# Index

Agency costs

```
definition, 13
 promoting orthodoxy of, 12-13
 Australian Pipeline Ltd v Alinta Ltd, 149
 Takeovers Panel, challenge to role, 149
Assignment of contractual rights see Contractual rights
Australian Competition and Consumer Commission (ACCC)
 establishment of, 306
 leniency policy, 293, 296
    immunity, under, 293
    implications for, 296-297
    new policy, 293, 314-315
 mergers, authorisation of, 283
    determinations, 285-287
    market share considerations, 314-315
 petrol prices regulation see Petrol price collusion
 proposed increases in powers for, 233, 236, 315, 388
 proposed merger with Australian Prudential Regulatory Authority (APRA), 385
 regulatory regime, 306
    cartel conduct, 236, 268, 293, 385-387
 representative actions on behalf of third parties, 315
 value of witness statements as evidence, 296-297
 Visy case, 385-387
Australian Competition Tribunal
 mergers, role in, 283, 285-286, 289, 292
    power to grant immunity, 283
 role in competition law and market regulation, 56-60
 Sydney Airport Corporation Ltd v Australian Competition Tribunal, 56-58
    judicial review by Full Federal Court, 58-59
    SACL appeal to High Court, 60
Australian Law Reform Commission (ALRC)
 client legal privilege report, 316
 gene patenting and human health, report, 425
 legal risk in international transactions, 334
 privacy law review, 434-437
Australian Securities and Investments Commission (ASIC)
 chairman, appointment of new, 221-224
 company law and securities, 221-224
 failure in ASIC v Citigroup Global Markets Australia Pty Ltd case, 234
 further funding by government, 316
 infringement notice provisions issued by, 70
 leniency policy, 238, 296-297
```

Vines v ASIC appeal, 221-224

### Baxter case

```
ACCC v Baxter Healthcare Pty Ltd, 316, 374-378
consequences of Baxter's anti-competitive conduct on supply contracts, 377, 378
Crown immunity, 375, 377
derivative Crown immunity, 375-376, 377
government tenders and Baxter's pricing, 374, 377
broader operation of Trade Practices Act, 316, 374
```

#### **Book reviews**

```
An Outline of the Law of Partnerships, 438
Annotated Trade Practices Act 1974, 306
Class Actions in Australia, 61
Employers, Ex-employees and Trade Secrets, 143
Equity in Commercial Law, 228
Jacobs' Law of Trusts in Australia, 379
```

#### **Boral** case

impact of, 313-314, 360, 362

#### **Boycotts**

exclusionary provisions and, 5, 33-45, 315

#### **Broadband facilities**

Australia, in, 150

### Carbon trading

```
emissions abatement measures, 225-227

Clean Development Mechanism under Kyoto Protocol, 227
federal government response, 225
State government responses, 226
forest-based carbon sequestration, 226
greenhouse effects issues, 69, 225
international developments, 227
Prime Ministerial Task Group on Emissions Trading, 225-227
```

