members of the public.

A number of federal Acts also authorise the making of subordinate legislation which does not have to be debated in the Parliament. That subordinate legislation is of two main types: regulations which are made, tabled before both Houses of the Parliament and which the Parliament has 15 sitting days to consider and may disallow; and other legislative instruments. Notices of technical regulations are generally published in the *Commonwealth of Australia Gazette* as well as on the websites of bodies such as Food Standards Australia New Zealand (FSANZ).

On 1 January 2005, the *Legislative Instruments Act 2003* commenced operation. This Act requires all legislative instruments to be subject to the same process of tabling and disallowance before the Parliament as regulations are. There are a few exemptions to the Legislative Instruments Act where, for example, commercial uncertainty would result if disallowance was allowed, however all such exemptions must be approved by the Parliament. The Legislative Instruments Act also provides for a process of expiry of legislative instruments after they have been in force for approximately 10 years, unless specific

action is taken to preserve them. By this means legislative instruments are regularly reviewed and kept up-to-date.

Administrative action taken under legislation is also subject to scrutiny in a number of ways. For example, many administrative decisions can be reviewed on their merits by the independent tribunals, such as the Administrative Appeals Tribunal, which was established by the *Administrative Appeals Tribunal Act 1975*, and similar bodies in the States and Territories. Merits review of an administrative decision involves its reconsideration. On the facts before it, the Tribunal decides whether the correct – or in a discretionary area, the preferable – decision has been made in accordance with the applicable law. It will affirm, vary or set aside the original decision. There are also various forms of action that can be taken in courts to review administrative decisions and the processes undertaken to arrive at those decisions.

Australia, including all Australian States and Territories, has legislation designed to allow members of the public (regardless of citizenship) access to information in the possession of ministers, departments and public authorities. The *Freedom of Information Act 1982* (the FOI Act) has three main functions. Firstly, the FOI Act creates a general right of access to information in documentary form held by the Government of the Commonwealth. This is limited only by exceptions and exemptions necessary for the protection of public interests and certain business affairs. Secondly, the FOI Act makes available to the public information about the operations of departments and public authorities. Thirdly, the Act creates a right to amend records containing personal information that is incomplete, inaccurate, out-of-date or misleading.

Australia's Joint Standing Committee on Treaties (JSCOT) was first established in 1996 as part of a package of reforms to improve the openness and transparency of the treaty making process in Australia. The Treaties Committee has been appointed by the Commonwealth Parliament to review and report on all treaty actions proposed by the Government before action is taken which binds Australia to the terms of the treaty.

Australia's trade policies, like those of other WTO members, are subject to regular review through the Trade Policy Review Mechanism (TPRM) established in 1989 and confirmed by the Marrakesh Agreement establishing the WTO. The objective of the TPRM is to contribute to improved adherence by all members to WTO rules, disciplines and commitments made under WTO multilateral trade agreements. The TPRM assists the smoother functioning of the multilateral trading system by achieving greater transparency in, and understanding of the trade policies and practices of members. The TPRM last reviewed Australia's trade policies in 2002.

A key feature of many trade agreements to which Australia is a party is an overarching chapter on transparency which guides and commits each party to ensure that relevant laws, regulations, administrative guidelines and decisions are made and implemented in a manner necessary to achieve the objectives of the agreement. Australia's approach to transparency in the context of bilateral liberalisation agreements usually includes the nomination of a contact point on each side to facilitate communication on any matter relating to the agreement. Further, under the FTAs to which Australia is a party, either side may request further information about any proposed measure which it considers might materially affect the operation of the agreement. Australia's FTAs also include provision for persons of the other side to be given due process in any administrative agency processes, reviews or appeals.

Transparency in government decision-making processes and commitments to abide by appropriate transparency provisions in trade agreements fulfil a number of important objectives including:

- Providing each party with information in a timely manner about future measures which may impact on the business transactions of traders and investors such that those traders and investors can make adjustments to altered conditions;
- Ensuring that once an agreement has been reached and enters into force, implementation, monitoring and enforcement is facilitated; and
- Protecting the principles of natural justice and due process.

4.3.1.8 Mutual recognition of qualifications

Under the Australian Constitution the Australian Government does not have the power to make laws on the regulation of professions. This is a matter for the State and Territory Governments. Similarly, there are no procedures in Australian law by which qualifications obtained overseas are formally 'recognised' in educational terms. For instance, the recognition of foreign educational or academic qualifications for the purpose of admission to study at an Australian education institution is a matter for that particular institution to determine as appropriate.

