



Australian Government
Department of Foreign Affairs and Trade

Strengthening Commercial Laws in the APEC Region





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APEC Branch
Department of Foreign Affairs and Trade
R G Casey Building
John McEwen Crescent
Canberra ACT Australia 0221

Telephone: (+61) 2 6261 1111

Facsimile: (+61) 2 6261 3009

Email: apec@dfat.gov.au

Internet: <http://www.dfat.gov.au>

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CONTRIBUTORS

Authors

Professor Michael A Adams is a Professor of Corporate Law at the Faculty of Law, University of Technology, Sydney (UTS) and Assistant Director of the UTS Centre for Corporate Governance. He is the former President of Chartered Secretaries Australia and Chair of the Australasian Law Teachers Association. He was the 2000 recipient of the Australian University Teachers' award in "Law and Legal Studies" and works as a consultant to the law firm Blake Dawson Waldron. Professor Adams has been teaching corporate law, securities regulation and management law for 19 years in the United Kingdom, United States and Australia.


Professor Sam Blay is a former Dean of Law at the University of Tasmania, and is currently professor of law at UTS. Professor Blay's main teaching and research interests are International Law, the Law of Torts and International Trade Law. He has published extensively, and received major awards in his fields of specialisation. Professor Blay has developed and coordinated several short term capacity-building courses for senior lawyers and officials from China, Philippines and Vietnam.

Helen Burrows LL.M, BA (Hons) is a solicitor admitted to practise in the Supreme Court of New South Wales. Prior to admission, Ms Burrows worked as an author for the Thomson Company. She has worked for law firms in Australia and the United Kingdom and now works for Australian Legal Resources International (ALRI) in Sydney, managing international legal development projects. At ALRI, Ms Burrows helps design and implement capacity building and institution strengthening activities.

Professor Philip Griffith is a specialist in Intellectual Property Law at UTS with a particular interest in Patent Law and the Law of Trade Secrets. He has researched, written and taught in the field since 1972. He is interested in the legal, economic, social and policy considerations surrounding intellectual property regimes and patent protection of the processes and products of biotechnology and methods of treatment of the human body. Professor Griffith has presented papers at major international conferences on the topic of biotechnology and patent protection.

Jim Harrowell is a partner of national law firm Hunt and Hunt, one of six Australian law firms with a licence to operate in China, and has returned to practice having been the National Managing Partner. Mr Harrowell is the Chairman of Interlaw, an association of international law firms, and has 15 years experience in the delivery of legal services in Asia, particularly in China.





Bruce Johnston is a partner in the Melbourne office of Allens Arthur Robinson where he is a specialist in natural resources and energy law. He has over 20 years experience in the Asia-Pacific region, particularly in the areas of foreign investment, natural resources and energy, financial services and mergers and acquisitions. Mr Johnston was resident in Indonesia as a licensed foreign legal consultant to one of Indonesia's leading law firms for several years and has extensive experience of Indonesian transactions. He has advised the Indonesian Government on aspects of its energy sector reform as well as many well known international companies. He is a member of the International Legal Services Advisory Council, the Resources, Energy and Environmental Law Committee of the Law Council of Australia Business Law Section and the Energy Law Committee of LawAsia.

Maureen McLaughlin BA/LLB (Hons) is a Senior Associate and founding member of Phillips Fox's Vietnam team, opening the first foreign law office licensed in Hanoi in 1993. Phillips Fox now has branch offices in Hanoi and Ho Chi Minh City, with 8 foreign lawyers and 15 Vietnamese legal and support staff in its Vietnam team. Ms McLaughlin has over 10 years experience advising on all legal aspects of investing and doing business in Vietnam for a wide range of international companies. She is the editor of Phillips Fox's *Foreign Investment Laws of Vietnam*, a subscription service providing English translations of Vietnamese laws relating to foreign investment, and the editor of Phillips Fox's monthly *Vietnam Legal Update*. She is also a regular contributor of articles on Vietnamese law for publications in the Asia-Pacific region.

Dr David Morrison is the Director of the Australian Centre for Commerce and Taxation at the Faculty of Business, Economics and Law and Senior Lecturer at the TC Beirne School of Law at the University of Queensland. Dr Morrison's primary teaching and research interests are in the area of taxation law, including income tax, taxation system reform and taxation design and drafting. He maintains a research interest in corporations and insolvency law, particularly from an economic analysis of law perspective. He is also a Barrister-at-Law, Chartered Accountant and Fellow of the Taxation Institute of Australia.

David Russell QC is a barrister practicing in Sydney and Brisbane, principally in the areas of commercial, administrative and taxation law. He was President of the Taxation Institute of Australia from 1993 to 1995, Chairman of the Institute's International Relations Committee from 1995 to 2001, and President of the Asia Oceania Tax Consultant's Association from 1996 to 2001. He was a member of the National Review of Standards for the Tax Profession from 1992 to 1994, and a member of the Ministerial Consultative Committee for the Tax Law Improvement Project from 1995 to 1998.

Organisations

Allens Arthur Robinson is one of the largest law firms in the Asia-Pacific region. The firm is based in Australia (Sydney, Melbourne, Brisbane and Perth) and has a network of regional offices (Hong Kong, Phnom Penh, Port Moresby, Singapore and Shanghai) and a close relationship with one of Indonesia's leading law firms in Jakarta). They are a full service law firm with around 200 partners and 600 other legal professionals. The firm has internationally recognised experience and expertise in mergers and acquisitions, foreign direct and indirect investment, corporate and commercial law, natural resources and energy, banking and finance, capital markets, dispute resolution, intellectual property and technology law.