## Cartel offence

```
cartel conduct, 235-237, 240, 249, 293, 297, 387
   Visy case, 385-387
concept of "bad rigging", 244
conspiracy to subvert competition, as, 275-277
constraints on prosecutorial/judicial discretion to dismiss charge, 268-269, 275
corporate criminal responsibility, 248-249, 273-275, 276-277, 385
   potential limiting effect of, 247
definition, 236-237, 244
   alternative approaches to, 266-277
   need for public review, 237-238
delay in implementation, 236, 385, 387
dishonesty, 235, 237, 241-242, 254, 267, 387
   concept as element of offence, 236-237, 241-242, 250, 253, 275
   concept of moral obloquy, 242
   Criminal Code, under, 254, 261-262, 268-276, 386
   disclaimers, 238-239
   element of dishonesty under government proposals, 250-252, 387
```

```
element of dishonesty under UK Enterprise Act, 252-253
    excessive subjectivism and risk of inegalitarian bias, 265-266
    Ghosh test, 254-255, 261-262, 265-267
    other jurisdictions, in, 253-254, 255
    problems in applying dishonesty, 260-261, 277
    problems of excessive subjectivity in context of cartel offence, 263-265
    problems of excessive subjectivity in offences against property, 262
    redefining dishonesty for cartel offence, 267-268
    standards of ordinary people, 254-266
    UK, in, 252-253, 254, 255-257, 277
 exemptions and defences, 272-273, 276
 government proposals for criminalising serious cartel conduct, 235-236, 241, 244-252, 277, 387
    agreements among members of network competing against another network, 243
    agreements between negotiating partners to engage in joint negotiations, 243-244
    agreements with no sustained effect on price levels, 243
    collaborative agreements entered into to create value, 243
    culpability and prosecutorial discretion, 246-247
    defining serious cartel conduct, 239-250
    degree of harm or danger to competition, 246
    impact if change of government on 24/11/07, 387
    maximum penalties, 235, 250
    sanctions and rules of evidence, 249-250
    threshold of $1 million value of affected commerce, 244-247
 government working party, 236
    non-publication of report, 237
 intention to dishonestly obtain a gain, 239-240, 242-244
 memorandum of understanding (MOU) between ACCC and DPP, 239, 240-241, 246
 mental elements, 247-248, 269-271, 275-276
    potential limiting effect of additional, 247
 OECD and ICN definitions of serious cartel conduct, 254
 per se offence, as, 244
 physical elements of, 271-272, 276
 proposals by Dawson Committee for cartel criminalisation, 235, 237, 244, 254, 277, 387
 Trade Practices Act, 237, 239, 248-249, 267, 277, 385-387
    general prohibition against anti-competitive agreements, 272, 314
    parties embarking on joint venture, 263
Chinese walls
 likely amendments to Corporations Act 2001, 70
Class actions
 Australia, in, 61, 390-397
 book review, 61
 capturing the class, 392-393
 commencing group proceedings, 391-392
 Dorajay Pty Ltd v Aristocrat Leisure Ltd, 397
 fraud on the market, 390, 393-6, 387
```

assumptions of theory, 394-395 United States court considerations, 395

proof of validity, 393-396, 387

High Court decision in Sons of Gwalia Ltd v Margaretic, 390-391, 396

## Clickwrap electronic contracts see Electronic contracts

#### Climate change

Australian Business Roundtable on Climate Change, 225 recommendations, 226

carbon trading see Carbon trading

Intergovernmental Panel on Climate Change (IPCC), 225

initiatives by state and territories legislation, 226

international developments, 227

legislation for sustainable development see Sustainable development law

#### Coal mining

cases involving environmental groups and sustainability principles, 136-139 industry

argument for fossil fuels, 225

### Company law

disclosure issues, 70-71 securities, and, 221-224, 370-373

transnational companies, affecting see Transnational companies

Treasury consultation papers, 70-72

#### Competition law and market regulation, 5, 69, 150, 297

Australian mandatory access regime, 54-60, 388

advantage to infrastructure owners and operators, 59

Productivity Commission recommendations, 59

Trade Practices Amendment (National Access Regime) Act 2006, 59

BHP Billiton Iron Ore Pty Ltd v National Competition Council, 54-56

scope of "production process" exclusion, 54-56

"Birdsville Amendments" to TPA, 313-315

date of Royal Assent, 317

effect on pricing decisions of companies, 315, 316

changes proposed for, 233, 297, 313-316, 387-388

collective bargaining regime, 69

electronic contracts see Electronic contracts

gene technology issues see Gene technology

intellectual property and see Medical biotechnology

mergers see Mergers

National Competition Policy reforms, 186, 432

sustainable development see Sustainable development law

Sydney Airport Corporation Ltd v Australian Competition Tribunal, 56-60 charges dispute on maximum take-off weight (MTOW) or passenger service charge (PSC), 56

cost changes, effect on competition, 57

dependency considerations, 57, 59

determination by tribunal, 56-57

efficiency considerations, 57-58, 60

Full Federal Court judicial review on question of law, 58-59

SACL appeal to High Court, 60

## Conflict of interest

Australia, significance in, 5

### Constitution

```
extent of regulation of transnational companies, under, 347 corporations power, 348-349 external affairs power, 347, 349-351 trade and commerce power, 347-348
```

## **Consumer protection**

```
anti-competitive protections
   certain business interests, for, 52, 314
   price fixing, 398-389
Australian legislation, review of, 5, 46-53, 72, 233
   agenda for Productivity Commission, 47
   background to review, 46-47
   key issues, 48-53
   reasons for, 47-48
   website for terms of reference, 47
consultation paper on consumer policy framework, 72
enhancement of consumer interests and representation, 52, 233
national co-ordination and consistency, 50-51
personal data, proposed ALRC changes to see Privacy law
possible impact if change of government on 24/11/07, 387-388
regulatory review framework, 48-50, 52
   economic efficiency, 48
   regulatory efficiency, 47, 49-50, 52-53
   social justice considerations, 50
removing red tape, 50-51
   role of Red Tape Taskforce, 46, 47, 49, 50
unfair contract terms, 51-52
   "clickwrap" and other electronic contracts, in, 152-1580
unnecessary duplication, 50-51
```

