

# *Doing business in Australia*

## An introductory guide

October 2016

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**1**

# *Introducing Australia*

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# 1 *Introducing Australia*

## *Size and population*

Australia is the world's sixth largest country, comprising an area of approximately 7.7 million square kilometres. It is a vast continent covering a distance of approximately 3,700 kilometres from its most northerly point to its most southerly point and is almost 4,000 kilometres wide from east to west.

Australia is comprised of six states and two territories:

- the Australian Capital Territory, which includes Canberra, the political capital of Australia
- New South Wales in which Australia's largest city Sydney, is located
- Northern Territory
- Queensland
- South Australia
- Tasmania
- Victoria
- Western Australia.

In 2016, Australia's total population exceeded 24 million people.

## *The Australian lifestyle*

Australia has one of the world's best lifestyles with life expectancy at 84.3 years for females and 79.9 years for males. With the low cost of living, affordable quality housing, extensive healthcare benefits and one of the best education and social systems in the world, Australia has much to offer expatriates and their families. Surveys of world cities consistently rate Australia's major cities as offering a great lifestyle.<sup>1</sup>

## *Resources and climate*

An industrialised continent, Australia is blessed with an abundance of mineral and agricultural resources and arguably the best climate in the world. Australia is located in the southern hemisphere, therefore summer is in the months of December to February while winter is in the months of June to August. In Australia's north, summer is hot with rain from November to March. Elsewhere, the average temperature is 28°C in

January and dry. In the southern states, winter is mild with an average temperature in July of 16°C.

## *A multicultural community*

Inhabited by Indigenous Australians and later settled as a British penal colony in the 18th century, Australia is an increasingly diverse, multicultural nation. Collectively over 200 different languages and dialects are spoken including over 50 indigenous languages. Australia is home to people from more than 200 countries and has an enviable international reputation for diversity.

Australia is a harmonious community which has benefited from an active program of immigration over the last 50 years. As at 30 June 2010, approximately 1 in every 4 residents was born overseas. Of those born overseas, 40 per cent were born in Europe and 33 per cent in Asia.<sup>2</sup>

## *Certainty and security*

The Australian legal system is a mixture of common law and statute, similar to the legal systems in the United Kingdom, other Commonwealth countries and some European countries. The common law tradition which applies in Australia expects and values judicial independence. Decisions of the courts conform to due process and are made in the context of prevailing law. Contractual arrangements are therefore protected by the rule of law and the independence of the judiciary. Domestic companies, foreign companies and individuals have the same standing before the law.

## *Regulatory framework*

The Commonwealth of Australia is a federal constitutional monarchy, constituted by the Commonwealth of Australia, 6 states and 2 self-governing territories. The Commonwealth and each of the states and territories has its own legislature with law making authority. The Commonwealth has primary authority over matters like foreign affairs, corporations, trade and commerce, corporate and income taxes and defence.

The major legislation regulating the financial industry is the *Corporations Act 2001*, the *Banking Act 1959* and the *Insurance Act 1973*.

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<sup>1</sup> 2016 Worldwide Quality of Living Survey  
by Mercer Human Resource Consulting

<sup>2</sup> Australian Bureau of Statistics

## ***The Australian economy***

Australia has one of the strongest, most competitive, open and flexible economies in the world.

In 2009, the standard of living in Australia surpassed that of France, Germany, Italy, Japan, Russia and the United Kingdom.<sup>3</sup>

Australia's economy has grown (on average) by approximately 3.3 per cent per annum since 1990. In 2014 – 2015, the Gross Domestic Product of Australia was approximately A\$1,620 million.

Australia's strong economic growth has been coupled with low inflation. Over the last 15 years, the inflation rate has been stable, at an average of 2.5 per cent over the period.

The unemployment rate in Australia was 5.8 per cent in January 2016.

Australia is one of the largest economies in the Asia Pacific region after Japan, China and Korea. China is Australia's largest trading partner.

Australia's time zone spans the close of business in the USA and the opening of business in Europe.<sup>4</sup>

## ***A good place to do business***

Multinational companies view Australia as presenting the best business case for regional headquarters to target the dynamic Asia Pacific region.

Key business centres in Australia include Sydney (New South Wales), Melbourne (Victoria), Brisbane (Queensland) and Perth (Western Australia). Office space costs in Australia's business centres are low relative to major business centres with Sydney being the highest ranked at 16th and Melbourne being ranked 50th.<sup>5</sup>

Australia is a leading financial centre in the Asia Pacific region. The Australian Securities Exchange is among the 15 largest listed exchanges in the world with a market capitalisation of A\$1.5 trillion. Australia's alliance with markets throughout the region is increasingly providing business people with a comprehensive range of financial services in the Asia Pacific region.<sup>6</sup>

Australia offers real cost advantages for every category of business needs from prime central business district

office space, metropolitan factory space and industrial land, to transport infrastructure and low-cost utilities.

There is a strong and enduring tradition of democracy in Australia where rule of law and regulatory frameworks prevail.

## ***The work force***

Australia continues to offer a multilingual, highly educated and skilled workforce. Australia has a comprehensive education and training system with around 50 per cent of Australia's work force having some form of tertiary qualification. Australians also possess a diversity of language skills with approximately 15 per cent of the population speaking a language other than English.<sup>7</sup>

## ***Education in Australia***

Australia offers one of the best education systems in the world. With a 99 per cent literacy rate, Australia is able to provide a highly educated, skilled and computer literate labour force to investors

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<sup>3</sup> Organisation for Economic Cooperation and Development

<sup>4</sup> Axiss Australia, Australia: The new centre of global finance

<sup>5</sup> DTZ – The Global Office Occupancy Costs Survey 2014

<sup>6</sup> January 2016 Monthly Report, World Federation Exchanges, and [www.asx.com.au](http://www.asx.com.au)

<sup>7</sup> Axiss Australia, Australia: The new centre of global finance

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## **2**

# ***Foreign investment in Australia***

## 2 *Foreign investment in Australia*

### *Foreign investment – An introduction*

The Government welcomes and encourages foreign investment consistent with the national interest. Australia's screening process for foreign investment is long established, but changes from time to time. The Government has the power to block proposals that are required to be notified or are significant and which are determined to be contrary to the national interest.

The Foreign Investment Review Board (**FIRB**) is a non-statutory body that examines proposals by foreign persons to undertake investment in Australia and makes recommendations to the Treasurer on whether those proposals are suitable for approval under the Government's Foreign Investment Policy and whether they are in compliance with the *Foreign Acquisitions and Takeovers Act 1975 (Cth)* (**FATA**). The FATA was significantly amended in December 2015 and new regulations also came into force at that time.

FIRB also provides information on Australia's foreign investment policy guidelines and, where necessary, provides guidance to foreign investors to ensure compliance with the Government's policy.

### *Foreign persons*

Australia's foreign investment legislation and policy applies to investment proposals by foreign persons. A foreign person is defined as:

- a natural person, not ordinarily resident in Australia
- a corporation in which a natural person not ordinarily resident in Australia or a foreign corporation holds a substantial interest
- a corporation in which two or more persons, each of whom is either a natural person not ordinarily resident in Australia or a foreign corporation, holds an aggregate substantial interest
- the trustee of a trust estate in which a natural person not ordinarily resident in Australia or a foreign corporation holds a substantial interest
- the trustee of a trust estate in which two or more persons, each of whom is either a natural person not ordinarily resident in Australia or a foreign corporation, hold an aggregate substantial interest

- a foreign government
- a general partner of a limited partnership where an individual not ordinarily resident in Australia, a foreign corporation or a foreign government holds an interest of at least 20% in the limited partnership (or two or such persons hold an aggregate interest of at least 40% in the limited partnership).

If the Treasurer is satisfied that one or more foreign persons together with any one or more associates control an entity then the associate may also be treated as a foreign person (even if that associate is not a foreign person).

### *Substantial interest*

Generally, where the monetary threshold is triggered, an acquisition by a foreign person of a substantial interest in an Australian entity requires FIRB approval. In respect of a company, a substantial interest is where a foreign person holds an interest of at least 20% in the company. In respect of a trust, a substantial interest is where the foreign person, together with any one or more associates, holds a beneficial interest in at least 20% of the income or property of the trust.

FIRB approval may also be required where foreign persons propose to acquire an aggregate substantial interest which involves two or more foreign persons acquiring an aggregate interest of at least 40% in an entity or trust.

### *Notifiable Actions and Significant Actions*

There are two types of actions that require notification to FIRB under the FATA: "notifiable actions" and "significant actions".

A notifiable action requires mandatory prior notification to FIRB. Failure to give notice of a notifiable action can, in some cases, attract serious criminal penalties including personal penalties on individuals knowingly involved in a contravention.

A significant action does not require prior notification to FIRB but a foreign person may voluntarily elect to give notice of a proposed significant action. If a foreign person voluntarily elects to give notice of a proposed significant action, the Treasurer may prohibit the proposal or approve the proposal either

with or without conditions. If a foreign person proceeds with a significant action without giving notice to FIRB, the Treasurer may, if it determines the action is contrary to the national interest, still make the same orders (including disposal orders) that the Treasurer could have made had prior notice been given.

There are different criteria that apply in determining whether an action is notifiable or significant or if an action is both notifiable and significant. However, both types of actions only apply if the action exceeds specified monetary thresholds.

Different monetary thresholds apply depending upon the nature and type of investment and the identity of the foreign person. In particular, different monetary thresholds apply to foreign persons from a country with which Australia has a free trade agreement (**agreement country investor**). Currently, Australia has trade agreements with New Zealand, the US, Chile, Japan, Korea and China.

Foreign government investors are subject to a nil monetary threshold, meaning most investments into Australia by foreign governments or their related entities require prior notification.

## **Investments requiring prior approval**

Types of investment proposals which are subject to the FATA or the Foreign Investment Policy and which require notification to FIRB are:

- the acquisition of shares or rights to issued shares (which includes options, convertible notes and other instruments which may be converted to shares) representing a substantial interest in an Australian corporation valued at more than A\$252 million. For agreement country, different exemption thresholds apply, namely A\$252 million for investments in prescribed sensitive sectors, or A\$1,094 million in any other case <sup>8</sup>
- the acquisition of assets resulting in control of an Australian business valued at more than A\$252 million. The thresholds for agreement country investors are the same as for the acquisition of shares referred to above
- takeovers of offshore companies whose Australian subsidiaries or gross assets exceed A\$252 million. For agreement country investors, the A\$1,094 million threshold referred to above applies, except for offshore takeovers involving prescribed sensitive sectors where the A\$252 million

threshold applies. In some cases, offshore takeovers where there is no transfer of shares in an Australian company may only constitute a significant action, meaning notification to FIRB may only be voluntary

- direct investments by foreign governments or their agencies irrespective of size
- direct investments in Australian agribusinesses with gross assets of more than A\$55 million. Investors from Chile, New Zealand and the US are subject to a higher threshold of A\$1,094 million
- the acquisition of interests in Australian real estate (including interests that arise via leases, financing and profit sharing arrangements) that involve:
  - developed non-residential commercial real estate, and is valued at A\$252 million or more (A\$1,094 million for agreement country investors)
  - vacant commercial land (irrespective of value)
  - residential real estate (irrespective of value)
  - shares or units in Australian land entities (being entities whose interests in Australian land exceed 50% of their total assets) (A\$252 million, unless the entity being acquired holds agricultural land in which case the threshold is generally A\$15 million or sensitive land when the threshold is A\$55 million)
  - certain intra-group reorganisations and restructures (even where there may not be any ultimate change in control).

There are a range of other transactions which may be considered significant actions under the FATA. As explained above, while significant actions do not have to be notified, the Treasurer may make orders to prohibit or unwind them unless approval has been sought and obtained.

## **Sensitive sectors**

Restrictions apply in more sensitive industry sectors which reflect community concerns and matters which are contrary to the national interest. Specific restrictions on foreign investment apply in sectors such as residential real estate, media, telecommunications, transport, defence related industries, encryption and security technologies and communications systems and extraction of uranium or plutonium or the operation of a nuclear facility.

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<sup>8</sup> The countries listed and the figures quoted are subject to annual indexing and were current as at 1 September 2016



## **Agribusiness**

Agribusiness is treated as a separate class of investment with its own thresholds. Any acquisition of a direct interest in an agribusiness is notifiable to FIRB.