Professional Recognition

Professional recognition in Australia is based on transparent systems and procedures that are non-discriminatory as they do not, for example, have nationality or other arbitrary requirements.

Generally, the professions in Australia can be divided into four categories: regulated professions; partially-regulated professions; self-regulated professions and unregulated professions.

- The professions regulated by State and Territory legislation include health-related professions, veterinary science, law and architecture. An applicant's eligibility to practise in these professions is determined on the basis of prescribed examinations which allow them to qualify for registration by State and Territory Registration Boards.
- In partially regulated and self-regulated professions, professional bodies determine and maintain entry requirements to the profession, which may include competency-based assessments and/or assessments based on qualifications. Employment may be dependent upon demonstration of eligibility for membership of the key professional body. In partially regulated professions some States or Territories require registration/licensing under legislation, or some activities carried out by the professions may be regulated under State, Territory or Australian Government legislation.

Educational and Academic Recognition

The Australian Government's role in relation to educational qualifications is to develop policy to improve the level of recognition of educational qualifications gained overseas, so that people with overseas training may more easily work and study in Australia. One aspect of this policy is the provision of information, advice and assistance in relation to the recognition of overseas educational qualifications, and to encourage improved international arrangements for the recognition of educational qualifications. Initially, the policy focus was on qualifications recognition for employment purposes to facilitate the entry of the overseas trained into the Australian workforce at an appropriate level. This remains an important outcome in qualifications recognition. However, increasingly information, advice and assistance have been provided to promote academic mobility internationally. AEI-NOOSR's educational assessment recommendations compare the educational level of an overseas qualification in terms of qualifications on

the Australian Qualifications Framework (AQF). The AQF guidelines, which define each qualification, are expressed as learning outcomes.

Mutual Recognition Arrangements

Internationally, the Australian Government aims to facilitate mutual recognition arrangements and mobility frameworks by which countries agree to exempt each other's professionals from trade-restrictive requirements. For example, the APEC Engineer and APEC Architect projects were initiated and led by the Australia Government.

Australia has negotiated a variety of international mutual recognition arrangements both at a government and non-government level, to streamline the recognition of educational and professional qualifications and skills providing an impetus for the harmonisation of standards and criteria, reducing differences in regulatory requirements and facilitating the mobility of skilled labour. The negotiation of mutual recognition agreements requires a detailed knowledge of the academic and professional standards, experience, and legislative and other requirements for independent practice in the profession. Where these agreements are entered into by Australian professional bodies with their international counterparts they have exercised considerable autonomy.

Mutual Recognition Agreements

Mutual recognition has played an important role in the economic integration of the Australian States and Territories as well as the Australian and New Zealand jurisdictions. Australia's Mutual Recognition Agreement (MRA), which commenced operation on 1 March 1993, provides that if a person is registered or licensed to practise an occupation in one Australian State or Territory, he or she is eligible for registration in an equivalent occupation in any other participating State or Territory without the need to undergo further assessment of qualifications or experience. The Trans-Tasman Mutual Recognition Arrangement (TTMRA), commenced operation on 1 May 1998, extended the MRA to New Zealand. The mutual recognition legislation aims to remove artificial barriers to the mobility of skilled labour across all jurisdictions of Australia and New Zealand.

These mutual recognition schemes are currently being reviewed as part of the regular five-yearly evaluation of the efficiency and effectiveness of the operation of the MRA and TTMRA.

Other International Agreements

With regard to academic recognition, Australia is a party to a number of international agreements, notably the Convention on the Recognition of Qualifications Concerning Higher Education in the European Region (the Lisbon Recognition Convention) which covers Europe, the United States, Canada and Australia, and the UNESCO Convention on the Recognition of Studies, Diplomas and Degrees in Higher Education in Asia and the Pacific (the Regional Convention). In addition, Australia has agreements with a number of countries which recommend mutual acceptance of a range of education qualifications, mostly in the higher education sector, primarily to facilitate student mobility. Parties to these conventions and agreements are committed in principle to recognising or encouraging the recognition of the qualifications of other contracting parties, but the conventions and agreements do not guarantee an individual's admission to a specific course of study in another country.

4.3.1.9 Intellectual property

Australia is a signatory to a variety of international intellectual property (IP) conventions. These provide mechanisms for registering Australian patents, trade marks, and plant varieties in other signatory countries. International protection for copyright and circuit layouts is achieved under the conventions through the principle of 'national treatment'. Broadly speaking, each convention member country gives the same rights to the nationals of other convention countries as it gives to its own nationals. The laws of members of the treaties must conform with the minimum standards specified in the treaties.