## Contractual rights

```
assignment of, 140-142
   unresolved issues, 140-142
commercial contracts, 215-220
   implied duty of good faith, 215-218
   meaning of contract, arrangement or understanding, 403-405
   nature of implied duty, 218-219
contractual damages, 104, 210
   claims in tort, 211-215
   rules for 104-106
contractual exclusion of good faith see Good faith
insurance, in see Insurance contracts
Pacific Brands Sports & Leisure Pty Ltd v
Underworks Pty Ltd, 140, 217
   analysis, 141
   conclusion, 140
   facts, 140
   judgment, 140-141
superannuation, in see Superannuation
```

definitions, 154-155

Digital Rights Management (DMR), 153

operation of rules, 170-2

# Corporate governance issues, 5, 7, 10-16 compliance fatigue, 11-12, 15 disengagement and "box ticking", 12 law and politics debate, 10-11, 13-14 legal regulation by "Reaganomic" economic theory, 15 promoting orthodoxy of agency costs, 12-13 resource-based politics, 13-14 SME-specific solutions, 16-17 trickle-down effects relevant to SMEs, 15-16 small business organisations see Small business organisations transnational companies see Transnational companies **Corporations and Markets Advisory Committee (CAMAC)** report on corporate social responsibility, 5, 70-71, 389 response to report, 70-71, 389 Council of Small Business Organisations of Australia (Cosboa), 7 **Dawson Review** recommendations regarding cartel criminalisation, 235, 237, 244, 254, 277, 387 Trade Practices Act, of, 33, 46, 69, 150, 233, 314 Direct marketing ALRC proposal regarding, 435 **Directors** breach of duties, 221-222, 370-373, 385 court decisions, 221-227, 370-373 Deputy Commissioner of Taxation v Dick, 370-372 Edwards v Attorney-General (NSW), 370 Vines v ASIC, 221-224 business judgment rule, 71 expansive application of s 1318 of Corporations Act, 370-373 high standards for, 221 hostile takeover bid, liability in, 221-224 remuneration packages, 388-389 scope of director's duties, 221-224, 228, 372-373 **Electronic contracts** consumer protection regulation, 152-154, 172-174, 177 adequacy of current regime, 157-165 attempts to oust relevant consumer protection laws, 172-174 future regulation, 176-180 Productivity Commission inquiry, 152-153 contract formation issues, 155-157 brousewrap, 157 clickwrap, 156-157 shrinkwrap, 156

End Use Licence Agreements (EULAs), 154-155, 157-159, 165-168, 170, 173-174

```
sui generis scheme, 178-179
unfair terms in "clickwrap" and other contracts, 152-180
analysis of, 165-76, 178
changes other than specific provision, 167-169
choice of law and other venue clauses, 172-173
contracting out of exceptions to copyright, 175-176
mandatory arbitration clauses, 173-174
notice clauses, 169-170
penalty clauses, 175
provisions for future variation, 166-167
time limitations, 174-175
variations to contract, 165
variations to usage rules for digital content, 170-172
```

## Employee share ownership (ESO) plans

```
Australia, operation in, 73-92
   background to, 77-80
   conditional relief to normal disclosure requirements, 79-80
   details of tax concession regime, 78-79
   effects of participation in, 73-75
   National Australia Bank Ltd, 73-75, 80, 81-87, 92
   Palm Springs Ltd, 73-75, 80, 87-91A, 92
   rationale and regulation, 75-80
improved enterprise performance, 73-75, 90-91
ownership objectives, 73-74, 76, 82-84, 87, 88-90
remuneration objectives, 73-74, 76, 84-85, 90, 91, 92
research into, 74-75, 77
   methodology, 80
Shared Endeavours inquiry (Nelson Report), 73, 74-75, 79, 81
tax incentives, 73-74, 75, 77, 86-87
   deferral concession, 78-79
   exemption concession, 79
workplace change objectives, 73-74, 76-77, 81, 84-85, 90, 92
```

### **Employers**

duty of "good faith" in employment relationship, 205-206 employees records, ALRC review of privacy exemptions, 435-436 equal opportunity for women *see* **Equal opportunity in workplace** ex-employees and trade secrets, 143