Agribusiness includes the following:

- Agriculture, forestry and fishing;
- Food product manufacturing, including:
  - Meat processing
  - Poultry processing
  - Seafood processing
  - Milk and cream processing
  - Cheese and other dairy product manufacturing
  - Fruit and vegetable processing
  - Oil and fat manufacturing
  - Grain mill product manufacturing
  - Sugar manufacturing

Any Australian entity that has more than 25 per cent of its total asset value, or the value of its business or the value of its total earnings in agribusiness activities is considered an agribusiness. In working out the proportions, the assets and businesses of the entity and its subsidiaries are taken into account.

Foreign persons must get approval before acquiring a direct interest (generally at least 10 per cent, or the ability to influence in or control) in an agribusiness where the value of the investment is more than A\$55 million (regardless of the value of the agribusiness). For investors from Chile, New Zealand and the US, the threshold increases to A\$1,094 million.

## **Foreign government investors**

Foreign government investors are treated differently from other foreign persons due to the different view that the Government takes of the national interest when a foreign government is involved in the investment.

A foreign government investor is a foreign government or a separate government entity, or a corporation or trustee of a trust or general partner of a limited partnership in which a foreign government or a separate government entity holds a substantial interest of at least 20 per cent or governments or government entities hold an aggregate substantial interest of at least 40 per cent. Once a particular corporation, trust or limited partnership is considered a “foreign government investor”, it is considered a foreign government for the purpose of applying the test to its invested entities.

A separate government entity means an individual, corporation or corporation sole that:

- is an agency or instrumentality of a foreign country or a part of a foreign country
- is not part of the body politic of a foreign country or of a part of a foreign country.

Separate government entities can include government utilities, sovereign wealth funds, state owned enterprises and government pension funds.

Foreign government investors from a particular country are associates of each foreign government investor from that country or any part of that country so that their interests are aggregated.

Due to the breadth of the definitions, listed companies and funds, investment funds and private equity funds can be foreign government investors if they have one or more significant investments by a foreign government investor.

All foreign government investors must notify FIRB before acquiring a direct interest in an Australian entity, business or land or starting a new business. A direct interest is, generally speaking, acquiring at least 10 percent of the entity or business or the ability to influence, participate in or control. A foreign government investor must also notify if it intends to acquire a legal or equitable interest in a mining or production tenement or an interest of at least 10 per cent in securities in a mining, production or exploration entity.

## **Real estate**

The Australian government has a specific policy in relation to residential real estate, commercial real estate, agricultural real estate and mining and production tenements. Unless a proposed acquisition of real estate falls within an exempt class, the foreign person is required to notify FIRB of any such investment proposal.

### **Residential real estate**

Residential real estate means residential land and housing, excluding commercial and rural properties. Residential land is defined as land where there is at least one dwelling on the land or the number of dwellings that could reasonably be built on the land is less than 10. This means acquisitions of residential real estate requiring notification can include (subject to eligibility requirements):

- single blocks of vacant land
- new dwellings
- established (second hand) dwellings
- redevelopment of established (second hand) dwellings.

### *Commercial real estate*

Commercial real estate includes vacant and developed property which is not for residential purposes. It may include rural property that is not used wholly and exclusively for carrying on a substantial business of primary production. Commercial real estate acquisitions requiring notification include (also subject to eligibility requirements):

- developed commercial property
- vacant land
- land related to mines
- land related to critical infrastructure, such as airports

### *Agricultural land*

Agricultural land means land that is used, or could reasonably be used for a primary production purpose. Foreign persons must notify FIRB for any acquisition of an interest in agricultural land where the cumulative value of agricultural land owned by the person (and its associates) is more than A\$15 million. This includes the proposed purchase.

The threshold for Chile, New Zealand and US investors is A\$1,094 million and for investors from Singapore and Thailand is A\$50 million. These thresholds are not cumulative and apply on a case by case basis.

### *Mining or production tenements*

Foreign persons, other than certain agreement country investors, must get approval to acquire an interest in a mining or production tenement regardless of value. Chile, New Zealand and US investors need to notify FIRB where the value of the interest to be acquired is more than A\$1,094 million.

### *Approval process*

The Australian Treasurer authorises FIRB to make determinations on foreign investment proposals which are consistent with the Foreign Investment Policy and do not involve any sensitive issues (mostly proposals involving real estate).

Proposals are examined to see whether they conform with the requirements of the Foreign Investment Policy and the FATA. Whilst the majority of proposals are approved, the Treasurer has the power under the FATA to prohibit proposals that are contrary to the national interest or to impose conditions on the approval.

Generally, the Treasurer has 30 days to make a decision and a further 10 days to notify the applicant of its decision. Accordingly, in most cases, approval is granted and notified within 40 days of receiving a statutory notice. FIRB may extend the period by a further 90 days if necessary or agree an extension with an applicant.

### *The national interest*

In the majority of industry sectors, smaller investment proposals are exempt from the FATA or notification under the Foreign Investment Policy and larger proposals are approved unless it is determined that they are contrary to Australia's national interest. The screening process undertaken by FIRB allows comments to be gathered from relevant interested parties and other government departments in determining whether larger or more sensitive foreign investment proposals are contrary to the national interest.

FATA does not provide a definition of national interest. Therefore, the government determines what is contrary to Australia's national interest by reference to widely held community concerns.

The Government typically considers the following factors when assessing proposals:

- national security;
- competition;
- impact on other Government policies (including taxation);
- impact on the economy and the community; and
- character of the investor.<sup>9</sup>

The Government has specific policies for real estate, agriculture and foreign government investors.

### *Imposition of conditions on approval*

FATA allows the Australian Treasurer to approve a proposal subject to conditions to ensure that the proposed action will not be contrary to the national interest.

### *Taxation*

The Australian Taxation Office (**ATO**) is consulted to determine the potential taxation impact of many non residential foreign investment proposals. If, following consultation, the Australian Treasurer considers the proposal may involve a risk to taxation revenues, then certain conditions may be imposed as to the approval,

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<sup>9</sup> FIRB Annual Report 2014-2015, p.10

to ensure that the action will not be, or is not, contrary to the national interest. This however is not common and working with the FIRB and ATO in a collaborative way should mitigate any risk.

### ***Following approval***

Approval under the Government's Foreign Investment Policy is usually only given for a specific transaction and where it is expected that the transaction will be completed in a timely manner (generally within 12 months of the Treasurer's decision). If:

- an approved transaction does not proceed at the time it is approved
- the parties enter into new agreements at a later date
- a transaction is not completed within 12 months

further approval must be sought from FIRB for the transaction.

As stated above, the time period for an approval may be varied in circumstances where it can be shown that an extended period is fundamental to the success of a proposal and that extending the timing of the proposal does not involve an activity (for example, real estate speculation) that would be contrary to the national interest. In such circumstances, the extended period will be stated in the approval.

### ***Government incentives to industry***

The government offers a number of incentives to promote foreign investment in Australia. These incentives range from taxable grants and tax relief to the provision of infrastructure services at discounted rates.

The primary Government body established to promote and encourage foreign investment in Australia, is Austrade.

### ***Austrade***

Austrade's mission is to increase national prosperity by assisting Australians to succeed in export and international business, as well as promoting and supporting productive foreign investment in Australia.

Austrade is a government agency dedicated to providing export and investment services to Australian companies engaging in business outside Australia and to international buyers and investors. In relation to international buyers and investors, Austrade can provide:

- Initial coordination of all investment enquiries and assistance

- Information on the Australian business and regulatory environment
- Assistance and introductions for establishing operations in Australia
- Market intelligence and investment opportunities
- Identification of suitable investment locations and partners in Australia
- Advice on Australian government programs and approval processes

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# 3

## *Structure of business entities*

# 3 Structure of business entities

## **Business entities – An introduction**

A person can conduct business in Australia as a sole trader, in partnership, through a trust, through a joint venture or as a corporation.

Companies that are incorporated outside of Australia that wish to carry on business in Australia must either incorporate a wholly owned or partly owned subsidiary company in Australia or register a branch office in Australia.

Most foreign companies conduct business in Australia through a wholly or partly owned subsidiary or through an Australian branch.

## **Incorporation**

Foreign companies may establish an Australian subsidiary by registering a new company or by acquiring a recently incorporated shelf company which has not yet engaged in trade.

Companies are incorporated with the Australian Securities and Investments Commission (**ASIC**). Companies incorporated in Australia will be issued with a unique nine-digit Australian Company Number (**ACN**).

The *Corporations Act 2001* (Cth) (**Corporations Act**) provides that a company may be:

- unlimited with share capital
- limited by shares
- limited by guarantee
- no liability (although this only applies if the company's sole objects are mining or mining related objects).

The most common form of business entity in Australia is a company limited by shares. Companies limited by shares are either proprietary companies or public companies. Only public companies may engage in public fund raising activities and be listed on the Australian Securities Exchange (**ASX**).

## **Proprietary companies**

Proprietary companies are often used for private ventures or as subsidiaries of public companies. There are no restrictions on the size of a proprietary company, except the restriction on the maximum number of shareholders explained below.

A proprietary company:

- may either be classified as a large proprietary company or a small proprietary company depending on certain criteria (see below for details)
- provides limited liability for its members, so that upon a winding up of the company a member's exposure is limited to the paid and unpaid amounts (if any) on their shares
- may not have more than 50 non-employee shareholders
- cannot engage in fundraising activities in Australia that would require the lodgement of a prospectus or other disclosure document, except in limited circumstances (for example, raising funds from existing shareholders or employees may be permissible)
- must have at least one Australian resident director but need not have a secretary. If a secretary is appointed, that secretary must be an Australian resident
- must have the words "Proprietary Limited", "Pty Limited" or "Pty Ltd" in its name if it is a limited proprietary company.

A proprietary company is considered to be a large proprietary company if it satisfies at least two out of the three following criteria:

- the consolidated revenue for the financial year of the company and any entities it controls is A\$25 million, or more
- the value of the consolidated gross assets at the end of the financial year of the company and any entities it controls is A\$12.5 million, or more
- the company and any entities it controls have 50 or more employees at the end of the financial year.

If a proprietary company does not satisfy at least two out of the above three criteria it is regarded as a small proprietary company. The significance of being a large proprietary company is that the entity is then subject to annual financial reporting obligations requiring the public disclosure and auditing of accounts, which is discussed further below.

## **Public companies**

Public companies:

- are often used for larger public ventures

- may have an unlimited number of members/shareholders
- must have at least three directors, at least two of whom must ordinarily reside in Australia
- must have at least one company secretary that ordinarily resides in Australia
- may issue a prospectus for the offer of securities (subject to applicable laws)
- can list on the ASX
- must have the word “Limited” or “Ltd” at the end of their name if they are limited public companies.

### **Australian branch**

The establishment of an Australian branch may be preferable to incorporating a subsidiary if one of the objectives is to consolidate the financial results of the company in the place of residence of the overseas company and to avoid some of the administrative burdens of managing another separate entity. If a foreign company chooses to establish a branch office in Australia, it must be registered as a foreign company under the Corporations Act. Registration of a foreign company does not create a separate legal entity; rather it creates a public record and registration of a foreign company’s presence in Australia

The foreign company must lodge an application form with ASIC, with certified copies of the current certificate of incorporation in its place of origin and its constitution or equivalent constituent documents. In some cases, other documents may be required.

A registered office also needs to be established in Australia and a local agent must also be appointed. The local agent may be an individual or an organisation.

Upon registration, an Australian Registered Body Number (**ARB**N) will be allocated to the foreign company.

Once registered, the foreign company must lodge its annual accounts with ASIC and comply with other reporting requirements.

### **Representative offices**

Where a foreign company does not intend to carry on business in Australia it may seek to establish a representative office. Such an office must however only engage in activities which will not amount to carrying on business (for example, undertaking promotional activities). The Corporations Act provides a list of certain activities which, by themselves, will not constitute carrying on a business. These include, for example, merely maintaining a bank account or

conducting certain isolated transactions. However, if a foreign company has a place of business in Australia it will be deemed to carry on business in Australia. Further, if the representative office wishes to engage in any activities that constitute carrying on business, an Australian branch must be registered.

### **Company and business names**

A formal register of company and business names registered in Australia is maintained by ASIC.