Australia has specific laws covering patents, trade marks, designs, plant breeder's rights, copyright and circuit layouts. Two Commonwealth government departments carry primary policy and administrative responsibility for IP. Responsibility for policy development and administration of the patent, trade mark, design and plant breeder's rights systems rests with IP Australia. The Attorney-General's Department (AGD) has responsibility for policy development and administration of the *Copyright Act* and the *Circuit Layouts Act*.

A summary of the role of Australian Customs in enforcing intellectual property rights at Australia's borders is at Annex 4D.

Patents Act

The *Patents Act 1990* establishes a legislative framework for granting a patent and for maintaining a register of patents. A patent is available to protect any device, substance, method or process which is new, inventive and useful. The registered owner of a patent has the exclusive right to commercially exploit the invention for generally the 20 year life of the patent.

Modified examination

Modified examination under the *Patents Act 1990* and the Patents Regulations is a process by which certain patentability requirements, particularly those in relation to clarity and descriptive support, are taken to be met for the purposes of examination on the basis of an identical patent being granted for a prescribed foreign country. Furthermore, modified examination only applies where the patent granted in the prescribed country is in the English language. This requirement exists because the Australian examiners needs to ascertain with certainty whether the specification under examination in Australia is the same as the patent granted in the prescribed country.

If, however, an applicant from a non-English speaking country filed their application in an Anglophone country such as the United States, when they apply in Australia they can use their US application as the basis on which to seek modified examination in .

A full explanation of the modified examination process is contained in the Australian Patent Examiner's Manual at Part 13. This manual can be viewed on the IP Australia web site at: http://www.ipaustralia.gov.au/resources/manuals_patents2.shtml

Requests for examination

In Australia, an applicant has up to 5 years in which to request the examination of their patent application. However, the Commissioner of Patents may, within this period, ask the applicant to request an examination of their application and the applicant is given 6 months to respond with a request for examination. The reasons for asking the applicant to request an examination are:

- a) that the Commissioner reasonably considers it expedient to give the direction having regard to the progress made in the examination of applications filed before the filing date of the application concerned;
- b) that the Commissioner reasonably considers it to be in the public interest to give the direction;
- c) that the Commissioner reasonably considers it expedient to give the direction, having regard to the examination of another application for a standard patent or the examination of an innovation patent.

Clause (a) above is used to manage the orderly processing of examining applications in the various technology areas. This practice is independent of the origin of the application (Australian and overseas applicants are treated equally). The main consideration is the workload of the particular examination section (examination sections are established based on a range of technologies). To remove these provisions would introduce unpredictability into the workflow within the Patent Office and cause serious delays in the operations of the office as well as increasing the pendency period for applications. It would also create public interest concerns that the status of patent applications were not being determined in a reasonable period.

In practice, applicants will generally receive a direction to request examination at about 40 months from the priority date and hence need to request examination by 46 months. This generally equates to 34 months from the filing date in Australia and therefore is commensurate with the three year period allowed for this purpose in Japan.

Other Acts

The *Trade Marks Act 1995* establishes a legislative framework for assessing applications to register a trade mark and for maintaining a register of trade marks. A trade mark can consist of, for instance, words, symbols, pictures, sounds and/or smells, or any combination of these, used to distinguish the goods and services of one trader from another. The registered owner of a trade mark has the exclusive right to commercially exploit the trade mark. Initial registration lasts 10 years, but registration may be renewed for successive periods of 10 years on payment of the renewal fee.

The *Designs Act 2003* establishes a legislative framework for registering a design and for maintaining a register of designs. Registration protects the visual appearance of designs which have an industrial or commercial use. Designs which are essentially artistic works are protected by copyright and are not eligible for design registration. The registered owner has the exclusive right to commercially exploit the design. Initial registration lasts for five years, but registration can be renewed for one further five year period.

The *Plant Breeder's Rights Act 1994* establishes a system for assessing applications to register a plant variety and for maintaining a register of plant varieties. New varieties of all plant, fungal, algal species and transgenic plants are eligible for protection. The registered owner has the exclusive right to commercially exploit that plant variety. In tree and vine varieties, this right continues for 25 years from the date of granting, and in all other varieties, for 20 years from the date of granting.