### **Energy regulation**

issues, 5, 69

### **Environmental law**

challenges of climate change, 225-227
ecological sustainable development see Sustainable development law international developments, 227
Kyoto Protocol, 225, 226, 227
National Emissions Trading Taskforce, 226
New South Wales Greenhouse Gas Abatement Scheme, 226
Prime Ministerial Task Group on Emissions Trading, 225-227

### Equal opportunity in workplace

```
legislation in Australia, 338, 351-356
agency regulating, 343
cultural relativism, arguments for, 354-356
economic reasons for extending, 353-354
legal and ethical reasons for extending, 352
overview of statutory obligations, 352
social reasons for extending, 354
```

### **Equity**

commercial law, obligations in, 228 transnational companies see Transnational companies

### **Exclusionary provisions under Trade Practices Act**

strict liability for contamination, 197, 198

```
background, 33-34
consideration and construction of ss 4D & 45, 41-45, 293
corporations, prohibitions for, 34, 41-44
recent case law, 35-44
ACCC v Liquorland (Aust) and Woolworths Ltd, 5, 37-44
Rural Press Ltd v ACCC, 35-37
```

## Gene technology

```
Australian medical biology industry, 409-412, 421, 425, 431, 433
    innovation in see Medical biotechnology
 Competition Principles Agreement (CPA), 181, 182, 184, 186, 190-191, 202-203
    government policy on unnecessary restrictions on competition, 187, 201
    guiding principle, 187-188, 190
    pro-competition template, 185, 190
    regulation reforms, 185-190, 201
 Council of Australian Government Agreements (CoAG), 184-185
 developments leading to regulatory review, 182-184, 186
 Gene Technology Act 2000 (Cth), 181, 189, 190
    acceptance of risks posed by GMOs, 182, 189-190, 200
    background issues, 182-183
    dual purpose, 181, 192
    existing regulations, 185-186
    objects, 189, 194-199, 202
     "product" rather then "process" regulation, 195
    proposed regulations, 186-190
    regulatory compliance costs, 188
    review, 182-184, 186, 190-202
    scope of, 191-194
genetically modified organisms (GMOs), 181, 189, 191
    appropriate balance in regulation of, 182, 189-190
    appropriate form of regulation for, 186, 195
    consideration in Panel Report, 192-198, 202
    environmental impacts of, 183, 195-198, 202
    health and safety issues, 183, 192, 194-196, 202
    hurdles for new or competing GMOs and GM products, 189
    promotion of commercial transactions in, 189, 193, 196
```

```
government policies, 185-190, 201
    biotechnology, 186
 Panel Report, 182, 184, 190-201
    conclusions, 192, 198
    criticisms of, 191-201
    regulatory burden, 199-201
    rejection of CPA's analytical approach, 190-191, 196, 198-199, 200, 202-203
 productivity, relevance to, 181, 203
 public interest considerations, 182, 187-188, 191, 194
    national public and stakeholder consultation process, 184
    public trust and legitimacy, 182-183, 194
 Regulatory Impact Statements (RIS), 186, 189, 191, 194, 202
    Checklist, 187
    key elements in, 186-187
    outcome and effect, 189-190, 197
 removal of anti-competitive arrangements, 184-185, 201
 review of National Competition Policy, 186, 432
Good faith
 commercial contracts, in, 215-220
    implied duty, 215-218
 nature of implied duty, 218-219
 common law obligation of, 110-111
 community standards, 113-114
 conduct, duty, 218-219
 contractual exclusion, 111
    entire agreement, 118-120
    express, 114-115
    implied exclusion, 118-120
    inconsistent express contractual provision, 115-117
    judicial responses to, 111-114, 120-121
    sole discretion, 117-118
 employment relationship, duty in, 205-206
 extending the duty, 206-209
    enforcing the extended duty, 209-210
 insurance contracts, in see Insurance contracts
 neoformalism, 112
 reasonable, 112-113, 202, 218-220
    High Court view, 219-220
 superannuation, regarding see Superannuation
 Workers Compensation Act (NSW), plaintiff employee claim in Supreme Court, 211
Government Insurance Office (GIO) appeal case
 director's liability during hostile takeover bid, 221-224
    Corporations legislation, 222-224
 due diligence issues, 223-224
 majority decision of NSW Appeal Court, 222-224
 statutory duty of care, 222-223
Hague Conventions
 application, 318, 325, 334
 Choice of Court Convention, 318, 325-326
```

```
Hague Conventions - continued
 Convention on International Child Abduction, 336
 Evidence Convention, 333-334
 Service Convention, 334-335
Indemnity
 allocation of risk between contracting parties, 93, 107-108
 broad meaning, 93
 categorisation of, 95-96
 commercial dealings, use in, 93-94, 107-109
 definition, 94-95
 drafting of, 93-109
    complexity, 93
    concept of commercial construction, 97-98
    construction, first principles of, 96-97
    rules of construction, 96-102
    special rule, whether, 101-102
 effect of Brambles decision, 98-102
 functions, 93
 rules of assessing contract damages, 102
    application to claims under indemnities, 102-109
    Damages Rules, 104-108
    difference between debt and damages, 104
    issue of relevance to parties, 102
    rules for contractual damages, 104-108
    The Fanti case, 103-104
Infringement notice provisions
 issued by ASIC, 70
 opposition to, 70
 Treasury consultation paper, 70
Insolvency
 cross-border insolvency, 326-331, 332
 defences for insolvent trading under Corporations Act, 72
    inadequacy of, 373
 shareholders claims against insolvent companies, 390-397
    capturing the class, 392-393
    commencing group proceedings, 391-392
    Dorajay Pty Ltd v Aristocrat Leisure Ltd, 397
    fraud on the market, 390, 393-396, 387
    High Court decision in Sons of Gwalia Ltd v Margaretic, 390-391, 396
    proof of validity, 393-396, 387
Insurance contracts
 good faith in, 204-205, 206-210
    claims in tort, 211-215
    concurrent liability in tort and contract, 212
    damages for breach of contract, 210
    nature of duty, 218-219
 total and permanent disability (TPD) cover, 206-208, 210, 212
```