The Australian Centre for Commerce and Taxation, a recently established University of Queensland Centre, is situated in the Faculty of Business, Economics and Law and specialises in high level commercial and taxation law research and related advisory information. The objectives of ACCAT are to advance the quality of research and consultancy in commercial and taxation matters particularly with a focus on the Asia-Pacific region. The Centre will also lead research into areas associated with its existing teaching profile to provide for commercially applicable competencies in the areas of its specialisation.

Australian Legal Resources International is an independent non-governmental corporation of judges and lawyers that works to support countries seeking to establish or reinforce democracy, social justice, human rights and good governance.

Hunt and Hunt is a major national Australian law firm with offices in every capital city together with Newcastle, Shanghai and an affiliated office in Auckland. The firm is the Australian member of Interlaw, a legal association with 65 member firms in 110 major cities throughout the world. Hunt and Hunt represents a number of Australian and overseas clients in the region, focussing on China and the developing market in India.

Phillips Fox is the sixth largest law firm in the Asia-Pacific area, with 10 offices throughout Australia, New Zealand and Vietnam. Phillips Fox provides the highest quality legal and related services across a range of industries and specialisations, including insurance and financial services, banking and finance, business and corporate, competition and trade practices, construction, property, employment and industrial relations, intellectual property and information technology.

The University of Technology, Sydney is an Australian university with an international focus. The Faculty of Law provides higher education with a professional perspective at the undergraduate and postgraduate levels.



OVERVIEW

Importance of Strong Commercial Laws in the APEC Region

Economies in the Asia-Pacific region are increasingly recognising the importance of continuous economic and structural reform across all fronts, including on economic legal infrastructure.

Strengthening economic legal infrastructure, in tandem with trade and investment liberalisation and facilitation, is essential if economies are to maximise and sustain the opportunities arising from globalisation.

APEC member economies have over the last few years taken significant steps to strengthen their economic legal infrastructure, including in the areas of corporate and competition law, intellectual property rights, contract law and insolvency. Efforts have focussed on the introduction of new written laws that are clear, consistent and accessible, creating the potential for a better business and investment environment.

However, the effectiveness of these laws has been reduced in some instances through the limited capacity of governments and institutions to apply and enforce them. This shortcoming is now slowly but steadily being addressed.

Commercial Laws Seminars

APEC, under its strengthening economic legal infrastructure initiative, has been assisting economies through institutional capacity building efforts with symposiums, seminars and workshops. Recently, this included seminars on commercial laws in China, Indonesia, the Philippines, Thailand and Vietnam, managed by the Department of Foreign Affairs and Trade with funding from Australia's international development aid agency, AusAid.

The seminars provided a forum to deliberate on economic legal infrastructure issues of concern to the participating economies, to identify international "best practice" approaches and to explore local solutions.

Delivered jointly by Australian academic consultants and legal firms in cooperation with local partners, the seminars followed different formats to accommodate differences

in legal systems, stages of economic development and culture, and to create optimal learning conditions.

Each seminar was conducted over three days and attended by high level officials, academics, and business representatives. All seminar participants were provided with extensive study materials to serve as an on-going resource.

Outcomes and Lessons Learnt from the Seminars


The seminar in China considered the economic and legal challenges presented by China's recent accession to the World Trade Organisation (WTO). As China's economy is liberalised and opened to greater competition, such issues as good corporate governance and the protection of intellectual property rights (IPR) have become key factors for business and investment, which underpins China's continued economic growth and development. Seminar sessions examined the legal practicalities of doing business in China with a focus on the importance of business structures, the need for well-drafted contracts and warranties, and consideration of alternate dispute resolution mechanisms.

Having achieved significant reforms in recent times, participants at the Thai seminar concluded that the key to strengthening economic legal infrastructure is through training and education on the importance of the rule of law at all levels of Thai society. Discussions at the seminar focussed on enforcement issues in capital markets with a presentation from the Stock Exchange of Thailand, as well as the challenges of privatisation, insolvency and restructuring.

Despite its very different cultural and historical experience, the participants at the Indonesian seminar also appreciated the importance of strong commercial laws that are appropriately applied and enforced to engender business and investor confidence. Recent amendments to Indonesian corporations, bankruptcy and anti-monopoly laws were highlighted while the inviolability of contracts, and protection of IPR, traditional knowledge and consumers emerged as key issues. The underlying theme of all sessions was the need to improve the enforcement of commercial laws, particularly in terms of anti-monopoly law and foreign arbitration awards.

The Philippines seminar was structured in the form of a mini summit allowing participants to openly discuss and debate the merits of current domestic issues of concern, identifying in particular the local challenges confronting economic legal enforcement. Discussion focussed on the effectiveness of a Bill before Congress on the





transfer of assets for liquidation purposes, the current ability of regulators to enforce IPR, the state of commercial dispute resolution in the Philippines, and the ability of the Philippines to effectively utilise the WTO's dispute mechanism.

The seminar held in Vietnam was timely in light of Vietnam's negotiations on accession to the WTO and considered some of the key legal challenges facing Vietnam, including detailed discussions on contract law, IPR and dispute resolution. It also provided drafters of Vietnam's Commercial Law access to international expertise that proved helpful in articulating approaches to certain contract law provisions, such as contract formation, performance and remedies.

All of the seminars demonstrated that economies have made promising progress in developing economic legal infrastructure but highlighted the need for greater emphasis on enforcement of economic laws.

APEC will continue to provide capacity building support to strengthen economic legal infrastructure, including initiatives in the near future on enforcement in corporate governance and competition policy, debt collection, arbitration/litigation, and legal instruments on international financing and dispute resolution.