A name is available to a company for registration unless the name:

- is identical to a name that is reserved or registered under the Corporation Regulations or included on the national business names register
- breaches the legal principles codified in the *Competition and Consumer Act 2010* (Cth) in the areas of “misleading and deceptive conduct”, “misrepresentation” and “passing off”.

There are also restrictions on what can be included in a company name including certain words, names or phrases such as “building society”, “trust”, “university”, “chamber of commerce” and “chartered”.

All companies registered under the Act are entitled to an Australian Business Number (**AB**N) which a company will need to register for the purposes of the Goods and Services Tax (**G**ST). If a company’s annual turnover reaches a prescribed amount, then the company must have a GST registration and therefore also hold an ABN. An ABN is also required to register a business name.

If a company wishes to trade using another name (that is, other than its registered company name) then the trading name must be registered as a business name. Business name registrations are administered at a national level by ASIC. A business name is a type of ‘identifier’ for a business and does not create a legal entity. The registration of a company name or a business name does not grant any proprietary or intellectual property rights in the name itself. To obtain intellectual property protection under statute, it would be necessary to obtain a trade mark registration.

### **Constitution of a company**

The activities of a company are carried out by the persons responsible for the management and control of the activities of the company. Those powers are normally divided between the directors and the shareholders. The way in which the power is shared between these two groups is determined by the terms of the company’s constitution. Generally, the directors have the power to make all decisions on behalf of the company except those matters that are reserved for

the approval of shareholders under the Corporations Act or other applicable laws, the constitution or the company's shareholders agreement (if any).

The constitution of a company is a special type of statutory contract between the company, its members and the directors and secretary. The constitution sets out the various rights of the members and directors, rules relating to the transfer of shares, provisions concerning members' and directors' meetings and rules by which the company is to be internally governed.

## ***Process of incorporation***

The process involved in incorporating an Australian proprietary limited company is:

*Step 1:* The applicant must choose a company name for the Australian company and ensure that the name is available and acceptable for registration.

*Step 2:* The applicant must complete the relevant application form and lodge the form with ASIC. ASIC will only register the company if the name is available.

The form asks for details about the proposed company, including:

- the registered office and principal place of business in Australia
- the share structure
- shareholders
- the proposed directors/secretaries of the company (the details required include the names, residential addresses, date and place of birth).

At least one director must be an Australian resident and companies cannot be directors.

After the company has been incorporated, the company will need to comply with the following post-incorporation matters which require the company to:

- apply to the Australian Taxation Office for an ABN and Tax File Number (TFN)
- keep an up to date company register. This register will contain the register of members and company records and will need to record minutes of all directors and shareholders' resolutions and meetings. The company will also be required to make an annual solvency declaration (that is, the directors must resolve that the company can pay its debts as and when they fall due for payment)
- keep and lodge audited financial statements and reports each year (applicable to large companies or companies controlled by a foreign entity that have not obtained relief from ASIC). There is currently no fee for lodgement of financial statements with

ASIC as long as they are lodged within the required time period. Late fees apply if they are lodged out of time.

ASIC must be notified of changes to the following:

- company name, with notifications to be made within 14 days of the change
- company details (for example registered office or principal place of business), with notifications to be made within 28 days of the change
- company constitution, with notifications to be made within 14 days of the change (only public companies need to lodge their constitution with ASIC and give notice to ASIC regarding any amendments to the constitution)
- directors details (for example name, address, new appointment or resignations), with notifications to be made within 28 days of the change
- share structure or shareholder details, with notifications to be made within 28 days of the change.

## ***Share capital***

The minimum number of shareholders for both a proprietary and a public company limited by shares is one.

The number of shares which can be issued by a company is unlimited.

The manner in which a company deals with its share capital is strictly regulated by the Corporations Act.

## ***Company officeholders***

Under the Corporations Act a company is required to appoint officeholders to act on behalf of the company. These officeholders are responsible for ensuring the company fulfils the legal requirements prescribed by the Corporations Act.

The directors of a company are responsible for the day to day management of its affairs. A public company must have at least three directors and a proprietary company, at least one director.

In the case of a public company at least 2 of the directors must be Australian residents and a proprietary company must have at least one director who ordinarily resides in Australia.

The secretary of a company is responsible for acting as executive officer to the board of directors and administrative officer of the company. Whilst a proprietary company is not required to have a secretary, a public company must have at least one secretary. A secretary must ordinarily reside in Australia.

Every company carrying on business or deriving property income in Australia must also appoint a Public Officer. The Public Officer appointed must be an Australian resident. The Public Officer is responsible for undertaking or ensuring compliance with all things which are required of a company under Australian income tax legislation.

A company officeholder does not need to be an Australian citizen to qualify as an “Australian resident”. Whether the individual is to be regarded as an Australian resident is a question of fact and a number of criteria must be considered and satisfied.

### ***Registered office***

An Australian company must have a registered office in Australia. The registered office must be a street address situated in Australia. A postal address will not satisfy the requirement that the company maintains a registered office.

### ***Auditors and financial reporting***

All public companies must appoint an auditor within one month of the date of their incorporation.

The following entities are required to prepare an annual financial report which must be audited:

- all public companies
- all large proprietary companies
- small proprietary companies which are controlled by foreign entities.

ASIC will, in certain cases, grant relief from the requirement to prepare and audit financial reports for:

- large proprietary companies in which a foreign company has an interest
- small proprietary companies controlled by foreign companies.

Under the Corporations Act auditors have obligations with respect to independence, disclosure and financial reporting.

### ***Books, accounts, registers and filing requirements***

The Corporations Act requires companies to maintain various records and registers of their accounting and administrative transactions. It is usually the company secretary (if one is appointed) who carries out such tasks.

The Corporations Act also requires certain documents to be filed with ASIC from time to time so that an updated record of the company’s affairs is available for inspection by the public. A public company must prepare and lodge with ASIC annual financial reports.

Every company will receive a company statement from ASIC annually in which a director or secretary of the company must notify ASIC of any changes to the relevant details of the company for the public register, including names and addresses of all officers, registered office, address of principal place of business and details of shareholders and their shareholdings



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# **4**

## ***Australian Securities Exchange (ASX)***

# 4 Australian Securities Exchange (ASX)

## **Australian Securities Exchange – An introduction**

Australia's national stock exchange is the Australian Securities Exchange (ASX) registered under the name ASX Limited. ASX is a listed company.

Smaller stock exchanges exist, however they do not have the depth and breadth of the ASX. The ASX is the 15th largest exchange in the world by market capitalisation.

The stated objectives of the ASX are to provide a fair, well-informed market for financial securities and an internationally competitive market. To this end, the ASX issues listing rules which all listed entities must observe. The ASX Listing Rules (**Listing Rules**) govern:

- listing
- quotation
- market information
- reporting
- disclosure
- trading and settlement
- administration
- general supervisory matters
- various other aspects of a listed entity's conduct.

The Listing Rules aim to protect the interests of listed entities, maintain investor protection and regulate the operation of the market. The Listing Rules are enforceable against listed entities and their associates under the Corporations Act.

Listing on the ASX can be lengthy, complex and costly process involving numerous professional advisors and requiring careful planning and project management. Often a company needs to restructure its corporate group, its operations and internal governance arrangements as part of the process.

## **Admission categories**

There are three categories under which an entity may apply for listing on the ASX. These are:

- General Admission

- Foreign Exempt
- Debt Issuer

Each listing category has different conditions that the entity must satisfy. Most entities apply for listing under the General Admission category. A summary of each category is set out below.:

- *General Admission* – a company seeking admission under this category must satisfy either the “asset test” or the “profit test” and various other conditions, some of which are set out on the following pages. Most entities apply under the General Admission category, which is available for both Australian-incorporated companies as well as foreign companies. The headings below focus on the requirements of the General Admission listing category as this is the most commonly used.
- *Foreign Exempt* – this category is available for foreign companies that are already listed on an overseas exchange which is a member of the World Federation of Exchanges (WFE). The WFE membership captures approximately 65 major publicly recognised stock exchanges around the world (such as the New York Stock Exchange, the London Stock Exchange and the Shanghai Stock Exchange).

The Foreign Exempt category is only available for very large entities given the required profits and assets test that the foreign entity must meet. Namely, the foreign entity must either have net tangible assets of A\$2 billion or operating profit before income tax for each of the past three years of at least A\$200 million.

The advantage for a foreign entity qualifying for admission under the Foreign Exempt category, rather than the General Admissions category, is that the entity will not be subject to most of the Listing Rules. This includes exemptions from the continuous disclosure requirements and timetables for corporate actions prescribed by the Listing Rules. The rationale for this is the entity will still be governed by similar requirements in the jurisdiction of its principal listing.

In order to be admitted under this category, an entity must provide the ASX with a copy of its latest annual report and any subsequent interim reports. Following admission, the entity must continue to provide the ASX with copies of its annual reports.

- *Debt Issuer* – an entity seeking admission under this category will issue debt securities only and is subject to different requirements including corporate form and minimum net tangible asset requirements. An ASX debt listing can be applied for in relation to wholesale debt securities or retail debt securities. Once listed under this category, the ongoing Listing Rule requirements that apply to the entity differ from those that apply to entities under the General Admission category.

The rest of this section focuses on the requirements of the General Admission category.

## **Requirements for General Admission**

For an Australian company or foreign company to be admitted to the official list, the following key conditions must be met to the ASX's satisfaction:

- profit/asset test
- satisfactory shareholders spread
- prospectus/information memorandum issued.

The ASX has absolute discretion to admit an entity to the official list and determine the category of an entity's admission.

### **Profit/asset test**

A company seeking admission to the official list must satisfy either the "profit test" or the "asset test".

To seek admission under the "profit test", the company's:

- aggregated profit from continuing operations (before tax) for the last three full financial years must have been at least A\$1 million; and
- consolidated profit from continuing operations (before tax) for the last 12 months (to a date no more than two months before the company applies for admission) must be more than A\$400,000.

To seek admission under the "asset test":

- the entity (except for "investment entities" – see below) must have either net tangible assets at the time of admission of at least A\$3 million after deducting the costs of fund raising, or a market capitalisation of at least A\$10 million (based on the offer price under the prospectus). In addition, one of the following conditions must be satisfied:
  - less than half of the company's total tangible assets (after raising any funds) must be cash or in a form readily convertible to cash; or
  - half or more of the company's total tangible assets (after raising any funds) are cash or in a

form readily convertible to cash, and the company has commitments consistent with its business objectives to spend at least half of its cash and assets in a form readily convertible to cash

- the company must have working capital of at least A\$1.5 million, or an amount that would be A\$1.5 million if the company's budgeted revenue for the first full financial year that ends after listing was included in the working capital. There are special requirements for mining exploration entities or oil and gas exploration entities.

For an "investment entity" (whose principal activities involve investment in securities or futures contracts, rather than managing or control of a business or entity) to satisfy the "Asset test", the entity must satisfy one of the following:

- have net tangible assets of at least A\$15 million after deducting the costs of fundraising; or
- be a pooled development fund and have net tangible assets of at least A\$2 million after deducting the costs of fund raising.

### **Shareholders spread**

The ASX requires a company seeking General Admission to have a satisfactory spread of shareholders. This is to ensure there is sufficient liquidity in the market for trading in the company's securities. Generally, the entity is required to have at least 400 shareholders who each hold shares with a value of at least A\$2,000. However, ASX will also accept a fewer number of shareholders subject to a sufficient number of shareholders being unrelated to the company and its directors, as follows:

- A minimum of 350 shareholders who each hold shares with a value of at least A\$2,000 so long as at least 25 per cent of the company's shares are held by parties unrelated to the company.
- A minimum of 300 shareholders who each hold shares with a value of at least A\$2,000 provided that at least 50 per cent of the company's shares are held by unrelated parties.

Restricted securities, being shares that are required to be subject to "escrow" by the ASX will not count towards satisfying the shareholder spread requirements.

### **Prospectus/information memorandum**

Generally, an entity seeking to list on the ASX in conjunction with fundraising will need to issue a prospectus. This will require the company to prepare and lodge a prospectus with ASIC and issue the prospectus to the public.

If the company:

- does not need to raise funds in conjunction with its application to list on the ASX
- has not raised funds in the three months prior to its application to the ASX
- will not raise funds in the three months after its application to the ASX

an information memorandum (rather than prospectus) may be accepted by the ASX. The preparation of a compliant prospectus under Australian law requires careful attention to detail and professional advice carried out with a formal due diligence and verification process.