The *Copyright Act 1968* provides copyright owners with certain exclusive rights in relation to original artistic, dramatic, musical and literary works (including computer programs), films, broadcasts and sound recordings. These rights include the rights to reproduce and to communicate to the public. Upon Australia's accession to the WIPO Performances and Phonograms Treaty, performers will be accorded exclusive economic rights in sound recordings which embody their performances. The *Copyright Act* also

provides for the protection of non-economic rights known as moral rights. There is no registration process for copyright. The term of protection varies between some categories of copyright material. Literary, artistic, dramatic and musical works are now generally protected for the life of the author plus 70 years. The *Copyright Act* allows the parallel importation of music and software.

Australia has updated its copyright laws to take account of new technological developments. The *Copyright Amendment (Digital Agenda) Act 2000* introduced a new technology neutral right of communication and substantially updated the *Copyright Act 1968* in other areas including new provisions to protect technological protection measures (TPMs), rights management information and pay television broadcasts. The Australian Government is currently reviewing the effectiveness of the Digital Agenda reforms against their stated objectives. Some amendments were made to these provisions in Schedule 9 to the *US Free Trade Implementation Act 2004* and in the *Copyright Legislation Amendment Act 2004* and further amendments will be made in relation to the TPM provisions. Under the AUSFTA there is a two-year implementation period for the TPM obligations.

The *Circuit Layouts Act 1989* provides protection to owners of the layout designs of integrated circuits (also known as computer chip designs or semi-conductor chips) against unauthorised copying. There is no registration process. The maximum possible protection period is 20 years.

The *Australian Wine and Brandy Corporation Act 1980* provides the legislative framework for protection and administration of geographical indications. The Act vests power in the Australian Wine and Brandy Corporation to establish a Committee to deal with applications for the determination of geographical indications for wine in relation to regions and localities in Australia.

Some types of IP do not have special statutory protection. Confidential information and trade secrets are protected through contract and the common law action for breach of confidence. In addition, business reputation and goodwill in unregistered trade marks or trade names may be protected by the common law action of passing off or an action for misleading or deceptive conduct under the *Trade Practices Act 1974* or equivalent State or Territory legislation.

Enforcement of intellectual property rights

Intellectual property rights (IPR) are enforced through a variety of mechanisms, including opposition processes, warning letters, commercial negotiations, alternative dispute resolution, customs seizures and litigation. Australia provides a well developed system for enforcing IPR through both administrative and judicial processes. Administrative authorities such as the Commissioner for Patents, the Registrar of Trade Marks and Registrar of Designs may make various decisions as to the granting of patents, trade marks and designs. In addition, the Copyright Tribunal is a specialist administrative body dealing with disputes regarding statutory licences. Administrative decisions can be appealed to the Administrative Appeals Tribunal (AAT) or the Federal Court. Appeals from decisions of the AAT can also be made to the Federal Court. Courts determine substantive disputes regarding IPR.

Further information on copyright can be found at the website of the Attorney Generals' Department at <http://www.ag.gov.au>, and further information regarding patents, trade marks, industrial designs and plant breeder's rights can be found at the website of IP Australia at <http://www.ipaustralia.gov.au>.

4.3.1.10 Rules of origin

Australia applies non-preferential rules of origin (ROO) to Japanese goods. These ROO are implemented in accordance with the World Trade Organization Agreement on Rules of Origin.

Australia also has a number of ROO regimes under various trade agreements and international agreements. Australia's ROO regimes can be broadly classified into two main groups: factory cost / cost to manufacture rules, and product-specific rules, based on change of tariff classification.

Factory cost / Cost to manufacture

Most of Australia's 'factory cost', or 'cost to manufacture' ROO incorporate two requirements:

- 50 per cent of the 'factory cost' or the cost to manufacture the goods must be incurred in the Parties; and
- the last process in the manufacture of the goods must be undertaken in the Parties.

The factory cost or cost to manufacture the goods is calculated using a specified set of costs covering the materials used in production and certain overhead and labour costs. This ROO, with some variations, forms the basis for Australia's trade agreements with New Zealand, Singapore, Papua New Guinea and the Forum Island Countries, the Australian Generalised Tariff Preference (AGTP) system for developing countries and the duty-free preference for Least Developed Countries. A summary of the major differences are:

- the FTAs with New Zealand and Papua New Guinea apply the factory cost ROO with no major change;
- the FTA with Singapore has a 30 per cent of cost to manufacture requirement on some electrical and electronic goods and goods not made in Australia;
- the agreement with the Forum Island Countries allows them to use content from throughout the Forum Islands;
- the AGTP allows content from all recognised developing countries; and
- the Least Developed Countries preference allows 25 percentage points of the 50 per cent to come from recognised developing countries.