Purpose of this Booklet

As an additional reference for participants to the commercial laws seminars, as well as other policy-makers, this booklet brings together short papers on some of the cross-cutting legal issues discussed at the seminars.

A common thread in all seminars was the need to improve enforcement and Bruce Johnston considers next steps in the implementation and enforcement of commercial laws in the region. Another key factor raised in the seminars was the importance of good governance to sustainable economic growth and regional stability, which is discussed by Jim Harrowell.

IPR and taxation are complex legal issues that impact on all jurisdictions. Professor Philip Griffith highlights the steps required to establish, maintain and operate an effective IPR enforcement regime, while David Russell QC explores avenues to enhance cooperation between economies on revenue and taxation laws.

APEC provides strong support to the WTO and recognises the need to assist developing economies to engage in its processes, including the dispute settlement procedure.

Professor Sam Blay looks at these issues and the changes to domestic legal infrastructure and commercial laws required to accommodate WTO rules.

The next three papers address specific commercial law issues of relevance to all APEC economies. Bruce Johnston identifies the key elements of a strong and effective contract law regime and Dr David Morrison considers possible improvements to insolvency laws. Professor Michael Adams highlights the importance of good corporate governance practices to investors across the region.

The last two papers consider the important issues of competition policy and dispute resolution. Maureen McLaughlin emphasises the importance of a robust competition law regime to promote fair competition, while Helen Burrows examines arbitration and other alternate methods of dispute resolution.

This collection of papers is designed as an aid and tool for policy-makers in building awareness of the issues among their stakeholders.

The authors understand that these issues are complex and that the material provided may not in all cases adequately reflect the cultural and institutional differences across jurisdictions. What it does highlight, however, are the key legal issues of concern to both domestic and foreign businesses and investors, and how these need to be addressed to enable them to compete and succeed in a fair and open business and legal environment.



NEXT STEPS: IMPLEMENTATION AND ENFORCEMENT

Bruce Johnston, Partner

Allens Arthur Robinson

Clear Thinking

APEC has recognised for some years the need for member economies to improve their economic legal infrastructure in order to encourage investment flows. To date, the focus for reform of economic legal infrastructure in APEC member economies has been on the development of “*best practice*” economic laws and regulations, and there have been some very significant achievements.

However, those achievements will be of limited long term value unless those laws and regulations are efficiently administered and enforced. “Best practice” economic laws will not of themselves produce “best practice” behaviour by business and officials: it is not enough just to have sound economic laws on the statute books.

There is a need to build skills and knowledge within the government and regulatory agencies, which have responsibility for administration of the economic laws, and in the judiciaries, which have responsibility for enforcement. In addition, the ability of businesses to participate in developing economies and to comply with their obligations under new economic laws and regulations will require capacity building both within the private sector itself and in the legal profession.

Investors expect fairness, transparency and reliability in government administration, but it is unfair and unrealistic to expect officials who are responsible for administration of the new laws to be able to perform their duties where they have no experience or detailed understanding of the new laws themselves. This is particularly the case in relation to new regulatory agencies established to oversee specific new policy areas, such as competition policy or consumer protection, where new concepts are introduced to an economy. Plainly there is a need for capacity building through initial and continuing training and support.

The judiciary is the public face of economic law enforcement. Business and investors are encouraged by the presence of a judicial system which is impartial, where the judges are well trained and where the courts are recognised as accessible, competent and reliable. They place great reliance on the predictability of administrative and judicial outcomes: predictability and certainty give them confidence that their investments will be secure and that their competitors, and government agencies, will behave in accordance with the economic laws. This in turn leads to reduced “*country risk*” costs (which, ultimately, are paid by the host

economy through investment premiums which are higher than they otherwise might be), increased competition, efficiencies and innovation – all of which benefit the host economy.

Areas for future reform include:

- entrenching the independence of the judiciary, by ensuring that selection of judges is based on professional qualifications and merit, that appointments are made in a transparent way and that removal is only “*for cause*” and is also done transparently, and by ensuring that judges are suitably remunerated and respected;
- improving the quality of decisions by providing both technical legal and case management training to the judges on a continuing basis;
- improving access to the courts by upgrading courtroom and support facilities for judges, court officials, litigants and their lawyers; and
- enhancing respect for judicial decisions, by facilitating delivery of decisions in open court and by publication.

The private sector relies on the legal profession for access to and understanding of the law, so it is very important for member economies to have legal professions which are recognised for their competence, ethics, integrity and accessibility. It follows that academic and practical training programs will need to be developed for both law students and lawyers already in practice.

Bar Associations should have a primary role in developing and enforcing practice and ethical standards of their members. Scholarships and exchange programs can provide great opportunities for the legal profession to develop the skills necessary to help their clients in the private sector comply with new economic laws, but coordination of these programs will be critical.

The economic legal infrastructure of every economy, developed or developing, requires constant monitoring and a willingness on the part of both government and the private sector to make adjustments and to upgrade laws and practices over time.

Key legal issues from the commercial laws seminar program are summarised in the following papers. The program was designed to improve the economic legal infrastructure of developing economies within APEC by providing assistance to build capacity in the development, implementation and enforcement of sound commercial and economic laws. The challenge now is to develop the necessary institutions and to provide the necessary technical skills to ensure “best practice” economic behaviour, not just “best practice” laws.



GOOD GOVERNANCE: A KEY FACTOR FOR SUSTAINABLE ECONOMIC GROWTH AND REGIONAL STABILITY

J G F Harrowell, Partner



The Asian financial crisis in 1997 emphasised the critical importance of good governance.