### ***Restricted securities***

The ASX may restrict the transfer of shares (known as escrow) issued before the listing so that they cannot be sold for a period of up to two years after listing. This is more common where the company gained admission to the ASX official list under the “assets test”, or where transactions with related parties are involved.

The ASX will also usually seek to restrict shares issued shortly before the listing held by seed capitalists, certain vendors (if the IPO is partially or wholly achieved by a “sell down”), promoters, professionals and consultants advising on the listing and employees receiving shares under an employee incentive scheme.

The purpose of these rules is to help protect the integrity and confidence in the market where a company does not have a history of profits or is otherwise a speculative investment. If the company achieves admission to the official list by way of the “profits test”, then there is no escrow for its shares unless the ASX decides otherwise.

If an escrow applies, the relevant shareholders are required to enter into restricted securities agreements in a form set by the ASX.

After consulting with the offer’s underwriters, founding shareholders may also voluntarily escrow their shares in the interests of a more marketable offer.

### ***Foreign companies listing on ASX***

As explained above, foreign companies are eligible to list under the Foreign Exempt category as well as the General Admissions category. However, due to the requirements for the Foreign Exempt category, most foreign companies seek listing under the General Admissions category. A foreign company does not need to be listed on an overseas exchange to apply under the General Admission category. Sometimes

foreign companies may choose to undergo a corporate restructure or reorganisation to convert or re-domicile to an Australian company, although this is not a requirement.

Foreign companies wishing to list on ASX need to register as a foreign company with ASIC and appoint an Australian local agent, which may be a firm or individual.

In order to be admitted under the Foreign Exempt category, an entity must provide the ASX with a copy of its latest annual report and any subsequent interim reports. Following admission, the entity must continue to provide the ASX with copies of its annual reports. Notably, an entity admitted to this category has the considerable advantage of not having to comply with the continuous disclosure requirements and timetables for corporate actions prescribed by the Listing Rules (as the entity will still be governed by similar requirements in the jurisdiction of its principal listing).

In most cases, foreign companies are domiciled in countries whose laws do not recognise “CHESS” or the Clearing House Electronic Subregister System. CHESS is Australia’s system for the electronic transfer of legal title over quoted securities and uncertificated holdings.

To allow for such foreign companies’ securities to be traded on the ASX, a CHESS entity acts as the depositary nominee to be issued with those securities. The depositary nominee creates a reciprocal unit of beneficial ownership over each security that is then traded on the ASX. These are called CHESS Depositary Interests, or CDIs. The legal title to the securities is held by the depositary nominee company, however, the creation of the CDIs allows for trading of the foreign companies’ securities on the ASX.

Through this structure the holder of a CDI is effectively put in the same economic position as if the holder was the legal owner of the underlying shares. A CDI holder typically also has the ability to exercise any voting rights attached to the underlying shares through a proxy instruction given via the depositary nominee.

### ***Additional Information***

Please see our publication entitled “Listing a Company on the Australian Securities Exchange” for additional information which is available on our website <http://www.pwc.com.au/legal/publications/index.htm>

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# ***5*** ***Visa and immigration for business***

# 5 Visa and immigration for business

There are a number of visa categories available to businesses and business people wishing to come to Australia. The migration program allows for the permanent and temporary entry of business people and highly skilled individuals into Australia and visa requirements vary.

## **Business visitors**

Business people planning to enter Australia for a business visit are able to apply for either an Electronic Travel Authority (ETA) or eVisitor visa, depending on their country of passport. Once granted, the Business ETA and Business eVisitor visas provide the holder with permission to enter and remain in Australia for a period of up to three months from each entry. Business ETA and e Visitor visa holders are only able to participate in business activities while in Australia, specifically: attendance at business meetings or conferences (unpaid only), entering into or finalising contract negotiations, making general employment enquiries or for the purpose of an exploratory business visit.

Individuals who do not hold an eligible passport to access an ETA or eVisitor visa will need to apply for a Subclass 600 Visa under the Business Visitor Stream. These applications can be lodged online or as paper applications, and will be processed by the Australian High Commission or Embassy with responsibility for their country of residence/origin.

Business visitors who are required to undertake short term (no more than three months), highly specialised work will need to enter Australia as the holder of a subclass 400 visa.

## **Subclass 400 visa – short term work**

The subclass 400 visa was introduced in March 2013 and is available to visitors who may be seeking to enter Australia for short term work purposes. To access this visa, the proposed work must be highly specialised, where the person possesses skills which are not readily available to the Australian business from the local labour market.

This visa can be granted to allow work of up to three months (in limited cases, up to six months) where the work meets the definition of highly specialised and is non-ongoing in nature.

## **Sponsoring staff to Australia**

Companies operating in Australia, or companies operating in other countries wishing to establish an entity in Australia, are able to sponsor individuals to come to Australia on a Subclass 457 Temporary Work (Skilled) visa. Individuals sponsored on these visas are able to work in a specified position within the company or associated company as defined under the Corporations Act for a period of up to four years.

Sponsors of Subclass 457 visa holders must:

- demonstrate that they are lawfully operating a business that is actively engaged in business activities
- demonstrate that they are the direct employer of the sponsored employees (for a group of related and associated companies, the sponsor can be related or associated to the direct employer of the sponsored employee)
- demonstrate that there is no adverse information (eg immigration, discrimination, industrial relations, OH&S, taxation) relating to the sponsor or its directors, or an entity associated with it, or if there is adverse information, that it should be reasonably disregarded
- provide an attestation as to their strong record of, or demonstrated commitment to, employing local labour and non-discriminatory employment practices
- where the sponsor is an Australian business, demonstrate that they meet relevant training benchmark criteria. Where the Australian business has been operating for less than 12 months, they must provide an auditable plan for meeting these training benchmarks.
- provide evidence that the salary being offered to a 457 visa holder meets the minimum threshold for the 457 visa program **as well as** the market rate salary for the occupation in Australia
- if applicable, provide evidence that Labour Market Testing has been undertaken in relation to the nominated position and that this Labour Market Testing confirms there are no suitable qualified, readily available candidates in the local Australian labour market.

An employer operating an overseas business that has no formal operating base or representation in

Australia may also sponsor employees on a Subclass 457 visa but the visa holder would need to be nominated to do one of the following:

- establish a branch or other business activity such as a joint venture, agency, distributorship or subsidiary in Australia of the sponsoring entity
- fulfil obligations on behalf of the sponsoring entity for a contract or other business activity in Australia. In these cases, copies of third party contracts would be required.

457 visa applicants also need to satisfy the requirements for the grant of their individual visas, including health, character and English language requirements. For some applicants, formal English language testing may be required as part of the application process.

Companies operating in Australia may also sponsor staff for permanent residence where the nominated position is a permanent full time position and the position of the applicant is highly skilled.

## **Business innovators and investors**

Under the Business Skills program, business people can apply to come to Australia to start their own business, manage a new or existing business, or invest in Australia without the need for a sponsor, subject to meeting relevant criteria and the prerequisite business background and assets.

As of 1 July 2015, the Immigration Department issues three types of Business Skills visas, some with different application streams.

**Subclass 188** – This provisional visa subclass provides four streams:

- *Business Innovator* – this is points tested with points awarded for personal attributes including age, turnover of their business, assets in business, personal assets, employment experience, and English language ability. Applicants must also be under 55 years of age.
- *Business Investment* – this is points tested with points awarded for personal attributes as outlined above, and applicants must also be under 55 years of age.
- *Significant Investor* – this stream does not have any points requirement and has been a suitable option for many overseas business people who have a personal preference to stay outside of Australia for a substantial part of the year to manage their business(es) overseas. Eligibility requirements include the applicant making an investment of A\$5 million into a complying

investment in Australia. This investment must be maintained for a minimum four year period. The 55 years of age limit does not apply to this stream.

- *Premium Investor* – this stream also does not have any points requirement and is intended for talented entrepreneurs and innovators with a minimum A\$15 million to invest. Nomination for this stream of visa are by Austrade invitation only.

**Subclass 888** – After satisfying the relevant requirements including minimum prescribed qualifying periods, subclass 188 visa holders may progress to the subclass 888 permanent residence visa.

**Subclass 132** – Business Talent visa – This subclass of visa provides two streams:

- *Significant business history* – this stream requires the applicant to have a significant business history with ownership of a business with an annual turnover of at least A\$3 million per annum. Applicants must also be under 55 years of age.
- *Venture Capital* – visa applicant must be able to attract A\$1 million of investment from an Australian Venture Capital Association.

In most cases people will enter Australia on a provisional or temporary visa. After a minimum prescribed period they may be eligible to apply for a permanent Business Skills visa provided that all obligations of their existing provisional/temporary visa and additional requirements of the permanent visa are met. In some circumstances, sponsorship by State/Territory Governments may be obtained to assist business applicants by reducing usual business and investment criteria.

There are also other opportunities for business people to migrate to Australia if they are able to satisfy requirements in one of the General Skilled visa categories, which will look at the applicant's:

- age
- English language ability
- occupation
- qualifications
- work experience (including experience in Australia)
- where applicable, any relatives who are Australian citizens, permanent residents or eligible New Zealand citizens residing in Australia.

States and Territories may also provide additional sponsorship to an applicant to assist in meeting requirements under the General Skilled visa categories where the applicant proposes to enter a

particular State/Territory or rural location where their occupation is in need.

The number of places that are available for skilled permanent migration is set by the Immigration Department on an annual basis. The current 2015-2016 skilled migration program intake has been set at 128,550 places. Applications lodged under the general skilled migration programs continue to be subject to priority processing in the following order: regional and employer-sponsored permanent migration applications; applicants nominated by State and Territory Governments; applicants nominated by a relative who is an Australian citizen, permanent resident or eligible NZ citizen; and applicants who nominate an occupation identified as in critical shortage.

### ***Changes to the subclass 457 Visa program***

The subclass 457 visa program is the subject of regular reviews to ensure that it is effectively meeting the demands of Australian business and employers.

Following the Australian Government's most recent review in 2014, it has implemented various recommendations from the report entitled "Robust New Foundations" including further changes to English language requirements, more thorough assessment of genuine position criteria and extension to the validity period for standard business sponsorship agreements (up to five years).

All businesses sponsoring temporary residents are subject to potential monitoring by inspectors regarding their compliance against an extensive number of legally enforceable obligations. One major ongoing obligation that employers should be aware of is the obligation to ensure that a Subclass 457 visa employee's terms and conditions are, and continue to be, no less favourable than those provided to an Australian in an equivalent role in the same workplace (eg paying market salary). A failure to comply with an obligation can lead to an administrative sanction such as a bar to use of the program, an infringement notice, or a court ordered civil penalty.

More recently, an obligation not to engage in discriminatory employment practices has been embedded as another enforceable sponsorship obligation. This obligation only prohibits discrimination on the grounds of citizenship and visa status (discrimination on other grounds continues to be dealt with by other agencies).

Given the frequency of changes to the 457 visa program, it is crucial that businesses accessing these visas remain updated on changes to the requirements for sponsorship, nomination and 457 visa applications

as well as any associated changes to the sponsorship obligations and compliance regime.

### ***Other issues***

Permanent residents are free to purchase property whereas restrictions are placed upon the ability of temporary residents to purchase property. Employers sponsoring staff to Australia should also examine possible exemptions for the Superannuation Guarantee Charge and obtain relevant taxation advice in this regard.

Compliance with immigration law in general is taken seriously and employers should have regard to ensuring that people they employ have the correct authorisation.



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# 6

## *Corporate tax*

# 6 Corporate tax

## Corporate tax issues

The following summary provides a brief outline of the tax issues that may be applicable to a foreign entity doing business in Australia.

### Direct tax

#### Income tax

A company is a resident of Australia for income tax purposes if it is:

- incorporated in Australia, or
- carries on business in Australia and either its:
  - central management and control are in Australia
  - voting power is controlled by shareholders who are residents of Australia.

An Australian resident company is liable to pay Australian tax on all of its worldwide assessable income at the general corporate tax rate of 30 per cent.

An Australian permanent establishment of a foreign company would also be subject to Australian corporate tax.

#### Capital gains tax

Australian resident companies will generally be liable to pay capital gains tax (CGT) on gains on disposal of Australian assets at the corporate tax rate.