Change of tariff classification

Australia's FTAs with the United States and Thailand primarily use the change of tariff classification ROO. These ROO require imports to undergo a specified change in tariff classification, supplemented in some cases (largely within the vehicles, machinery and electronic equipment tariff chapters and, for ATFTA, the textiles, clothing and footwear chapters) by a regional value content (local content) requirement. The ROO in the AUSFTA and ATFTA are broadly similar, with the major differences being:

- textiles and clothing:
 - the AUSFTA has a 'yarn forward' ROO which requires most finished textile and clothing goods to be sourced from within the Parties from the yarn (and sometimes fibre) on; and
 - the ATFTA has a simpler transformation requirement with a 55 per cent regional value content. Up to 25 percentage points of the 55 per cent can come from other developing countries provided it undergoes the specified transformation.

- regional value content:
 - the AUSFTA uses three methods to calculate regional value content
 - : 'build down' which is calculated as the share of non-originating content to the free-on-board (fob) price of the finished good. The content level under this method ranges from 35 per cent to 65 per cent;
 - : 'build up' which is calculated as the share of local materials to the fob price of the finished good. The content level under this method ranges from 30 per cent to 65 per cent; and
 - : 'net cost' which is calculated as the fob price less any non-production costs; the net cost is roughly analogous to the factory cost. The net cost method only applies to automotive and automotive part goods. The content level under this method is 50 per cent.
 - the ATFTA uses a variation of the 'build down' method. The required content level ranges from 40 per cent to 55 per cent.

Australia and New Zealand have agreed to adopt the Change of Tariff Classification model for determining the rules of origin under ANZCERTA, subject to final agreement on sensitive sectors. This would simplify the administration of ROO and reduce compliance costs and reflect an increasing global trend towards using this type of ROO in bilateral free trade agreements.

4.3.1.11 Use of remedies

Anti-Dumping

In Australia, investigations of alleged injurious dumping are carried out in accordance with legislation that conforms to the provisions of the WTO Anti-Dumping Agreement. The two key pieces of legislation are the *Customs Act 1901* (which sets out the general inquiry process) and the *Customs Tariff (Anti-Dumping) Act 1975* (which makes provision for the imposition of anti-dumping and countervailing duties). Like the WTO Agreement, Australian legislation does not prohibit dumping, but recognises that anti-dumping remedies may be adopted where dumping causes or threatens to cause material injury to domestic industry.

Australian anti-dumping investigations are initiated following the receipt by the Australian Customs Service of a duly documented application (or petition) from Australian industry. Anti-dumping measures may only be applied after a formal investigation has demonstrated that:

- the goods under investigation are dumped;
- there has been material injury to the Australian industry producing like goods; and
- there is a causal link between the dumping and the material injury (that is, the dumped goods caused the material injury).

A finding that there is material injury requires clear evidence that Australian industry has suffered a loss in terms of indicators such as sales, market share, profits, employment and wages.

Australia's anti-dumping legislation ensures that investigations are carried out promptly, that all interested parties have appropriate opportunities to provide information and comment on findings of fact, and that there are appropriate avenues for appeal.

The Australian Government has sought to ensure that domestic industry is aware of the intent of the anti-dumping legislation and the necessity for application documentation to be comprehensive and evidence-based. Considerable effort and time may be involved in gathering and compiling the information required

to support an application. Upon receipt of an application, the Australian Customs Service will undertake an initial examination to determine if there appear to be reasonable grounds for the publication of a dumping duty notice. The Australian Customs Service will reject applications that do not meet the requisite threshold for initiation.

In setting the requirements for anti-dumping applications and the administration of anti-dumping procedures, the Australian Government seeks to preserve an appropriate balance between the rights of domestic firms and those exporting to the Australian market. Further, to prevent anti-dumping measures becoming a de facto instrument of long-term industry protection, any duties or undertakings which are imposed as a result of an investigation are subject to a five year "sunset clause". That is, measures automatically expire five years from the date of their imposition. Extension of measures beyond five years requires a further investigation by the Australian Customs Service, in accordance with the same procedures that apply to initial investigations.

Two products from Japan are subject to current Australian anti-dumping measures. Measures on hot rolled steel plate were imposed in April 2004 and are set to expire on 1 April 2009. Measures on PVC predate the WTO and were first imposed in October 1992. The measures have been reviewed since first imposed.