### Intellectual property see Medical biotechnology

#### International commercial litigation

Asian perspective, 318-337 bilateral level, 319 challenges and dynamics of international trade, 318, 337 complexities, 319-320 civil procedure, 321-323 cross-border insolvency, 326-331, 332 enforcement of judgments, 335 evidence, assistance with, 333-334 freezing and search orders, 332-333 Hague Conventions, 318, 325, 334 Choice of Court Convention, 318, 325-326 Evidence Convention, 333-334 Service Convention, 334-335 international commercial arbitration, 319-321 judicial assistance, 331-332 judicial comity, 336-337 judicial globalisation, 335-336 LAWASIA, role of, 321, 323, 337 Model Principles of Transnational Civil Procedure, 321-323 multilateral level, 318 regional level, 318 report by ALRC on legal risk in international transactions, 334 Seoul Statement on Mutual Assistance, 331 service, 334-335 UNCITRAL, 318, 328 UNCITRAL Model Law, 319, 329-333 UNIDROIT, 318, 321 venue disputation, 323-325

### **International Conventions**

### OECD see Organisation for Economic Development and Cooperation (OECD)

## International maritime leasing transactions

```
arrangements for taxation of profits, 5, 18-32
   background, 18-19
   considerations by Commissioner of Taxation, 18, 25, 31-32
charter fees and payment of royalties in McDermott Industries, 22-26, 31
   consequences of Full Federal Court decision, 25-26
   substantial equipment and jurisdiction issues, 23-24
Draft Taxation Ruling TR 2006/D8, 27-31
   consequences of, 31
   types of leases distinguished, 27-29
international tax treaties, under, 19-21, 25-26
   business profits, 20-21, 23
   permanent establishment, 23-26, 29-31
   purpose, 19
   Singapore-Australia treaty, 22-26
   UK/US-Australia treaties, under, 21, 26-31
OECD Model Tax Convention on Income and Capital, 19-21
```