Non-resident companies who hold investments on capital account are exempt from Australian CGT in most circumstances except where they dispose of Taxable Australian Property which broadly consists of:

- Australian real property; or
- Non-portfolio interests (10 per cent or more) in entities where the value of the interest is wholly or principally attributable to Australian real property.

Subject to some limited exclusions (eg property with a market value of less than A\$2.5 million), as from 1 July 2016, purchasers will be obliged to withhold 10 per cent of any sale proceeds from the disposal of Taxable Australian Property and remit this to the ATO, with the vendor needing to file a tax return to claim back any withheld amounts in excess of their final tax liability.

### Group taxation

A tax consolidation regime applies for income tax purposes for 100 per cent owned Australian group companies, partnerships and trusts resident in Australia. Australian subsidiaries that are 100 per cent owned by a foreign company and that have no common Australian head company between the non-resident parent and the Australian resident subsidiaries are also allowed to consolidate.

Groups that choose to consolidate must include all 100 per cent owned entities and the choice is irrevocable.

Consolidated groups file a single tax return and calculate their taxable income or loss ignoring all intra-group transactions. There are a number of other benefits of grouping.

Other implications of forming a tax consolidated group include a resetting of the tax cost base of certain assets to market value.

### Dividends paid by an Australian company

If fully franked dividends (that is, dividends paid out of profits which have been subject to Australian corporate tax) are paid by an Australian subsidiary to its foreign parent, no dividend withholding tax is payable. To the extent that dividends are unfranked, dividend withholding tax of 30 per cent (or as reduced under the relevant double tax treaty) is payable on the gross unfranked amount.

### Debt funding of an Australian company

Interest withholding tax of 10 per cent is imposed on interest paid by an Australian company to a foreign non-resident lending entity unless an exemption applies. If, however, the beneficial owner of the non-resident lender has a permanent establishment in Australia and the interest is effectively connected with the permanent establishment, interest withholding tax should not be applied.

Under debt and equity classification rules there may be situations where interest payable is treated as if it were a dividend. Interest paid on instruments that are classified as equity interests will not be deductible for the entity paying the return, but may be frankable. Similarly, dividends paid on interests that are classified as debt interests may be deductible to the entity making the payment and not frankable.

Thin capitalisation measures apply to the total debt of the Australian operations of multinational groups (including branches of those groups). The rules aim to prevent excessive gearing of an Australian entity. Interest deductions are denied to the extent that borrowing exceeds the safe-harbour ratio. The safe harbour threshold is (broadly) 60 per cent of the entity's Australian net assets, and applies to the Australian group on an associate-inclusive basis.

Where borrowing exceeds the safe-harbour ratio, multinational groups are not affected by the rules if they can satisfy the arm's length debt test or the worldwide gearing test:

- The arm's length debt test permits taxpayers to identify the maximum level of debt that an arm's length lender would loan to the Australian group on a stand-alone basis. Supporting documentation must be prepared to evidence the arm's length analysis.
- The worldwide gearing test permits the taxpayer to gear to a similar gearing level to the global gearing level, even if this exceeds the safe harbour threshold.

### *The Taxation of Financial Arrangements (TOFA)*

Special rules apply to the taxation of financial arrangements (**TOFA**). These measures provide six tax-timing (and limited character matching) methods for determining gains or losses in respect of financial arrangements. The default methods are the accruals method and the realisation method. In broad terms, the accruals method will apply to spread an overall gain or loss over the life of the financial arrangement where there is sufficient certainty that the expected gain or loss will actually occur. A gain or loss that is not sufficiently certain is dealt with under the realisation method.

### *Royalties payable to a foreign company*

If an Australian company pays royalties to a foreign resident, the royalties will be subject to royalty withholding tax at the rate of 30 per cent (or as reduced under the relevant double tax treaty) and may give rise to transfer pricing issues.

### *Base erosion and profit shifting*

Australia is committed to combatting multinational tax avoidance and actively participated in the negotiation and drafting of the Organisation for Economic Co-operation and Development (**OECD**) Action Plan on Base Erosion and Profit Shifting (**BEPS**). The final version of the Action Plan was published in October 2015 and is intended to address perceived flaws in international tax rules. The Action Plan contains 15 separate action points or work

streams, some of which are further split into specific actions or outputs.

The following actions have been taken by the Australian Government to implement BEPS and to combat tax avoidance:

- Country by country reporting (Action Point 13) has been introduced requiring entities with annual global revenue of A\$1 billion or more to provide a statement to the Commissioner of Taxation with relevant and reliable information to assist the ATO to carry out transfer pricing risk assessments (see below).
- Revised transfer pricing legislation which refers to Action Points 8 – 10 has been introduced.
- The Board of Taxation has been tasked with consultation on the OECD's recommendations to combat hybrid mismatches (Action Point 2) which allow companies to issue financial instruments and claim a deduction in one jurisdiction but not pay tax in another.
- Penalties in relation to breaches of transfer pricing and profit shifting schemes have been doubled.
- Multinational Anti-Avoidance Law has been passed (see below).
- Consultation to begin on mandatory disclosure (Action Point 11) soon.

### *Transfer pricing*

Australian transfer pricing rules adopt the arm's length concept as promulgated by the OECD. The transfer pricing rules apply to companies, branches, partnerships and trusts. Transfer pricing is seen as a major issue by the Australian Taxation Office (ATO), which is actively pursuing multinationals in Australia.

Where a taxpayer has cross border related party dealings totalling more than A\$2 million, the nature and quantum of these transactions are required to be disclosed to the ATO in the International Dealings Schedule (**IDS**) of the tax return. The data disclosed in the IDS is used by the ATO to select cases for transfer pricing reviews and audits.

The IDS requires the taxpayer to disclose the extent to which its related party transactions are covered by transfer pricing documentation. While transfer pricing documentation is not mandatory, preparing documentation can reduce the penalties that may arise if the ATO conducts an audit and makes a transfer pricing adjustment. To be eligible for penalty reductions, transfer pricing documentation meeting specific requirements set out in the Australian law must be prepared prior to lodging the income tax return.

In addition, as set out above, Australia has introduced legislation giving effect to the OECD's Country-by-Country reporting requirements for years beginning on or after 1 January 2016. These requirements will apply to multinationals with global turnover of more than A\$1 billion.

The adoption of the OECD transfer pricing documentation requirements will mean that eligible companies will have to prepare a CbC report (containing financial, tax, and headcount information for each territory the group operates in), a 'master file' (containing an overview of the group's global business, its organisational structure and its transfer pricing policies) and 'local file'. The ATO is developing implementation guidance on the Australian CbC rules and some local requirements (eg on the local file) may differ slightly from the OECD's recommendations.

### *Controlled foreign companies (CFCs)*

Non-active income of foreign companies controlled by Australian residents may be attributed to those Australian residents under rules that distinguish between countries resident in "listed" countries (such as the UK and the US) and in other "unlisted" countries. In general, if the CFC is resident in an unlisted country and it fails the active income test (typically because it earns 5 per cent or more of its income from passive or tainted sources), the CFC's tainted income (very broadly, passive income and gains, and sales and services income that has a connection with Australia) is attributable to the Australian parent. If a CFC is resident in a listed country, a narrower range of tainted income is attributed.

### *Anti-avoidance rules*

The Australian law includes a general anti-avoidance law that can apply where a taxpayer is found to have entered into a scheme with a sole or dominant purpose of obtaining a tax benefit. A specific multinational anti-avoidance law (MAAL) was introduced from 1 January 2016. This rule can apply where a foreign entity makes supplies to an Australian customer and the revenue is not taxed in Australia. Business models where Australian customers enter contracts directly with foreign entities therefore need to be considered carefully in light of the MAAL.

### *Tax incentives*

#### *Inward investment*

Depending on the nature and size of the investment project, the relevant Australian State governments may give rebates from payroll, stamp and land taxes on an ad hoc basis and for limited periods.

### *Early Stage Venture Capital Limited Partnership (ESVCLP)*

The ESVCLP program is aimed at stimulating Australia's early stage venture capital sector by allowing generous tax concessions for funds meeting the registration and investment criteria.

An ESVCLP is a venture capital fund, legally structured as a limited partnership and registered with Innovation and Science Australia (ISA) in accordance with the *Venture Capital Act 2002* (Cth) Act. An ESVCLP is a tax flow-through vehicle – that is, the ESVCLP will not be taxed at the partnership level. In addition, income and capital gains earned as a result of investment in an ESVCLP will be exempt from tax in Australia in the hands of the partners. Tax losses by ESVCLPs, however, will not flow through to nor be deductible by partners.

ESVCLPs must have their investment plan and partnership deed approved by ISA before they commence their investment activities. There are also a number of legislative requirements which restrict both the financial structure of ESVCLP investments and the nature of the investee entities.

Among those requirements are:

- ESVCLPs must not invest in entities whose value exceeds A\$50 million
- ESVCLPs must divest an investment once its value exceeds A\$250 million (refer below for amendments made in May 2016)
- ESVCLPs may only invest in entities whose predominant activities are eligible activities. Activities which are not eligible include property development, land ownership, banking, providing capital to others, leasing, factoring, securitisation, insurance, construction or acquisition of infrastructure or related facilities and making investments directed at deriving income in the nature of interest, rents, dividends, royalties or lease payments
- the size of the ESVCLP fund must be at least A\$10 million (and not greater than A\$100 million) (refer below for amendments)
- no single partner's interest in an ESVCLP may exceed 30 per cent of the total committed capital.

In addition, ESVCLPs are required to lodge quarterly and annual reports with ISA. The total amount a partnership invests in interests (including debt & equity interests) of a company/unit trust and any associate or other member of the same wholly owned group of that company/unit trust must not exceed 30 per cent of its committed capital. There are exceptions to this rule, which include superannuation funds,

authorised deposit taking institutions and life insurance companies.

### *Tax Laws Amendment (Tax Incentives for Innovation) Act 2016*

The Tax Laws Amendment (Tax Incentives for Innovation) Act 2016 came into force in May 2016. Key changes impacting ESVCLPs include;

- a non-refundable carry-forward tax offset for limited partners of ESVCLPs, equal to up to 10 per cent of contributions made by the partner to the ESVCLP during an income year
- the maximum size of an ESVCLP to increase to A\$200 million from A\$100 million
- the divestment requirement for ESVCLPs for investments which exceed A\$250 million to be removed. However, the tax concessions for those investments are restricted.
- allowing investments of an ESVCLP to invest in other entities, provided that they control the other entity, and the other entity broadly satisfies the eligible venture capital investment requirements.

### *Offshore banking units*

The taxable income derived from pure offshore banking transactions by an authorised offshore banking unit in Australia is taxed at the rate of 10 per cent.

### *Investment Manager Regime*

An Investment Manager Regime (**IMR**) has been introduced in Australia in order to attract foreign investment and reduce tax uncertainty for certain foreign funds.

The IMR, to the extent it applies, provides that any gains on the disposal of a portfolio interest (ie interests of less than 10 per cent) in an Australian investment should be free of Australian tax where its value is not predominantly attributable to land.

The IMR is of particular benefit to investors in non-tax treaty jurisdictions which hold portfolio investments on revenue account.

### *Depreciating assets*

Taxpayers may claim a deduction for the decline in value of capital assets such as buildings, motor vehicles, furniture and machinery and equipment.

Small business entities with a turnover of less than A\$2 million a year may use simplified depreciation rules under which:

- an immediate deduction may be claimed for depreciating assets that cost less than A\$20,000

that were acquired and installed ready for use on 12 May 2015 until the end of 30 June 2017;

- other depreciating assets should be pooled into a general small business asset pool and a 15 per cent deduction may be claimed in the first year, with a diminishing value rate of 30 per cent on the opening pool balance claimed each year after that; and
- if the balance of the pool at the end of an income year is less than A\$20,000, the balance is deductible in that income year.

Other business entities with a turnover of A\$2 million or more a year must depreciate a depreciating asset over its useful life using either the straight line or diminishing value method. The straight line method assumes that the value of a depreciating asset decreases uniformly over its effective life, while the diminishing value method assumes that the value of a depreciating asset decreases more in the early years of its effective life.

### *New Managed Investment Trust regime*

A new taxation regime for eligible Managed Investment Trusts (**MITs**), which make an irrevocable election to enter the regime, recently passed Australian parliament. It is commonly referred to as the **AMIT regime**. The AMIT regime applies from 1 July 2015 (for early adopters).