The imperative of having good governance practices and the need to initiate structural reform are not matters unique to the APEC region or only problems in developing economies. The failure to adhere to these principles has had a devastating impact on shareholders and ordinary citizens in some developed economies following major corporate collapses.

Every government in the Asia-Pacific region, irrespective of the state of economic development in their own economy, must strongly support the principles of good governance both for governments and business.

Plainly, encouraging good governance comes at a price and can only be achieved if governments are prepared to invest in institutional capacity building to ensure that there are regulatory systems capable of moving in a timely and effective way to deal with those who do not adhere to the principles of good governance.

Some may argue that the sheer cost of building institutional capacity to ensure good governance practices in developing economies in the Asia-Pacific region comes at a cost which is too high, having regard to other urgent priorities. But they fail to recognise that the issue of good governance has a direct economic impact on the capacity to deliver economic solutions to challenges in developing economies.

Good governance is just not an interesting legal theory for businesses in developed economies but a critical factor to ensure sustainable development and social stability, and can reduce regional tensions by improving living standards through economic growth.

The absence of good governance and institutions to ensure enforcement causes investors to regard a business proposition with a higher level of risk and therefore limits or discourages investment.

Governments that have established the legal structures and built institutional capacity to ensure good corporate governance will make their markets much more attractive, increasing the number and size of investment opportunities available and the pace of development.

Cultural attitudes can and have been accommodated, as evident from the work which concluded in China in May 2001 when the Pacific Economic Cooperation Council (PECC) Core Group on Corporate Governance finalised a set of governance guidelines. These guidelines are consistent with the regulatory environment in different economies, fit comfortably with many different cultures and can be applied by any business operating in the Asia-Pacific region.

Further work, however, needs to be done to build an educational program onto regulatory frameworks as ultimately only education will produce real changes in business culture. It is important that developed economies in APEC, including Australia, assist developing economies by focussed, demand driven capacity building in the practices of good governance.



LEGAL PROTECTION OF INTELLECTUAL PROPERTY RIGHTS



Professor Philip Griffith
Professor of Law

Introduction

During the last decade, APEC economies have introduced modern legislation on intellectual property rights (IPR) in response to the demands of the new trading environment and the WTO TRIPS Agreement. There are powerful incentives to introduce new laws and new administrative arrangements but development of effective enforcement systems should now be the priority.

Private Rights, Public Value and Potential Public Benefits

People think of IPR as a collection of private personal property rights focussed upon competitive advantage in commercial exploitation but there is also a significant element of "public good".

Publicly accessible patent documentation is a storehouse of technical information available to human kind. It gives researchers access to an unrivalled compendium of scientific and technical information and holds commercial information that can facilitate a range of business requirements and new opportunities. It can assist humanitarian aid projects in least developed economies by making it possible to identify and reuse past inventions where patent protection has expired but the technology is affordable and appropriate.

But inventors will not seek patents or publish their inventions if the patent system gives them no incentive. They want to be able to use patents to prevent infringement of their private rights, remove or prevent infringing or counterfeit goods from the market, recover compensation for losses, or seek restitution of unfair gains made by free riding infringers.

Similarly, copyright systems provide economic incentives for the creation, publication and dissemination of the cultural subject matters of our lives. The Trade Mark system facilitates orderly trading and a measure of consumer protection. The Design system encourages and rewards aesthetic presentation of the articles of daily life. All of the economic, social and cultural benefits that may arise from IPR systems require that there is an effective system of enforcement.

Responsibilities

Economies have many responsibilities and roles in setting up, maintaining and operating an effective enforcement system. The various possible roles include:

- providing an IPR system which balances the rights of owners and users;
- making policy choices about the type of enforcement and mix of elements suitable to the economy;
- enacting a legislative program establishing not only the nature of IPR but also an effective enforcement framework;
- providing for inexpensive, timely and effective opposition to grant procedures;
- providing an accessible court system in which enforcement actions can be expeditiously and fairly tried;
- staffing courts with judges capable of understanding the real issues in IPR and conducting timely, fair and balanced trials;
- providing a full range of appropriate legal remedies backed up by execution of court orders and judgements;
- establishing a police presence and a customs service that understands IPR issues and has the will, skills, training and resources necessary to carry out their role;
- facilitating cooperation and provision of information between rights holders and enforcement agencies like police or customs to help enforcement agencies identify counterfeit goods and to recognise genuine and false trade mark characteristics;
- facilitating the establishment of an alternative dispute resolution centre for IPR;
- providing for collective management of copyright exclusive rights in musical and literary works;
- creation of specialist copyright tribunals to rule on royalty rates in any compulsory or collective voluntary licensing schemes;
- ensuring that the government itself operates in good faith when it is a user of IPR subject matter;
- providing laws which protect against anti-competitive abuses of IPR including compulsory licensing systems, and protection against unfair or coercive anti-competitive terms in licensing; and
- promoting public awareness campaigns.

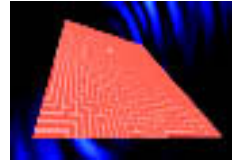
Conclusion

APEC should stay abreast of emerging IPR concepts which offer opportunities to developing economies. Securing the advantages of IPR will require the creation and enhancement of an enforcement system which gains the respect and confidence of researchers, inventors and the commercial sector.