Over the period 1995 to 2004 Australia conducted a total of five anti-dumping investigations on goods exported from Japan. In two cases, anti-dumping measures were imposed (the above-mentioned steel plate (hot rolled) and paper (2-sided coated woodfree sheets 75-150 gsm)). The anti-dumping measure on paper was imposed in September 1998 and expired in September 2003.

Three of the five anti-dumping investigations on products from Japan over the past nine years have not resulted in the imposition of anti-dumping measures.

The value of Japanese exports to Australia which are subject to anti-dumping duty is difficult to measure accurately. Statistical codes which included items subject to dumping duty from Japan covered imports which were valued at approximately US\$10 million in calendar year 2003. This was less than 0.3 per cent of merchandise imports from Japan in that year²⁹.

Countervailing duties

Australia's approach to the use of countervailing measures is similar to its approach on anti-dumping issues. Australia's legislative and administrative framework on the use of countervailing measures is consistent with the WTO Agreement on Subsidies and Countervailing Measures. Investigations on alleged injurious subsidisation are initiated through application (or petition) by the relevant Australian industry to the Australian Customs Service. The application must demonstrate that there is a subsidy and that the industry has suffered material injury as a result. A countervailable subsidy must be specific and not an excluded subsidy.

Where an application for investigation has been made and the industry's claims are considered to warrant investigation, the Australian Customs Service will publicly notify the investigation. The Australian Customs

²⁹ It should be noted that measuring the value of exports subject to anti-dumping measures in this way could produce an overestimate since products subject to measures may be defined more narrowly than the relevant statistical import codes. This method of measurement could also underestimate the effect of anti-dumping measures, since they may result in reduced import volumes.

Service will also write to all known importers and exporters of the goods inviting their participation in the investigation.

The Australian Government will only take action against subsidised goods that cause, or threaten to cause, material injury to an Australian industry producing like goods. There must be a direct and identifiable relationship between the impact of the subsidy and any alleged material injury suffered, or threatened to, the Australian industry.

Australia's legislation ensures that investigations are carried out promptly, that all interested parties have appropriate opportunities to provide information and comment on findings of fact, and that there are appropriate avenues for appeal.

Safeguards

Australia has established general procedures for inquiry into safeguard action. These are administered by the Productivity Commission, which was established in 1998. The Productivity Commission is the Australian Government's principal review and advisory body on microeconomic policy and regulation. There is no specific legislation for the imposition of safeguard measures in Australia. Investigations are initiated by the Treasurer, through a reference to the Productivity Commission and following the Government's agreement that such action is warranted. Following a decision to initiate a safeguard investigation, the Productivity Commission is required to report on:

- whether the conditions are such that the safeguard measures will be justified under the WTO rules;
- if so, what measures would be necessary to prevent or remedy serious injury and facilitate adjustment in the domestic industry; and
- whether the measures would be implementable, having regard to the regulatory impact of the measures.

While historically Australia was a major user of safeguard action, this has not been the case since the mid 1970s. Since entry into force of the WTO Agreements in 1995 Australia has conducted only one safeguard inquiry, relating to frozen swine meat, which did not lead to the imposition of safeguard measures. This trend reflects Australian policy on safeguard matters, notwithstanding Australia's established procedures on safeguards.

4.3.1.12 Handling of disputes

Australia seeks to resolve disputes with other governments in a cooperative, non-confrontational manner having regard to international law. As such, in both the bilateral and multilateral context, Australia places great emphasis on consultative processes for resolving disputes over interpretation or implementation of trade agreements.

Bilateral Agreements

This emphasis on consultation for resolving disputes is most apparent in the Australia-New Zealand Closer Economic Relations Trade Agreement (ANZCERTA), Australia's most comprehensive agreement. ANZCERTA does not include specific dispute resolution mechanisms, but instead provides for annual review and consultations. Settlement of disputes under ANZCERTA relies on the goodwill of both parties to work out amicable and practicable solutions.

It is equally present in the Australia-United States FTA (AUSFTA) which, while including detailed provisions on the establishment, operation and implementation of determinations of dispute settlement panels, clearly retains the primacy of the parties, through the Joint Committee, in interpreting the Agreement and resolving disputes through consultation. The Australia-Singapore FTA and Australia-Thailand FTA additionally provide for the use of conciliation, mediation or good offices, if agreed by the Parties.

In establishing formal dispute settlement mechanisms, Australia seeks fair, transparent, timely and effective procedures. A particular innovation in AUSFTA is provision for accelerated timelines in matters regarding perishable goods. AUSFTA also allows for a dispute panel to accept amicus briefs within certain guidelines. Australia would look to include such innovations in future dispute settlement mechanisms.