The benefits of the AMIT regime include deemed fixed trust treatment, an attribution model of trust taxation, the segregation of assets through multiple classes of assets, statutory mechanism to address errors in distributions and new cost base adjustment rules.

If the recipient of distributions from an AMIT is resident in an “information exchange country” the rate of withholding on distributions from the AMIT is limited to a 15 per cent final withholding tax.

### *Other incentives*

Other incentives that may apply are listed below:

- The R&D Tax incentive replaced the R&D Tax Concession from 1 July 2011 and provides more generous benefits for eligible R&D activities. Entities engaged in R&D may be eligible for a 45 per cent refundable tax offset (equivalent to a 150 per cent deduction) if their turnover is less than A\$20 million per annum or a 40 per cent non-refundable tax offset (equivalent to a 133 per cent deduction) for entities with turnover above A\$20 million per annum. Entities may also be able to carry forward unused offset amounts to future income years. You must register annually within 10 months of the company's year-end to access the program.

- Entities may also qualify for the R&D Tax Incentive where the R&D activities are conducted in Australia for an associated foreign corporate, that is resident of a country with which Australia has a double tax agreement. The intellectual property generated from these activities may also be held outside Australia (providing it is held within the same Multinational Group as the Australian entity). A company can also claim activities that are undertaken outside of Australia if certain eligibility criteria are met and over 50 per cent of the activities are performed in Australia. We recommend that you seek advice if you are looking to access the program in Australia as there are many threshold eligibility requirements to consider.

## *Indirect tax*

### *Stamp duty*

The various States and Territories of Australia impose stamp duty at various rates on transactions including mortgages, securities, insurance policies, non-marketable share transfers, lease documents and contracts regarding the transfer of assets, businesses or real estate. In certain States and Territories, some of the above transactions are stamp duty exempt.

Stamp duty laws are constantly evolving, with South Australia having recently abolished stamp duty on the transfer of non-real property assets and New South Wales having abolished stamp duty on the transfer of intangible assets and marketable securities.

Contracts entered into and settled after 1 July 2016 by foreign purchasers for residential property in Victoria (or where foreign purchasers are nominated to take a transfer of the property) attract an additional 7 per cent surcharge on the value of the land. Similar surcharges have also been introduced in New South Wales at an additional rate of 4% (from 21 June 2016) and 3% in Queensland (from 1 October 2016).

### *Land tax*

The government of each State of Australia and the Australian Capital Territory levies land tax (which is a tax levied on the owners of land, excluding a person's principal place of residence) based generally on the unimproved capital value of land. Varying rates of land tax apply across Australia and the rate payable generally increases according to the value of the property. Usually the land tax liability arises for land owned at a particular date, which in New South Wales, is at midnight on 31 December in each year.

Victoria and New South Wales have introduced surcharges applying to foreign owners. The surcharge in Victoria applies to all types of property at an additional rate of 1.5%. In New South Wales it only

applies to residential property at an additional rate of 0.75%.

### *Payroll tax*

Payroll tax is levied on employers on payments made to employees. It may also be levied on payments made to contractors.

Payroll tax is a state based tax. The rules regarding exactly what income is liable to payroll tax are mostly consistent between states, however, the rates of payroll tax vary in each state. Payroll tax is levied as a flat rate between 4.75 per cent and 6.85 per cent, once an employer's national payroll exceeds each state's agreed tax-free threshold. These thresholds range from A\$750,000 to A\$1.75 million.

The threshold is shared between 'grouped' employers. 'Grouped employers' include companies that have a common ultimate controller (Australia or overseas). The definition can also be applied more broadly to include employers that share employees, finance support functions, or even premises.

Payroll tax is levied regardless of whether an employee is paid from a foreign or local payroll.

In some states (currently, NSW and Tasmania), there are concessions offered in the form of payroll tax rebates where an employer increases its overall employee headcount in that state. The current rebates can be as high as A\$5,000 per new employee.

### *Customs duty*

Customs duty is generally levied on the sum of the "customs value" of goods, based on the Free On Board (**FOB**) value at the foreign port of export (ie in a majority of cases includes foreign inland freight). The customs value is determined in accordance with Australian customs law and may not necessarily be the same as the sale price of the goods. Customs duty is payable at the time the goods enter into Australia for home consumption. This can be the date the goods clear through the border or the date they are withdrawn from a customs bonded warehouse.

The *Customs Act 1901* (**Customs Act**) regulates the import of goods into Australia and their export. Part VIII of the Customs Act provides for the payment and computation of the duty payable on those goods. Some relevant factors in assessing the amount of duty payable include the country from which they originated, the tariff classification of the goods and their value. Generally, the rate of duty payable on most goods is 5 per cent, including automotive vehicles and parts. Tobacco, alcohol and fuels are subject to far higher rates of excise – equivalent customs duty. The amount of customs duty payable on imported goods may be reduced through the application of various Tariff Concession Orders

(TCOs), By-Laws, or Free Trade Agreements (FTAs). Application of these concessions depends on a variety of factors such as the nature or origin of the goods and in some cases the purpose for which the goods are imported.

Importers should enquire as to whether or not an existing TCO is available to allow for the duty free import of their goods. Generally speaking, where a TCO does not exist for the goods, importers can apply for a new TCO if it can be shown that there are no substitutable goods produced in Australia in the ordinary course of business in accordance with the requirements of the relevant section of the Customs Act.

Australia currently has several FTAs in force and under negotiation. Most recently, Australian concluded the FTA negotiations with the Republic of Korea, Japan and China with FTAs coming into force in December 2014, January 2015 and December 2015 respectively. Other FTAs in force include the Malaysia-Australia FTA and the ASEAN – Australia – New Zealand FTA (**AANZFTA**).

The AANZFTA is a comprehensive FTA covering all areas of economic activity between member countries, specifically, trade in goods and services, investment, intellectual property, e-commerce, temporary movement of business people, and economic cooperation. It offers significant benefits to Australian businesses trading in South East Asia by progressively eliminating all barriers to trade in goods, services and investment in all their forms. Below is a listing of Australia's existing FTAs and TFAs under negotiation. More information is available on Australia's Department of Foreign Affairs and Trade website.

Australia's existing FTAs include:

- ASEAN-Australia-New Zealand FTA
- Singapore-Australia FTA
- Thailand-Australia FTA
- Australia-United States FTA
- Australia-New Zealand Closer Economic Relations
- Australia-Chile FTA
- Australia-Malaysia FTA
- Korea-Australia FTA
- Australia-Japan Economic Partnership Agreement
- China-Australia FTA

FTAs concluded but not yet in force include the Trans-Pacific Partnership Agreement

FTAs under negotiation include:

- Australia-Gulf Cooperation Council FTA

- Australia-India Comprehensive Economic Cooperation Agreement
- Environmental Goods Negotiations
- Indonesia-Australia Comprehensive Economic Partnership Agreement
- Pacific Agreement on Closer Economic Relations
- Regional Comprehensive Economic Partnership
- Trade in Services Agreement.

In addition to the administrative processes involved with importing goods, importers should take care to ensure that they meet their customs compliance requirements.

There has been increased focus by the Department of Immigration and Border Protection (**DIBP**) on the treatment of transfer pricing adjustments for customs valuation purposes. Companies importing into Australia from related parties should review their transfer pricing adjustments for Customs implications, and determine whether there are any overpaid or underpaid duties. Regardless of the financial impact of the adjustments, related entities importing goods from foreign related party suppliers are encouraged to obtain a valuation advice from the DIBP to confirm that the appropriate customs valuation methodology is applied to the imported goods.

The DIBP has also commenced a targeted compliance program to ensure its legislative and policy requirements for cargo reporting are being met, especially in relation to assembly orders (ie shipments made up of consignments from multiple suppliers). Under customs legislation, separate cargo reports must be issued for each consignor/consignee combination within a consolidated shipment. This is particularly relevant for importers that utilise offshore consolidation hubs as part of their global supply chain network.

To ensure that the DIBP can effectively meet its compliance and enforcement priorities as Australia's international trade environment evolves, international supply chains become more complex and two-way trade increases, the Australian Government has recently committed to the implementation fundamental structural reforms to Australia's trade compliance environment.

The DIBP, in consultation with industry stakeholders, has designed a programme, referred to as the Australian Trusted Trader (**ATT**) Programme, based on partnership and shared responsibility between Australian Customs and international traders that can demonstrate supply chain security, a history of compliant behaviour and business sustainability.

The ATT opened to application from 1 July 2016. A trader accredited as a 'Trusted Trader' under the auspices of the ATT will receive a range of trade

facilitation benefits from DIBP, including enhanced border clearance privileges, reduced interventions, streamlined and periodic reporting, import duty deferral, 'front of queue' processing and priority service and international recognition under mutual recognition agreements with other jurisdictions.



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# 7

## *Goods and Services Tax (GST)*

# 7 Goods and Services Tax (GST)

## *An overview of GST*

A broad based goods and services tax (GST) has applied in Australia since 1 July 2000. The GST is based on the value added tax (VAT) model adopted in most countries around the world. GST is levied at a rate of 10 per cent of the taxable value of most goods, services, rights and property in Australia (including imports). Generally GST does not apply to exports of goods or services consumed outside Australia. From 1 July 2012, Australia moved to a self-assessment system for GST. Under the self-assessment system, the relevant GST liabilities and credits only crystallise for the taxpayer upon lodgement of a GST return or import declaration.

Some key points in relation to GST are listed below:

- If an entity is carrying on an enterprise, and its GST turnover equals or exceeds the annual GST registration turnover threshold, then it must register for GST. This threshold is currently A\$75,000 (A\$150,000 for non-profit bodies). Entities who do not breach this threshold can register for GST voluntarily if they are carrying on an enterprise anywhere in the world.
  - GST is payable at the rate of 10 per cent on the supply by a GST registered entity of most goods, services or intangibles, except to the extent that the supply is “input taxed”, “GST-free” or “outside the scope” of GST (see below). The supplier is legally liable for any GST payable. Typically the GST is recovered by the supplier from the recipient of the supply as part of the contract price.
  - Subject to certain exemptions, GST is also payable on the importation of goods at the rate of 10 per cent of the value of the taxable importation. The Department of Immigration and Border Protection will collect GST from importers of goods at the time of importation, unless the entity is registered for the deferred GST scheme (in which case the relevant GST amount will be remitted to the Australian Taxation Office in the importer’s next monthly GST return).
  - Some importations of services may also be taxable, under a “reverse charge” rule.
  - Registered entities are generally entitled to claim an input tax credit for GST paid on things acquired in carrying on their enterprise. A four-year time limit is in place to limit retrospective input tax credit claims. No input tax credits are available for acquisitions that relate to making input-taxed supplies, or for anything acquired or imported for private consumption.
- GST returns must be lodged on a quarterly basis by suppliers with a GST turnover of less than A\$20 million, unless they elect to lodge returns on a monthly basis. Suppliers with a GST turnover of A\$20 million or more must lodge their GST returns on a monthly basis. Taxpayers can elect to lodge annual GST returns if they are not required to be registered for GST.

## *Different types of supply for GST purposes*

- Some supplies will be “GST-free” (usually referred to as “zero-rated” in other GST or VAT regimes). Where supplies are GST-free, the supplier is not liable to remit GST on the supply, however there is no restriction on claiming input tax credits for the GST paid on costs relating to making the GST-free supply.
- The following supplies may be GST-free (subject to certain conditions):
  - exports of goods;
  - international air and sea travel;
  - domestic air travel if part of an international trip;
  - most health, education and child care services;
  - most food; and
  - water, sewerage and drainage.
- Other GST-free supplies include, but are not limited to:
  - the sale of an existing business (what is called in the legislation “the supply of a going concern”)
  - the first supply of precious metals;
  - supplies through inwards duty-free shops;
  - grants of freehold and similar interests by government;
  - certain cross-border supplies with an ultimate recipient in Australia who is registered for GST;
  - certain supplies of services for consumption outside Australia; and
  - certain supplies of farm land.
- Some supplies are “input taxed” (usually referred to as “exempt” in other GST or VAT regimes). This means the supplier does not pay GST on the

supply, but is not generally entitled to claim input tax credits on the things acquired to make the supply (except in certain circumstances where a partial input tax credit may be available for acquisitions of a specified kind that relate to making financial supplies).