Liquor licences

```
decision in ACCC v Liquorland (Aust) and Woolworths Ltd, 5, 37-44
    Ettamogah, 39-40
    Global Beer, 40
    Jin Ro, 40
    Palms Village, 40
Media
 cross-ownership rules, 69
Medical biotechnology
 Australian medical biology industry, 409-410, 421, 425, 431, 433
    market power, 410-412
    ownership of upstream biomedical patents, 425
    role of competition policy in fostering innovation, 431-433
 biotechnology companies, 409
 characteristics of high technology industries, 408
 follow-on innovation in biomedical research, 418-425, 433
    cumulative innovation and grant of patents, 419-420
    cumulative innovation literature, 418-419
     "ex ante" versus "ex post" contracting, 423-424
    explosion in up-stream patents, 422
    factors supporting greater rights for researchers, 424-425
    incentives to maximise, 420-425
    innovation incentives, bargaining to restructure, 421
    long pre-commercial phase involved, effect of, 424
    research capabilities and, 422-423
 intellectual property and competition law, 407-408, 410, 416-417, 425-433
    barriers to entry and market structure, 411-412
    competition and innovation, 416-417, 420
    competition treatment of intellectual property, 429-431
    concentration levels within medical technology industry, 417
    concentration versus competition, 412-413
    diverging approaches to complementary aims, 426-427
    dynamic efficiencies, court consideration of, 411
    finding a balance, 427-431
    general principles and policy debate, 427-428
    industry structure/market behaviour, relevance of, 410-417
    monopoly theorists, 414-416
    reconciling aims, 425-426, 427
 patent protection, 409, 417, 418, 425
    dependence on, 425
 patents, 408, 410, 419-420, 425-426, 433
    adequate incentives, 421-425
    defensive patenting, 412
    extent of patenting activity, 410
    facilitation of innovation, 413, 414, 416-417, 420, 432
    licensing, 418, 423-424, 427, 431, 433
 Schumpetarian hypotheses, 414-416
```

availability of technological opportunities, 415-416

relationship between market structure and innovation, 414-415

relationship of firm size to innovation, 414

Australia, in, 69-70, 278, 283-291, 358

```
Mergers
```

```
ACCC role, 283, 285-287, 313-315, 359
    Australian Competition Tribunal, 283, 285-286, 289, 292, 360, 364
    Australian courts, 360, 362-364
    authorisation process, 283-284
    efficiency defence, 278-279
    merger authorisation determinations, 285-286
    merger clearance determinations, 286-288
    Merger Guidelines, 284, 359
    legislative regime, 283
    proposed acquisition of Berri by Coca Cola, 365, 367-369
    Trade Practices Act, under, 150, 233, 283, 291, 314-315, 358, 361, 363
 Canada, 278, 282
 efficiencies in merger authorisation determinations, 278-291
    international treatment of, 279-282
    justification of recommended change, 289-291
    lessons to be learned, 288-290
    parties to attempted to enumerate competitive effects, 289-290
    recommended changes, 288-291
    separating out pro-competitive effects, 290-291
 European Union, 278, 281-282, 288
 merger analysis, 358-369
    current Australian approach, 358-361, 369
    emphasis of Australian courts on constraints, 362-364
    Porter Five Forces Model, 358, 361-368
    some hypothetical mergers, 365-367
    structure-conduct-performance (SCP) model, 359-360, 363, 365, 369
 New Zealand, 278, 283-385, 288
    Commerce Commission, 284, 288
    Mergers and Acquisitions Guidelines, 284-285
 United States, 278, 279-280, 288
Mining sector
 application of sustainable development principles to, 122-139
    federal and state legislation in Australia, 127-132
    inadequacy of Australian Minerals Industry Code, 126
    judicial interpretation in recent coal mining cases, 136-139
    key State mining legislation, 130-132
 International Council on Mining and Metals Framework (ICMM), 124-125
    Assurance Procedure, 125
    Global Reporting Initiative (GRI) Guidelines, 124-125
    Sustainable Development Framework Principles, 127
 Minerals Council of Australia (MCA) 2004 report, 126-127, 132
```

operation of MCA's Enduring Value framework, 126-127, 132

report of Australian Minerals and Energy Environment Foundation, 126

"polluter pays" principle, 123

concept see Sustainable development law

sustainable development

#### Mining sector - continued

self-regulation approach to, 126-127, 139 Victoria's Mineral Resources Development Act 1990 amendment and renaming of, 131-132

### **National Competition Policy (NCP)**

consumer protection review, 46-47 implementation of, 387, 432 technical innovation, 186, 432

### **National Grocery Pricing Inquiry**

proposed, 387

#### **Nelson Report**

Shared Endeavours inquiry, 73, 74-75

#### Occupational health and safety

```
concept of control in determining responsibility, 298-289, 205
absence of control as defence, 299
control not defined in legislation, 299
judicial decisions interpreting and applying, 299-305
duty of care, 298-289
extent of duty, 299
multiple concurrent duty holders, 299
relevant parties, 298
subject matter of duty, 299
OHS legislation, 298-304
operation of federal legislation, 299
Telstra Corp Ltd v Comcare Australia Pty Ltd, 300-301, 305
cases contrasted with, 301-302
other decisions, 302-304
```