COMMERCIAL LAWS AND TAXATION

David Russell QC
Industry Advisory Board Member and
Adjunct Professor, Australian Centre for
Commerce and Taxation



Taxation is a major factor in international trade and investment. It influences firms and investors in deciding where and how they do business in the global marketplace, paying particular attention to both the complexity and costs of operating in the taxation regime. For governments, the challenges of taxation in the global market context might include the difficult balancing act of maximising revenue without discouraging activity, and of charging tax across sectors in an equitable and economic enhancing manner. Consequently, the development of taxation strategies has linkages to efforts in promoting international trade and investment. Individual economies in the Asia-Pacific region and the APEC forum, as a collective, need to be more aware of this. Indeed, regional cooperation in taxation may offer significant advantages.

Within regional economic groupings, a number of approaches to taxation cooperation can be identified.

The highest level of cooperation is that adopted within the European Union (EU). In the EU, not only is there a major initiative towards harmonisation of taxation (which in the case of value-added tax has reached the point that all member countries' tax appeals system incorporates the European Court of Justice), but the member countries have also agreed to eliminate so-called "harmful tax competition". A major project to identify harmful features is in place, although there has been some slippage in its implementation.

A second level of cooperation involves the negotiation of Double Taxation Agreements, so that trade and investment flows are not distorted by either double taxation or inappropriate avoidance of taxation.

The third level of cooperation involves support for the economic infrastructure associated with sound tax systems. This involves a number of key components, of which the most important are the law (both principal and subordinate) itself, the administration of the system, the wider tax profession and the tax culture.

At a governmental level, such support can take a number of forms. One example was a project funded by the Asian Development Bank to report on measures taken within the

Asia-Pacific region to review tax haven abuse as part of the OECD program to discourage or eliminate harmful tax competition. A second form of cooperation at this level involves technical assistance in the drafting of legislation.

The final level of cooperation involves relationships between the tax professionals in member economies concerned. In the EU, this is coordinated by the Confédération Fiscale Européenne (CFE) which has a level of official recognition. Within the APEC economies generally, there is no comparable body, although within the western part of the region the Asia Oceania Tax Consultant's Association, established at the initiative of Japanese tax professionals in 1992 having its initial operation centred in Tokyo (1993-1996), but since administered in Sydney (1997-2000) and Seoul (from 2001), could perhaps play a role in this area.

The highest level of cooperation, that operating within the EU, is clearly not appropriate for some APEC economies at this stage in terms of forming an APEC-wide arrangement, although good tax design practice necessarily will lead to a level of harmonisation of taxation laws within the individual APEC economies.

There are, however, major opportunities for the development of comprehensive networks of Double Taxation Agreements throughout APEC economies. Issues such as transfer pricing require comprehensive work, not only through such agreements but also by joint administrative action by revenue authorities. This will allow those engaged in international trade to do so with confidence that the allocation reached of their profits between the economies involved, if appropriate in a commercial sense, will be accepted by the revenue authorities of the economies involved. Where the revenue authorities concerned are unable to reach agreement, the dispute between the revenue authorities of the respective economies should not impinge on the transaction in the form of double taxation.

In addition to problems which arise from the conflicting demands of revenue laws for transactions between economies, lack of transparent legislative and administrative aspects of tax systems – or systems which impose excessive burdens – have a capacity to create and maintain artificial barriers to market entry. Where such barriers are unintended, their identification (together with identification of appropriate remedial action) will enable APEC economies to more fully benefit from economic development.

The operation of a viable system of taxation requires not only well drafted laws and appropriately skilled revenue officials, but also a tax profession with an appropriate basis of technical skills and ethical values. While there is a considerable level of mutual assistance between some of the tax professionals within APEC economies, this is an area which requires further development of a viable profession and the encouragement of cooperation between the professions in APEC economies and existing multi-economy professional organisations.



THE WORLD TRADE ORGANISATION

Professor Sam Blay
Professor of Law



The emerging global economy presents unique opportunities for APEC members. However for the developing economies in APEC, the regime of trade liberalisation presents complex challenges as much as opportunities. The singular pressing challenge is the development of the capacity to adapt to the rapidly evolving structure of the global economy. This involves three related elements: the ability to participate in global trading institutions, the willingness to adopt domestic policy reforms and the opportunity to engage in trade capacity building.

In the modern world, events and processes in global institutions increasingly shape national trade policies. The ability of economies to participate in negotiations and processes that shape their national trade policies and the rules and practices of international commerce is central to protecting their commercial interests. More importantly, the current global approach to trade requires their active participation in WTO processes and institutions to promote and enhance market access for their products. Real and sustainable economic growth in developing economies requires meaningful market access.

While APEC members continue to play a leading role in the WTO process, the different levels of development in APEC economies necessarily result in different levels of participation and indeed different levels of benefits in the form of market access. This situation calls for a careful evaluation with the view to assisting developing economies to integrate into the WTO trading system more effectively. More critically, it requires a firm commitment to the Doha Development Agenda.

The process of integration into the WTO system involves the comprehensive realignment of the domestic legislative infrastructure to accommodate WTO rules, where appropriate. To maximise the benefits from trade liberalisation and the WTO process, APEC economies, like all WTO members, should embark upon wide ranging domestic policy reforms.

The need for changes in several domestic substantive laws in general, and commercial laws in particular, to accommodate and reflect the emerging trends in the global economy cannot be overemphasised. The changes in commercial laws will provide both the crucial infrastructure for foreign investment and the catalyst for growth

of local business activity. The current reform process in commercial laws in several APEC member economies demonstrates a clear commitment to embrace the principles of free trade, and is very welcome.

However, for developing economies in the APEC family, law and policy reform to reflect WTO processes and trade liberalisation has complex resource implications that cannot be underestimated. Technical assistance grants to help developing economies better understand and implement the WTO trading system are essential if APEC is to realise its objective of promoting economic cooperation and growth among members.