Close consideration must also be given to the applicability of the dispute mechanism to each specific chapter. In particular, Australia is attentive to the need to:

- avoid inappropriate overlap between the jurisdictions of the WTO dispute settlement procedure and that of any dispute settlement procedure under a bilateral agreement;
- include choice of forum provisions to minimise ‘forum shopping’; and
- ensure bilateral dispute settlement procedures do not inappropriately impinge on the jurisdiction of domestic courts and tribunals (for example, in areas of competition policy and government procurement).

Investment Disputes

Australia’s robust domestic legal system provides appropriate protection for investors. Under its investment agreements with other countries, Australia also provides investors of those countries with the option of referring disputes to the International Centre for Settlement of Investment Disputes and provides for foreign awards to be enforced. Australia is a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958, New York) (the New York Convention) and the International Convention on the Settlement of Investment Disputes (1965, Washington) (the ICSID Convention). Both these Conventions are implemented through the *International Arbitration Act 1974*.

While provision for investor-state dispute settlement is a feature of Australia’s bilateral Investment Promotion and Protection Agreements with a range of developing country partners, such a mechanism was not considered appropriate in the AUSFTA.

4.3.1.13 Other issues (including other trade facilitation issues)

Superannuation

Superannuation is compulsory for most employees under Superannuation Guarantee (SG) legislation. The SG arrangements were introduced in 1992 to ensure employees were provided with adequate levels of superannuation support from their employer, and in broad terms require all employers to pay a 9 per cent superannuation contribution for their employees. Subject to some limited exceptions, SG applies to all work done in Australia whether by an Australian resident or a foreign national, to avoid labour market distortions.

The exceptions to SG include work done by a very limited class of exempt employees, namely, foreign senior executives working in Australia for no longer than 4 years on a temporary business visa. The exemption is restricted to very senior executives who for example have been brought into Australia by their foreign employer to set up an Australian division of the employer's multinational business. The Australian Taxation Office has published guidelines on where this exemption applies. The guidelines are in the ATO's Practice Statement PS LA 1999/7.

Temporary residents on certain visa classes may access their superannuation on permanent departure from Australia. This concession recognises that such temporary residents are unlikely to retire in Australia and be eligible for the Australian age pension. However, the measure does not apply to Australian citizens, permanent residents or New Zealand citizens because although these individuals may leave the country, they retain the option of returning and retiring in Australia, with accompanying access to the age pension.

The departing Australia superannuation payment was introduced from 1 July 2002 and is subject to special taxation and withholding arrangements. Under amendments to the Superannuation Industry (Supervision) Regulations, a departing Australia superannuation payment can only be received by a person who:

- entered Australia on an 'eligible temporary resident visa' that are prescribed in Schedule 1AB of the SIS Regulations;
- has a visa that has expired or been cancelled; and
- have permanently departed Australia.

Where the application of SG can result in double coverage, Australia is prepared to consider entering into Social Security Agreements with the relevant countries to avoid this. Double coverage relates to the situation where an employee is sent from one country to work temporarily in the other and their employer is required to make superannuation/social security contributions both in the home country and in the other country. Under such an Agreement Australia could exempt a Japanese employer from having to make SG contributions in Australia, provided they make relevant social security contributions in Japan, and Japan provides a similar exemption in respect of Australian employees sent to work temporarily in Japan.

Discussions between Australia and Japan about a possible Social Security Agreement are currently underway.

Annex 4C Australian Competition Policy: Recent Developments

Major recent improvements in the Competition Policy over the past 10 years include:

- On 1 March 2004, the Senate Economic References Committee released its report into “The effectiveness of the *Trade Practices Act 1974* (TPA) in protecting small business” (Senate Report). The Government tabled its response to the Senate Report on 23 June 2004 accepting some of the Report’s recommendations. The Government has commenced consultations with the States on proposed amendments to section 46 of the TPA.
- On 30 June 2003, the ACCC launched a formal leniency policy to encourage whistle blowers to come forward and expose hard core cartel activity (which is prohibited under section 45 of the TPA).
- In May 2002 the Government indicated that airport-specific access regulation would not continue to apply, following a Productivity Commission inquiry report that concluded there were insufficient grounds for an airport-specific access regime as the general access provisions available under Part IIIA of the TPA (and Part IV) provide sufficient safeguards for those seeking access to airport facilities. Accordingly, section 192 of the Airports Act was repealed on 6 September 2003 by the *Civil Aviation Legislation Amendment Act 2003*.
- In 2002, an independent committee undertook a review of the competition provisions (Part IV) of the TPA and their administration (the Dawson Review). The Government has introduced the Trade Practices Legislation Amendment Bill 2004 to implement the recommendations accepted by Government. The amendments seek to improve existing processes by providing for greater accountability, transparency, timeliness and efficiency which will benefit both business and consumers.
- In December 2002, the Australian Parliament passed amendments to Part XIC of the TPA and the *Telecommunications Act 1997* to facilitate timely access to basic telecommunications services; facilitate investment in new telecommunications infrastructure; and encourage a more transparent regulatory market.
- In August 2002, the Australian Government repealed the *Prices Surveillance Act 1983* (PSA) and inserted a new part (Part VIIA) into the TPA, following an inquiry by the Productivity Commission. Under Part VIIA, prices surveillance applies only to those markets where, in the view of the Minister, competitive pressures are not sufficient to achieve prices and protect consumers.
- The Government will be introducing legislative changes to amend the objectives, scope and operation of the National Access Regime (Part IIIA of the TPA and Clause 6 of the Competition Principles Agreement), following a Productivity Commission review conducted in 2001.
- In June 2001, the TPA was amended to facilitate access for small business and consumers to remedies under the TPA.
- In October 1999, the Productivity Commission completed an inquiry into the impact of National Competition Policy on rural and regional Australia. The Government endorsed the thrust of the Commission’s recommendations, which were directed at improving the way in which competition policy is implemented.

- On 8 July 1999, a new Part VB was inserted into the TPA to prohibit price exploitation or excessive profit-taking resulting from the implementation of the New Tax System, which included the Goods and Services Tax.
- In 1997, a National Electricity Code was authorised to establish a framework for third party access to the electricity network.
- In 1997, a National Third Party Access Code for national gas pipelines systems was established.

Annex 4D Australian Customs' Role in Enforcement of Intellectual Property Rights at the Border

The Australian Customs Service (Customs) administers border provisions contained in the *Trade Marks Act 1995* and the *Copyright Act 1968*. The legislation complies with the requirements of the Trade Related aspects of Intellectual Property Rights (TRIPS) Agreement.

The Customs' role primarily is focused on the detection and seizure of infringing imported goods. After seizure the matter becomes a civil consideration where the intellectual property rights owner may take civil action against the importer. If no such action is initiated then the legislation requires Customs to return the goods to the importer. It is open to the importer to forfeit the goods to the Commonwealth prior to any civil action being initiated.

Owners of trademarks and copyright have prime responsibility for taking measures to protect their rights. This includes the registration of their trademark or stating where copyright is claimed as required by law and notification to Customs that they own the rights to be protected.

To protect trade marks or copyright material from counterfeit, pirated or unauthorised importation, the owner, or in some cases an authorised user, must have a Notice of Objection in place with Customs. The Notice is a legal document that allows Customs to seize imported infringing goods, which are under Customs' control, covered by the Notice.

A Notice of Objection is valid for two years and can be re-lodged to ensure ongoing protection. If the Notice is no longer required, the owner may withdraw it at any time. Separate Notices are required for trademarks and copyright material.

A security of \$A10 000 is required for the lodgement of a Trademark Notice of Objection and \$A5 000 for the lodgement of a Copyright Notice of Objection.

Not every consignment of goods that enters Australia presents a risk in terms of the border controls that Customs administers. Customs encourages trade mark and copyright owners and the public to provide information that will assist Customs to identify and intercept suspected infringing goods.

Where a Notice of Objection is in place and Customs seizes importations that infringe intellectual property, the seized goods are held for ten working days. In this period:

- the objector will commence legal action, or
- the objector will consent to the release of the goods, or
- the importer will voluntarily forfeit the goods, provided civil action has not commenced.

If the right's owner does not commence legal proceedings within ten working days of receiving the notification of seizure (or, if the period is extended, within a further ten working days), Customs must release the goods to the importer, subject to all other legislative requirements being met.

If the right's owner commences legal action within the prescribed period, the court will make an order about the goods, for example forfeiture of infringing goods to the Commonwealth. Customs disposes of forfeited goods under instruction from the court.

The importer of infringing goods has the option of forfeiting the goods to the Commonwealth prior to the commencement of any civil action. Goods are then the property of the Commonwealth and disposed of in accordance with legislative requirements.