## Organisation for Economic Development and Cooperation (OECD)

Convention on Combating Bribery of Foreign Public Officials, 341-342
Guidelines for Multinational Enterprises, 125-127
enforcement of, 125-126
Model Tax Convention on Income and Capital, 19-21
patenting activity, reported increase in, 410

## **Partnerships**

law of, 438

#### Petrol price collusion

```
ACCC difficulties in proving, 293-297, 398-399, 406 interlocking arrangements or understandings, 400 similar fact evidence, 405-406

ACCC v Leahy Petroleum Pty Ltd, 234, 293-297, 389, 398-406 background facts and evidence, 399-400 decision, 402 evidence, 400-402 first Leahy Petroleum case (Ballarat Petrol), 293-294, 399, 405-406 second Leahy Petroleum case (Geelong Petrol), 295-296, 297, 398-402, 405

APCO Service Stations Pty Ltd v ACCC, 294-295, 297, 399, 404
```

```
collusion, 296, 398-389
proof of, 293, 398-399
contract, arrangement or understanding, 403-405
price fixing, proof of, 296, 399-400, 405-406
vertical price fixing, 404
price fluctuations, 402, 406
United States, in, 404
```

## **Petroleum Commissioner**

proposed appointment of, 387

#### Privacy law

ALRC review, 434-437
cause of action against invasion of privacy, 436
clarifying consent, 435
direct marketing and sector specific regulation, 435
enforcement powers and remedies, 436
national consistency, 435
removal of exemptions, 435-436
unified privacy principles, 434
statutory right to privacy, 436

#### Private equity acquisitions

Australian markets, in, 69-70, 221 Senate enquiry, 69, 221 Corporations Act 2001, proposed changes to, 70-71

## **Productivity Commission**

consultation paper on consumer policy framework, 72 consumer protection legislation, review of, 46-53, 72 website for terms of reference, 47 inquiry into unfair terms in consumer contracts, 152-153 National Competition Policy (NCP) review, 46-47, 432 recommendations on mandatory access regime, 59

### Remuneration packages

arrangements, 388 shareholder consideration of, 388-389 possible cap on executive remuneration, 388

### Sanctions in corporate law

review by Treasury, 71-72

### Shareholders

claims against insolvent companies, 390-397 remuneration packages, powers regarding, 388-389

## Singapore

Singapore-Australia international tax treaty, 22-26 Art 4, 23-25 Art 5, 23 Art 10, 23 decision in *McDermott Industries*, 22-26, 31

```
Small business organisations
 ABS definition, 7
 common facets, 8
 concept of small and medium enterprises (SMEs), 7-10
    lacuna creating market uncertainty, 8
 corporate governance issues for SMEs
    available solutions, 16-17
    difficulties, 8-9, 13
    inapplicability of "Rolls-Royce" governance, 15-16
 predatory pricing and "Birdsville Amendments" to TPA, 313, 317
 relevance of Salomon's case, 9
    false legacy for SMEs, 9-10
 resource-based politics and SMEs, 13-14
 trickle-down effects relevant to SMEs, 15-16
Superannuation
 duty of good faith, 151, 204-205, 215
 total and permanent disability (TPD) cover, 206-208
    plaintiff's claim for benefits, 210, 212
Sustainable development law
 challenges for, 128, 132, 225
 concept of sustainability, 122, 132
    ecological sustainable development (ESD), 128, 132
    environmental impact assessment, 122-123, 133-135
    judicial interpretation of, 132-139
    sustainable development, 122, 131-132, 139
 corporate social responsibility, 123-127, 338
 Environment Protection and Biodiversity Conservation Act 1999 (Cth) (EPBC), 132
    Federal Court interpretation in Isaac Plains case, 136-137
 Global Compact, 123-124
    name and shame mechanism, 124
 initiatives by state and territories, 226
 international arena, in, 227
 International Council on Mining and Metals Framework (ICMM), 124-125
    Assurance Procedure, 125
    Global Reporting Initiative (GRI) Guidelines, 124-125
    Sustainable Development Framework Principles, 127
 mining sector, in, 122, 124-139
    Australian Minerals and Energy Environment Foundation, 2004 report, 126
    Australian Minerals Industry Code, inadequacy of, 126
    federal and state legislation in Australia, 127-132
    key State mining legislation, 130-131
    Minerals Council of Australia (MCA) 2004 report, 126-127, 132
    operation of MCA's Enduring Value framework, 126-127, 132
    recent coal mining cases, 136-139
    self-regulation approach, 126-127, 139
    Victoria's Mineral Resources Development Act 1990, renaming of, 131-132
 OECD Guidelines for Multinational Enterprises, 125-127
    enforcement of, 125-126
 "polluter pays" principle, 123
```

```
soft law approach and industry codes, 122
Australian context, 126-127, 132
international context, 123-126
state incorporation of principles in key legislation, 129-132, 226
```