The WTO dispute settlement system offers an unparalleled opportunity for members to settle trade disputes and to protect their trading interests through the Dispute Settlement Understanding (DSU). However, the DSU and the WTO Panel procedures require a specialist culture in international trade law and a proper understanding of WTO rules and procedures.

While APEC developing economies stand to gain from participation in the WTO, most currently lack the specialist personnel to take full advantage of the DSU. This suggests an urgent need for training programs aimed specifically at government lawyers and private legal practitioners to explain elements of the WTO and the procedures and techniques for dispute settlement.

Closely associated with the issue of specialist personnel is the question of capacity building in trade. The current global trading institutions and processes as presented in the WTO system require dedicated and specialist negotiators capable of representing their states' interests in harmony with the competing interests of other member nations.

For APEC, the task and the objective today are to provide an effective strategy that aims to strengthen the capacity of its members to ensure that individually and in concert, they are well equipped to pursue the objectives of trade liberalisation in the WTO environment. The task may be complex but the objective is certainly achievable even in the medium term. APEC's work on strengthening economic legal infrastructure and WTO capacity building are steps in the right direction to achieving this objective.



WHAT RULES OF CONTRACT LAW SHOULD DEVELOPING ECONOMIES ADOPT?

Allens Arthur Robinson

Clear Thinking

Bruce Johnston, Partner

Almost all business transactions and direct or indirect investments take place over a period of time and involve many different steps. These factors create risks for the parties: the longer the term and the more complex the transaction, the higher the risk. The parties invariably try to allocate and reduce risk by way of contract, and it is particularly important to them to know that the contract they adopt will be enforceable. A rules-based economic system requires a set of contract law rules which encourage verifiable contract terms, completeness and enforceability through formal rather than informal means.

The extent to which an economy's contract law rules support the use of contracts is a critical factor in determining the levels of participation in that economy, the speed and ease (and therefore efficiency and cost) with which commercial transactions may be carried out, and that economy's relative attractiveness to new investment. A system of contract law rules which allows the parties to carry out their promises on the basis of relatively predictable outcomes reduces risk and cost and will encourage initiative and higher participation levels. Where the contract law rules do not provide those benefits, investors will tend to compensate by investing for short, rather than long, term and in areas where other risks are lower.

It is rarely appropriate for a developing economy to simply graft the contract law rules of another economy onto its own body of laws on the basis that the other economy has been or is seen to be more successful in attracting investment. To do so ignores other historical, cultural and economic factors. There are, however, some fundamental concepts which are present in the contract laws of successful rules-based economic systems.

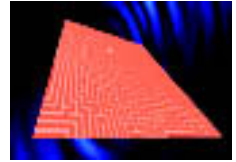
- *Legal capacity*: the law should specify the legal capacity requirements for entry into contracts, in particular contracts which are intended to bind third parties such as companies.

- *Disclosure and conduct*: the law should require a level of disclosure by the contracting parties prior to contract, and that they not engage in conduct which is fundamentally unfair, misleading or deceptive or which takes advantage of unequal bargaining power.
- *Formalities*: the formal requirements for enforceability (eg. notarisation) should be clear but minimal.
- *Content*: the parties should know and understand their contractual rights and obligations. There are different approaches to this issue in various legal cultures: in some economies there is a preference for all of the rights and obligations to be stated in great detail and then never changed without the consent of both parties, while in others, the parties are content with a framework contract which specifies the fundamental obligations while leaving the details to be worked out through negotiation over the life of the contract based on the relationship between the parties. This may be a question of balance and suitability to the parties, but the critical issue is one of contractual certainty.
- *External factors*: the parties' rights and obligations may be affected by external events which occur during the life of the contract. The contract law rules should specify the circumstances, if any, where conditions might be implied into contracts as well as clear *force majeure* rules.
- *Sanctions*: the contract law rules should prescribe the circumstances in which a party can seek direct enforcement of a contract or compensation for breach, and rules for determining compensation.
- *Dispute resolution*: contract law rules should generally allow the parties freedom of choice in the way in which they resolve disputes arising under the contract.
- *Enforcement*: this is the most important factor of all – the parties need a credible and effective last resort for enforcement of their contract rights. Contracts should be capable of being enforced formally through judicial processes, rather than informally through family, or business/political connections (where there is a risk of actual or apparent collusion and corruption), and on the basis of known rules applied without favour. However, this presupposes the presence of a skilled and well resourced judiciary.



LEGAL PROTECTION AGAINST INSOLVENCY

**Dr David Morrison, Director,
Barrister-at-Law, Australian Centre for
Commerce and Taxation**



The protection provided to business and investors by laws on insolvency, or perhaps more widely bankruptcy laws, are an important consideration in the promotion of international trade and investment and the realisation of economic growth and development within the APEC region.

Bankruptcy law has historically provided a means for creditors to collect debts with the consequence that the law strengthened a creditor's position while weakening the debtor's position. The subsequent discharge of debtors redressed the imbalance, although it became less significant with the advent of the limited liability corporate structure.

Following recent high-profile corporate collapses in several APEC economies, there is an increased focus upon the mechanisms of responsibility, governance, disclosure and enforcement for the securities industry. This emphasis has in turn highlighted the ex ante position of the bankruptcy regime, including the mechanisms available for corporate restructure and reorganisation.

There are various issues that APEC economies could consider to improve their insolvency laws in order to promote growth and investment in the region and improve investor protection.