- The following are some examples of input-taxed supplies:
  - certain types of financial services;
  - residential rents and the supply of residential premises other than the sale of new residential premises (which is taxable);
  - the subsequent supply of precious metals after the first GST-free supply of the precious metal.
- Supplies that are not for consideration, not made through an enterprise or not connected with Australia are generally outside the scope of GST.
  - Some examples of supplies that are out of scope for GST purposes include the following:
    - the receipt of dividends;
    - supplies between members of a GST group or between non GST registered entities; and
    - gifts or donations.

### ***Real property***

- The sale of a freehold or other interest in land by a GST registered entity will be subject to GST under the general rules. The parties can choose to apply the margin scheme provisions to calculate a reduced amount of GST on the supply, provided the supply is eligible and the supplier and recipient agree in writing that the margin scheme is to apply. Where the general GST rules apply, GST is calculated on the full selling price of the property. Where the margin scheme is applied, the amount of GST payable is 1/11th of the margin for the supply. Normally, the margin is the amount by which the consideration for the supply (the registered person's sale price) exceeds the consideration for the acquisition of the interest. Under a margin scheme transaction, the purchaser cannot claim an input tax credit for the GST paid on the margin.
- A sale of residential premises by an unregistered private individual(s) to another unregistered private individual(s) is outside the scope of the GST.

### ***Resident agents acting for non-residents***

- The GST on any taxable supplies made by a non-resident through a resident agent may be payable by the resident agent and not the non-resident.

This rule equally applies for claiming GST on acquisitions and paying/claiming import GST.

- The GST rules have recently changed so that more inbound supplies which are connected with Australia are caught by a “reverse charge” obligation on the Australian recipient as opposed to the Australian resident agent.

### ***Supplies of insurance***

- The supply of an insurance policy by an insurer is generally taxable. The GST is calculated on the insurance premium excluding any stamp duty payable on the premium. Life insurance is input taxed. Insurance supplies that qualify as exports and/or private health insurance policies are GST-free.

### ***Imported digital products and services***

- From 1 July 2017, the supplies of services and intangibles (eg streaming of content, games, digital media etc) made to ‘Australian consumers’ by non-residents will be included within the scope of Australian GST. This means that offshore intangible supplies made to private individuals in Australia will be taxable for GST purposes.
- Where these supplies are made via an ‘Electronic Distribution Platform’ (EDP), the GST obligations will fall on the EDP rather than the non-resident supplier.

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# 8

## *Personal tax*

# 8 Personal tax

## *Australian tax implications of resident status*

For individuals, the tax implications of resident status may be summarised as follows:

- Residents who are not temporary residents (see further below) are subject to tax on worldwide income and taxable capital gains (although a foreign tax credit is generally available within limits).
- The top marginal tax rate is 45 per cent and this applies to income over A\$180,000 (tax on the first A\$180,000 is A\$54,750 for the year ended 30 June 2016).
- In addition, a temporary budget repair levy applies to all taxpayers with a taxable income over A\$180,000. The levy is payable at a rate of 2 per cent of each dollar over A\$180,000. This levy will apply until 30 June 2017.
- Medicare is Australia's universal health insurance scheme. Contributions to the health care system are generally made through the tax return via the Medicare Levy. The Levy is 1.5 per cent of taxable income and reportable fringe benefits. A Medicare Levy Surcharge of an additional 1 to 1.5 per cent of taxable income and reportable fringe benefits is payable for higher income earners who do not have appropriate private hospital insurance. An exemption from the Medicare Levy is available to expatriates from certain countries, low income earners, and some other taxpayers meeting certain requirements.
- Inbound expatriates who are temporary residents will be exempt from tax in Australia on any foreign sourced investment income. They are also subject to capital gains tax on a narrower range of assets. An individual will be a temporary resident if they hold a temporary resident visa, and do not have a spouse (either married or de facto) who is an Australian citizen or Australian permanent resident.
- Residents may be subject to an accruals taxation system where they have transferred property or services to foreign trusts, or where they hold a substantial interest in controlled offshore companies. Temporary residents are exempt from these rules.
- There is a requirement for each employer to make a compulsory contribution into an Australian approved retirement fund (a complying Australian superannuation fund) on behalf of each employee.

The amount is currently 9.5 per cent of salary up to a specified salary cap, A\$50,810 per quarter for the year ended 30 June 2016. There are plans to incrementally increase the contribution rate to 12 per cent by 1 July 2025. However, certain exemptions may apply for inbound expatriates, including where they have transferred from countries with which Australia has signed a bilateral social security agreement and certain senior executives holding temporary resident visas.

## *Taxation of employment income*

A resident individual's worldwide employment income will generally be subject to Australian tax, regardless of whether or not the income is remitted to Australia. Where the income is subject to tax, the employer is obliged to withhold and remit a portion of the employee's income to the Australian Taxation Office.

Employment income subject to tax includes base salary, wages, allowances (other than exempt living-away-from-home allowances), commissions, director's fees and other cash remuneration such as bonuses and profit sharing payments including employee share/option schemes.

Any contract of employment should be reviewed by a taxation adviser prior to finalisation. This is important for purposes of identifying possible questions of residency and putting in place tax effective remuneration packages.

## *Fringe benefit tax*

Fringe benefit tax (**FBT**) applies to most non-cash benefits provided by an employer to an employee or an associate of an employee, previous employee or future employee.

The main areas generally affected by this tax are motor vehicles provided to employees, allowances paid to employees to cover food and accommodation costs while working in Australia, low or no interest loans, and payment or reimbursement of private expenses, such as medical insurance.

Fringe benefits are not taxable in the employee's hands. Instead, a separate tax collection procedure applies to fringe benefits, which is levied on the employer at the highest marginal tax rate. However, it is not uncommon for the employer to pass on the FBT costs as part of a total remuneration package for the employee.

FBT is levied on the employer and is payable with respect to benefits paid by both an Australian

company and an overseas company where the employee is working in Australia. There are numerous FBT exemptions and concessions for benefits which relate to employment assignments and re-locations. However, most of the exemptions relating to living away from home allowance have been curtailed as of 1 October 2012.

Australia should always seek specific advice regarding the application of Australia's tax rules and planning opportunities.

### ***Net capital gains***

Capital gains that have been derived on the disposal by sale, or otherwise, of assets acquired after 19 September 1985 are generally included in assessable income. Effective 21 September 1999, where the asset is held for more than 12 months (subject to certain exemptions) only 50 per cent of the net capital gain is assessable. This discount is generally not available for foreign residents and temporary residents in respect of capital gains which accrue after 8 May 2012.

Foreign residents and temporary residents are, however, only subject to capital gains tax on a limited range of assets. There are also special rules that apply to valuation of assets for capital gains tax, where an individual becomes a tax resident for the first time. The disposal of a main residence is generally not subject to capital gains tax.

### ***Planning for investments***

As previously indicated, residents of Australia who are not considered temporary residents are subject to Australian tax on their worldwide income, less a foreign tax credit where applicable. It is essential therefore to review personal investments and other related matters prior to becoming a resident of Australia to determine tax exposure and planning opportunities.

### ***Taxation of Financial Arrangements (TOFA)***

These measures prescribe the way in which foreign exchange gains and losses are identified and calculated and provide strict timing rules for ascertaining when foreign exchange (forex) gains and losses are recognised for tax purposes.

The TOFA legislation may apply to bank accounts and loans denominated in foreign currency if the accounts and loans were established, entered into, re-financed or varied on or after 1 July 2003. Certain exemptions may apply where specific conditions are met. Individuals who are considered temporary residents are only subject to these rules in specific circumstances.

### ***Before becoming a resident***

Anyone contemplating becoming a resident of

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# 9

## *Overview of Australian employment law*

# 9 Overview of Australian employment law

## **Australian employment law – An introduction**

Broadly speaking, Australian employment law is derived from the following sources:

- the common law; and
- the statutory and regulatory framework comprising the National Employment Standards and industrial instruments, such as modern awards and enterprise agreements.

## **The common law**

The common law is a primary source of obligations in employment in Australia. The most obvious source of common law obligations is the contract of employment. A contract of employment (whether written or oral) governs every employment relationship in Australia. However, any terms and conditions of an employment contract which breach the minimum conditions prescribed by the statutory and legislative framework will be invalid.

An employment contract need not be in writing, although it is highly recommended. A written employment contract ought to address a range of issues which will vary depending on a range of factors, including but not limited to:

- commencement and duration of the employment;
- remuneration;
- the employee's role and seniority;
- the manner which the relationship can be terminated; and
- any specific requirements, including confidentiality, intellectual property and post-termination restraints.

If used effectively, a written employment contract provides a mechanism by which the parties' relationship may be effectively described, governed and measured.

The importance of having a written and up-to-date employment contract has become more significant over the past few years, following several recent developments in the way courts approach cases concerning disputes over parties' obligations, rights and entitlements in an employment context.

Written workplace policies may be issued by the employer which set out procedures to be followed by employees when performing work or accessing entitlements. Subject to their terms, typically, policies do not contain binding obligations on the employer.

## **The statutory and regulatory framework**

Workers employed in the private sector and the Federal public sector are subject to federal workplace legislation, principally the *Fair Work Act 2009* (**FW Act**).

Employees working in the State public sector are still, in most cases, regulated by State workplace legislation.

## **The Federal statutory framework**

### **Fair Work Act**

Some of the key features of the system under the FW Act are:

- The introduction of a National Minimum Wage (A\$17.29 per hour for the 2016 financial year)
- 10 new National Employment Standards (**NES**) which are statutory minimum terms and conditions of employment (effective from 1 January 2010);
- Modern awards provide additional minimum terms and conditions for those employees covered by the modern awards;
- A new institutional framework for the administration of the national workplace relations system and new bodies to administer the system – the Fair Work Commission (**FWC**) and the Fair Work Ombudsman;
- A new system for the making of collective employment agreements, now called *enterprise agreements*. Employers, employees and unions must follow good faith bargaining rules when negotiating new enterprise agreements and there are new requirements for enterprise agreement content and approval. For an enterprise agreement to be made, it must pass a test which requires that each employee covered by the enterprise agreement to be “better off overall” in comparison



- to the minimum entitlement provided under an applicable modern award (the **BOOT** test);
  - Broader rights for unions to enter workplaces, and access information pertaining to employees, including the right to enter a workplace and hold discussions with employees and rights to apply to the FWC for access to non-union member employee records;
  - New transfer of business rules, which cover a broader scope of activities than previously applied including outsourcing, in-sourcing and transfers of employment between associated entities or employers where there has also been a transfer of assets. Enterprise agreements applicable to transferring employees will transmit to the new employer and will apply until they are replaced by another enterprise agreement. Additionally, transferred enterprise agreements will apply to the new employer's employees who are hired after the transfer of business and performing the same work alongside the transferring employees;
  - A category of rights called *general protections* covering not only the right to freedom of association but also the right not to be treated adversely because an individual has a workplace right, the right not to be subjected to discriminatory or wrongful treatment, coercion, misrepresentation, and the rights not to be subject to unlawful termination or sham contracting arrangements; and
  - A small business fair dismissal code for Small Business employers, being employers and their associated entities who employ fewer than 15 employees (excluding casuals not employed on a regular and systematic basis).
- care or support because of family or domestic violence.
- 3 A right to unpaid parental leave of up to 12 months for qualifying employees, with right to request an extension of up to a total of 24 months (approval subject to the employer's reasonable business requirements).
  - 4 Four weeks' paid annual leave (5 weeks for shift workers), with the ability for annual leave to be cashed out for a non award/enterprise agreement employees provided a minimum accrual of 4 weeks is retained (excluding casual employees).
  - 5 A right to personal/carer's leave and compassionate leave. Employees are entitled to 10 days paid personal/carer's leave per year of service (excluding casual employees). Employees are also entitled to 2 days unpaid carer's leave and 2 days paid compassionate leave (unpaid for casual employees) for each "permissible occasion".
  - 6 Community service leave – this includes up to 10 days paid jury service leave (excluding casual employees) and unpaid community service activities, including certain emergency management activities.
  - 7 Pending the development of a new national standard, existing long service leave entitlements provided under relevant award, enterprise agreement, or State and Territory legislation continue to apply see Other Legislation, below).
  - 8 Entitlement to paid public holidays and rules around work on public holidays.
  - 9 Minimum notice of termination and redundancy pay – all employees are entitled to receive a minimum period of notice of termination (or payment in lieu of notice) of up to 5 weeks depending on length of service and age (excluding casual employees). Additionally, certain employees who are retrenched are entitled to a minimum severance/redundancy payment calculated with reference to the employee's period of service with the employer. Small Business employers are generally excluded from the obligation to make severance/redundancy payments.
  - 10 Fair Work Information Statement requirement – this statement must be given to new employee as soon as practicable after they commence employment. The statement contains information about the NES, modern awards, agreement making, the right to freedom of association and the role of FWC.