#### **Takeovers**

```
foreign, efficacy of rules, 149
GIO appeal case see Government Insurance Office (GIO) appeal case private equity organisations, 69, 149, 221
attempted QANTAS takeover, 149, 221
standards for directors involved in, 221-224
```

#### **Takeovers Panel**

Australian Pipeline Ltd v Alinta Ltd effect of Federal Court decision on role, 149 discussion paper on private equity organisations, 69

#### Taskforce on Reducing the Regulatory Burden on Business

Red Tape Taskforce, 46, 47, 49, 50

#### **Taxation**

```
domestic taxation legislation, 19
international maritime leasing profits, 5, 18-32
Draft Taxation Ruling TR 2006/D8, 27-31
International Tax Agreements Act 1953, 19-20
OECD Model Tax Convention on Income and Capital, 19-21
tax concession regime in employee share ownership (ESO) plans, 73-74, 75, 77, 78, 86-87
deferral concession, 78-79
exemption concession, 79
```

### **Taxation Ombudsman**

possible abolition of office of, 150-151

## Telecommunications industry

ACCC role, 150

## **Trade Practices Act 1974**

```
amendments, 5, 59, 69, 150, 233, 237, 313-317
   proposed, 233, 237
   s 4D & s 45(2), 5, 33-45
   s 46, 313-316, 317, 388
   s 50, 316
annotated overview, 306
"Birdsville Amendments", 313-315, 317
   pricing decisions of companies, effect on, 315, 316
broader operation under recent High Court decision, 316, 374-378
cartel offences see Cartel offences
encouragement of vigorous but fair competition, 5, 150
exclusionary provisions and boycotts, 5, 33-45, 315
mandatory access regime, 54-60
   operation of Pt IIIA, 5, 54-56, 58-59, 60, 388
market regulation see Competition law and market regulation
mergers, 150, 233, 283, 291, 314-315, 358, 361, 363
unconscionable conduct, 150, 233-234, 306
```

# Index Trade Practices Amendment (National Access Regime) Act 2006 commencement, 33, 59 implications for infrastructure owners and operators, 59 Trade Practices Legislation Amendment (No 1) 2007 criticism of, 313-315 date of Royal Assent, 317 Trade secrets book review, 143 Transnational companies Australian corporations operating overseas, 339-341, 356-357 comparison with obligations when operating in Australia, 338, 357 corporate law and conduct, 338, 344-346, 356-357 Baia Mare cyanide spill in Romania, 345 equity issues, 338-339, 357 external affairs power, regulation under, 347, 349-351 human rights and related social responsibilities, 338-339, 342-345 international law, developments in, 341 International Trade Integrity Bill 2007, 339 Ok Tedi mining disaster in PNG, 339, 345 Corporations Act 2001, changes proposed for, 339-343, 357 conflict of laws, 346 Corporate Code of Conduct Bill, 338, 342-343 overseas obligation amendment, 343-345, 351

problems of regulating related entities, 346 equal opportunity in workplace, 338, 343, 351

potential barriers and criticisms, 345-347

application to transnational obligations, 351-356

cultural relativism, arguments for, 354-356

economic reasons for extending, 353-354

legal and ethical reasons for extending, 352

overview of statutory obligations, 352

social reasons for extending, 354

international commercial litigation see International commercial litigation

OECD Convention on Combating Bribery of Foreign Public Officials, 341-342

"overseas operation" defined, 343

UN document on responsibilities of, 339, 341

UN sanctions, 339

## Trustee

duty of good faith, 204-210 statutory changes in duties and powers of, 379

#### **United Nations**

human rights responsibilities of transnational corporations, 339, 341 UNCITRAL, 318, 328 UNCITRAL Model Law, 319, 329-333

#### Water reform

issues, 5, 69

report by Intergovernmental Panel on Climate Change (IPCC), 225

## **Work Choices**

High Court decision in *New South Wales v Commonwealth*, 348-349, 350 Labor Party criticism of legislation, 388

## Workers' compensation

plaintiff employee claim for benefits in NSW Supreme Court, 211

## Workplace relations

legislation, 151