The first and most pressing need in the region is to recognise the bad debts that exist (particularly government-backed bad debts) and to deal with them in a meaningful way. Writing off bad debts is the first step in an efficient bankruptcy regime towards future financial health. It is also essential that adequate safety measures (governance) and standards of appropriate corporate conduct are in place to minimise the potential for a recurrence of events. Finally, the determination of "insolvency" should be made by reference to both the cash flow test and the balance sheet test to take into account the different measures of a corporate entity's financial strength or lack thereof.

Harmonisation of company structures across economies in the region would make it easier for international investors to assess the viability of companies from one jurisdiction to the next. Another useful reform might be to attempt to standardise business regulation as far as possible. For example, work is already being done

with respect to international accounting standards and the UNCITRAL model law on insolvency.

It is important that the level of disclosure to securities commissions within each economy is on a par – thus furthering investor protection. In time, it might reasonably be expected that the Asia-Pacific region could develop a centralised stock exchange and securities commission to enhance economic efficiency measures and provide for more centralised investor protection.

Where corporations are in financial trouble, insolvency laws should provide for the liquidation of the entity in an efficient manner. Such a process will enable the best possible recovery process so that the maximum assets are available for distribution to the residual claimants. Where the corporation is insolvent, creditors are residual claimants and should be afforded the right to appoint an appropriate insolvency professional to protect their interests.

Another idea is the possibility of creating a harmonised regional professional body and qualifications standards for insolvency experts. Continued cooperation with the international insolvency body INSOL will assist in achieving this objective.

Where corporations are in financial distress and restructuring is a viable option, the insolvency legislation should provide for a voluntary administration regime that assists the quick assessment of the viability of financial alternatives and early remedial action. Voluntary administration could also allow the company to negotiate with creditors, be effectively financed and rehabilitated.

Economies should also give active consideration to adopting the *UNCITRAL Model Law on Cross-Border Insolvency* which would assist in the recovery of assets in other jurisdictions and help overcome the practical difficulties associated with the insolvency of internationally operating businesses.

For both the liquidation and/or restructuring of corporate entities in the Asia-Pacific region, clearly determined standards of professional qualifications for the conduct of any kind of external administration should be developed. In particular, it should be a requirement that an independent expert be appointed to oversee the governance of the financially distressed company to guarantee objectivity and ensure that the best interests of the residual stakeholders are represented.

The final element of a good insolvency regime is need for effective implementation and enforcement of insolvency laws. Dedicated insolvency or bankruptcy courts, or a tribunal system, should be established to interpret and apply insolvency laws. This would ensure that courts and judges have appropriate commercial law expertise and are familiar with the principles underlying the laws.



THE ATTRACTION OF GOOD CORPORATE GOVERNANCE

Professor Michael Adams
Assistant Director, UTS Centre for
Corporate Governance



Despite the common misconception played out in the media, corporate governance, or, more importantly, good corporate governance, extends well beyond the boardroom. Governments and regional forums such as APEC have an important role to play in defining acceptable standards of corporate governance and in providing the infrastructure within which these standards are monitored, enforced and upheld.

The unfortunate reality is that corporate governance only earns a place on the public and political agenda when something goes wrong. No better examples of this are the relatively recent corporate collapses in the APEC region. However, the cyclical nature of corporate governance is a paradigm within which all economies must work: the key for governments is to have the infrastructure in place to smooth the ebbs and flows of these cycles.

A simple example of the role of government in corporate governance has been seen in Australia in the last two years, following the collapses of HIH Insurance Ltd (insurance company valued at approximately AUD \$4 billion) and One.Tel Ltd (telecommunications company valued at approximately AUD \$600 million).

One has observed the three arms of government in action, taking steps independent of one another, but working towards the same goal: sound corporate governance in Australia. Parliament (the legislature) has begun drafting new legislation; the regulators (the executive) have commenced litigation against errant corporate officers and have begun issuing their own policy statements to implement the new legislative regime; and the courts (the judiciary) have increased the standards expected of directors and officers.

Furthermore, Australia has taken heed of what its global neighbours are doing in instituting the framework to promote a corporate culture of good corporate governance. This is the final cog in the wheel: the influence of regional forums such as APEC is critical to ensuring a consistent cross-border approach.

In a world where information travels at virtual light speed and corporations span the globe, international cooperation is necessary in ensuring the standards of good corporate governances are consistently upheld. The adoption of the *UNCITRAL Model Law on Cross-Border Insolvency* would be consistent with this approach.

The national benefits of having infrastructure in place that encourages sound corporate governance are innumerable. However, high standards of corporate governance, at the very least, promote confidence in the market and stability: two key factors in attracting investment, both domestically and internationally. Importantly, where such infrastructure exists at a regional level, the benefits experience a multiplier effect and all economies in the region stand to gain.

In conclusion, corporate governance is not merely a domestic policy issue: it is a regional and global issue. Guidelines such as those adopted by APEC (based on the principles of the OECD) go a long way to ensuring a consistent and internationally cooperative approach.



INSTITUTION BUILDING: COMPETITION LAW AND POLICY



**Maureen McLaughlin
Senior Associate**

A fundamental element of a strong and healthy market economy is fair competition between businesses operating within the market. To promote fair competition, and thereby inspire business and consumer confidence in a market, a strong competition law regime is imperative to regulate agreements in restraint of competition, exercise of market power, business mergers and acquisitions, and other competitive practices such as advertising.

A strong competition regime has several key ingredients. Firstly, an independent and impartial competition regulatory body is required to administer and enforce the competition regime and engender business and consumer confidence in the process. To promote independence and impartiality, it is highly desirable for the competition regulatory body to be separate from the executive government.

It is important that competition regulations clearly define the competitive practices that are subject to regulation and the circumstances in which such practices will be considered anti-competitive and therefore prohibited. This will ensure certainty for businesses in commercial decision-making.

A number of practices will be automatically deemed anti-competitive and will be strictly prohibited. If practices will be deemed anti-competitive and prohibited only when the participants hold a certain market share, the level of market share and how it is determined should be clearly prescribed. If exemptions will be available for otherwise prohibited anti-competitive practices, the grounds for exemption and the procedures for application for exemption should be clearly prescribed.

To maximise certainty in commercial decision-making, it is desirable for businesses to be able to make confidential approaches to the competition regulatory body for an advance determination as to whether their proposed business practices are acceptable under the competition regulations.

To ensure transparency in the administration of the competition regime, information on exemptions from the competition regulations should be publicly available.

In addition, it is necessary for the competition regulatory body to have adequate powers to investigate suspected breaches of the competition regulations, on its own

initiative and also at the request of interested parties. Procedures for the conduct of investigations should be strictly prescribed. The competition regulatory body should have the power to compel concerned parties to provide relevant documentation and information. Equally, any business under investigation should have the right to access evidence brought against it, the right to lead its own evidence and, most importantly, the right to legal representation.

To avoid unnecessary prosecutions, businesses should have the right to terminate voluntarily any business practices which are identified by an investigation as being prohibited anti-competitive practices.

In its consideration of exemption applications and in its investigations, the competition regulatory body should be subject to strict time-limits to ensure efficient administration of the competition regime and subject to strict confidentiality requirements to protect the commercial interests and reputation of businesses.

If a confidential investigation identifies a breach of the competition regulations, it is desirable for the hearing into such breaches by the competition regulatory body to be held in public in the interests of the transparent enforcement of the competition regulations, except where matters of national security or commercial confidentiality are involved. Procedures for the conduct of hearings should be clearly prescribed. The competition regulatory body should have the power to compel relevant parties to appear and give evidence. Equally, any business subject to a hearing should have the right to legal representation and the right to present argument at the hearing.

To ensure effectiveness of the competition regime, the competition regulatory body should have adequate powers to compel the cessation of prohibited anti-competitive practices and the remedy of the effects of such practices (such as compulsory demerger of businesses which have participated in a prohibited merger without exemption). Compensation should be payable for losses to other interested parties arising from prohibited anti-competitive practices. In the interests of transparency, penalty decisions made by the competition regulatory body should be publicly available.

Finally, the competition regulatory body should be accountable for its administration of the competition regime. Applicants for exemption from the competition regulations should have the right to appeal against decisions refusing exemption. Interested parties in investigations and hearings should have the right to appeal against decisions of the competition regulatory body as to existence of breaches of the competition regulations and penalties imposed for breaches.



DISPUTE RESOLUTION IN THE ASIA-PACIFIC

**Helen Burrows LL.M BA (Hons)
Project Manager**



More traders operate within the international marketplace today than ever before – a trend that is likely to continue. Yet, traders must operate amongst diverse legal systems with divergent political frameworks. The proliferation of international trade in recent decades has culminated in a plethora of changes in the manner in which business is conducted.

This significant expansion of trade has been accompanied by more complex trading relations, escalating trade disputes. The Asia-Pacific region has been a key contributor to this growth in international trade, and as a result, must possess dependable and efficacious dispute resolution mechanisms.

The jurisdictional and procedural uncertainties of resolving disputes, and the desire to avoid costly and protracted court proceedings, have led to an increasing international focus on the use of arbitration and other forms of alternative methods for dispute resolution (ADR). The fiscal value of many trade disputes is vast, and where e-commerce is developing briskly, the speed with which disputes are resolved is critical.

Arbitration has become the primary method of resolving disputes in many economies, but the growth in trade in the Asia-Pacific region has not been accompanied by an upsurge in arbitrated disputes. Perhaps this is understandable given the vast array of operative legislative and procedural codes within the region, which promote different levels of judicial involvement. Maybe parties lack confidence in achieving a just resolution through arbitration, a situation that is compounded by disparities in the enforcement of arbitral awards, particularly in economies where the *New York Convention*¹ does not operate.

The adversarial nature of arbitration is also problematic in the Asia-Pacific region. Adversarial approaches are culturally less acceptable as parties to arbitration exert less control over proceedings and the inflexibility of the procedure has the potential to extirpate trading relationships. Many Asian nations have opted for alternative systems to resolve disputes, most notably, negotiation, mediation and conciliation. Despite this, ADR has been questioned as the most appropriate means of resolving disputes given the distinct differences in each system. A lack of certainty that

the process will produce a fair result undermines the process, particularly as it is premised on consent.

Additionally, the development of international models for the conduct of trade have created a body of international jurisprudence, which also impact on dispute resolution procedures. The *New York Convention* has streamlined the enforcement of foreign arbitral awards, making enforcement simpler than that of a foreign, or even a domestic, judgement.

Asia-Pacific economies have reacted to the necessity for greater uniformity of trade laws. A number of economies have passed laws introducing the *UNCITRAL Model Law for Commercial Arbitration*², the *Washington Convention*³ or ICSID for the settlement of investment disputes between states, and the *International Sale of Goods Convention*⁴ to give more certainty to contracts. Constituent economies must be further encouraged to accede to these core international treaties. By promoting a broad range of dispute resolution mechanisms with comprehensible rules and procedures, the risks and instabilities of trade and investment will be reduced.

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1. United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958.
 2. United Nations Model Law on International Commercial Arbitration, 1985.
 3. United Nations Convention on the Settlement of Investment Disputes between States and Nationals of other States, 1965.
 4. United Nations Convention on the Contracts for the International Sale of Goods, 1980 (Vienna Sales Convention).