### *National Employment Standards*

The 10 NES prescribe:

- 1 Maximum weekly hours of work – 38 ordinary hours for full-time employees plus reasonable additional hours.
- 2 The right to request flexible working arrangements for employees who:
  - are parents or carers of children of school age or younger, or of an individuals with a disability or a medical condition;
  - have a disability;
  - are 55 or older;
  - are experiencing family or domestic violence; or
  - are caring for or supporting an immediate family or household member who requires

## ***Industrial Instruments***

The terms and conditions of employment of a large percentage of Australian employees are governed by industrial instruments, including modern awards and enterprise agreements.

### ***Modern awards***

There are approximately 120 modern awards, covering a wider range of industries and occupations.

Certain occupations are generally (but not always) not covered by a modern award such as senior management, qualified lawyers, accountants and human resources specialists. Even employees who are award-covered may be exempt if they have received and accepted a written guarantee of their annual earnings, which is above the high income threshold (A\$126,700 a year for the 2016 financial year, indexed annually).

Modern awards provide minimum rates of pay and minimum entitlements that are in addition to the NES entitlements, including overtime and penalty rates, allowances, leave loading, superannuation, procedures for consultation, representation and dispute settlement, and redundancy/severance pay.

Additionally, modern awards must also contain a flexibility clause, which allows employers and employees in certain prescribed circumstances to negotiate an individual flexibility arrangement varying the application of certain allowed parts of the modern award to meet their individual needs.

### ***Enterprise agreements***

As mentioned above, the FW Act sets out a number of requirements in relation to enterprise agreement bargaining, content and approval including:

- that the parties to the enterprise agreement engage in good faith bargaining;
- the passing of the BOOT test in comparing the relevant provisions of a modern award with the terms of a proposed enterprise agreements;
- enterprise agreements must contain “mandatory terms”, including flexibility and consultation terms. A “flexibility term” allows certain arrangements to be made with individual employees (such as an arrangement to work flexible hours or part-time). Consultation terms impose on employers the duty to consult with employees in the presence of the employees’ representatives (if the employees choose to) about major workplace changes that are likely to have a significant effect on them; and
- enterprise agreements must not contain any “unlawful terms” including discriminatory terms

and objectionable terms. An objectionable term is one that allows conduct that could contravene the general protections requirements or requires payment of a bargaining services fee.

Similar to modern awards, enterprise agreements provide minimum entitlements that are in addition to statutory entitlements provided under the NES such as overtime and penalty rates, allowances, leave loading, superannuation, procedures for consultation, representation and dispute settlement, and redundancy/severance pay.

If an enterprise agreement applies to an employee, the enterprise agreement will supersede any modern award that would otherwise apply to the employee.

## ***Claims against employers***

### ***Entitlements***

If an employer fails to meet any of the requirements under the NES or an industrial instrument, the employee (or the Fair Work Ombudsman) can initiate court proceedings against the employer for contravening the FW Act. A court may order the employer to pay the entitlements and may require the employer (as well as any person involved in the contravention such as a director of a corporate employer) to pay penalties.

When terminating employment, an employer must dismiss an employee in accordance with the FW Act which requires employer to:

- provide a minimum notice period for termination (of employment except where the employee is guilty of serious misconduct);
- recognise certain entitlements and industrial instruments if there is a transfer of business; and
- make redundancy payments in the event of a genuine redundancy

In addition to the FW Act, there may be termination entitlements which the employer is obliged to recognise under the contract of employment or industrial instrument.

### ***Unfair Dismissal***

Under the FW Act certain employees have statutory rights to claim relief for unfair dismissal (in circumstances where termination is considered to be “harsh, unjust or unreasonable”) subject to certain conditions and exemptions contained in the FW Act.

An employee (including a casual employee employed on a regular and systematic basis for a period of 12 months or longer) will generally be eligible to apply for unfair dismissal provided that:

- the employee has completed the **minimum employment period** of 6 months, or 12 months if the employer is a **small business employer** under the FW Act at the time of dismissal; and
- the employee is either covered by an industrial instrument or has annual earnings below the high income threshold (being A\$129,300 in FY14, indexed annually).

The *Small Business Fair Dismissal Code* applies to small business employers and a small business employer will be protected from unfair dismissal claims if it acts in accordance with process specified in this code.

If FWC finds that an employee has been unfairly dismissed it may order reinstatement to employment of the employee and/or compensation to the employee. The maximum compensation an employee can be awarded must not exceed the lesser of:

- A\$68,350 (ie 26 weeks' wages at the 2016 financial year high income threshold amount, indexed annually); and
- the total amount of remuneration the employee is entitled to receive or have received (whichever is higher) during the 26 weeks immediately prior to the dismissal.

### *Unlawful termination*

The FW Act also provides redress for an employee who is terminated unlawfully (as opposed to unfairly). In other words, the termination occurred for a prohibited reason which is prescribed by the FW Act including trade union membership or participation in trade union activities, temporary absence from work due to illness or injury, or on the basis of unlawful discrimination (for example, race, colour, sex, age, family responsibilities, pregnancy and religion).

The FW Act now extends the coverage of unlawful termination provisions to all employees and employers (including those who fall outside the Federal system).

### *General protections*

The general protection provisions in the FW Act aim to protect workplace rights and freedom of association and to provide protection from workplace discrimination. An employer must not take any adverse action against another person (such as an employee) because the other person has a workplace right, has exercised a workplace right, or proposes to exercise such a right.

“Workplace rights” has a very broad meaning. For example, a person has a workplace right if he or she has an entitlement under a modern award, enterprise agreement, or a workplace law, is able to initiate a

proceeding under a workplace law, or is able to make a complaint or inquiry in relation to their employment. “Adverse action” includes dismissing or refusing to employ someone, and also includes discriminating against them or otherwise injuring them in their employment (by, for example, demoting them).

An employer must not take adverse action against another person (such as an employee) because he or she has engaged in lawful industrial activity (such as belonging to or participating in a union) and must not dismiss an employee because the employee is temporarily absent from work because of illness or injury. An employer must also not take any adverse action against an employee (or prospective employee) because of his or her race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction, or social origin.

### *Breach of contract/wrongful dismissal claims*

There are other causes of action for dismissal (such as under the common law for breach of contract) which may provide an employee with redress if the employment contract is terminated other than in accordance with its terms.

Commonly, they are limited in practice to senior executives, managers or highly remunerated employees.

### *Discrimination/equal opportunity claims*

Employees who believe they have suffered discrimination may, irrespective of whether they are covered by the Federal or State industrial relations system, make a complaint to the Australian Human Rights Commission or the employee's respective State or Territory tribunal, such as the New South

Wales Anti-Discrimination Board, under the respective Federal, State or Territory discrimination legislation.

### *Bullying*

Workers who believe that they have been bullied at work can apply to the FWC for an order to stop the bullying.

Bullying is defined as repeated unreasonable behaviour by an individual or group that creates a risk to another worker's health and safety. Bullying does not include reasonable management action that is carried out in a reasonable manner.

If the FWC finds that bullying has occurred it can make any orders that it considers appropriate (other

than an order for compensation) to prevent the worker being bullied at work. These orders can be directed to the applicant worker, the other individual(s) involved and management of the employer/principal.

## Other Legislation

### *Paid Parental Leave*

The Federal *Paid Parental Leave Scheme* gives eligible employees up to 18 weeks' pay at the **National Minimum Wage**. This applies to eligible primary carers of newborn or adopted children. The payments are made by the Government to the employer, who then pays it to the employee. The payments can be paid before, after, or at the same time as existing entitlements such as annual leave, long service leave and employer-funded paid parental leave.

### *Superannuation*

Superannuation is a form of compulsory savings which a person may only access when retiring from the workforce and subject to other restrictions, such as age.

The *Superannuation Guarantee (Administration) Act 1992* (Cth) effectively requires employers throughout Australia to make certain superannuation contributions for their employees at the applicable superannuation rate. Failure to do so means the employer will be liable for a superannuation guarantee charge (made up of the superannuation guarantee shortfall amount, interest on that amount, and an administration fee), which is payable to the ATO.

The current rate of superannuation increased is 9.5 per cent of an employee's ordinary time earnings, subject to the superannuation guarantee maximum contribution base (currently A\$50,810 per quarter for 2016 financial year). Employees generally have the right to choose which superannuation fund or retirement savings account will receive their superannuation guarantee contributions.

### *Long Service Leave*

Many employees in Australia are entitled to long service leave, which was introduced a number of years ago to reward employees for having provided a long period of service to one employer. Historically, the entitlement has been governed by a pre FW Act industrial instrument or State or Territory legislation. Although the exact entitlement varies, it is typically 8.6 weeks for each completed 10 years continuous service and 4.3 weeks for each completed 5 years after then.

The NES, preserves existing entitlements to long service leave derived from one or more of the following sources:

- an enterprise agreement; or
- applicable State or Territory long service leave legislation.

### *Work Health and Safety*

Australian occupational health and safety legislation is generally State and Territory-based. There is no unitary, national work health and safety statute, although the Commonwealth and all States and Territories except Western Australia and Victoria have adopted similar "harmonised" occupational safety laws.

These laws impose significant obligations upon employers in respect of their employees and other persons entering the workplace. These obligations include providing:

- safe premises, machinery and substances
- safe systems of work, appropriate information, training, instruction and supervision; and
- a suitable working environment and facilities.

In addition, employers have obligations to implement and maintain systems for assessing and controlling health and safety risks, mechanisms for consultation with employees in relation to health and safety issues, and appropriate documentation and records.

Directors and senior managers also have a personal "due diligence" obligation, namely to acquire and keep up to date knowledge on health and safety matters, to understand the hazards and risks associated with the employer's business, to ensure that appropriate resources and processes are in place to respond to eliminate or minimise risks and to implement processes for complying with the employer's health and safety duties.

Failure to comply with these obligations may lead to prosecution and the imposition of significant penalties. Penalties may be imposed on employers (including directors and managers of an employer) for breaches.

Obligations are not confined to employers. Occupiers of premises, manufacturers, suppliers of plant, employees, self-employed persons and the Crown also have specific and separate obligations under occupational health and safety legislation.

Specific legal obligations will vary according to which State or Territory the employer or other person or entity is located.

## *Workers Compensation*

All Australian employees (including certain Australian employees based overseas and overseas employees based in Australia) are covered by workers compensation legislation. Each State and Territory has enacted workers compensation legislation, which imposes significant obligations on employers including:

- providing workers compensation insurance coverage;
- informing the relevant authorities about work injury and diseases;
- ongoing employer compliance responsibilities;
- workers compensation payments to injured employees;
- helping injured employees return to work; and
- establishing a rehabilitation policy and program.

## *Privacy and Surveillance laws*

*The Privacy Act 1998* (Cth) establishes Australian Privacy Principles (**APPs**) which set out various requirements in relation to personal data. The APPs do not, however, apply

to “employee records”. An employee record is a record of personal information that concerns a past or current employment relationship and can include medical information.

For the employee records exemption to apply, various conditions must be met such as an employer’s use of an employee record must be directly related to the employment relationship. The exemption does not apply to contractors or unsuccessful job applicants.

There are no comprehensive Federal laws dealing with workplace privacy or surveillance. Workplace surveillance is, however, specifically dealt with in New South Wales, Victoria, Western Australian, Australian Capital Territory and Northern Territory legislation. *The New South Wales Workplace Surveillance Act 2005* (NSW) is the most comprehensive workplace relations legislation. This prohibits all forms of camera surveillance, computer surveillance and tracking surveillance at work unless certain notice and other requirements are met.

In addition, there are restrictions on blocking emails and internet access in New South Wales workplaces (particularly in relation to emails from union websites).

## *Anti Discrimination*

There are various Federal, State and Territory statutes prohibiting direct or indirect discrimination

in specified areas. Relevant Federal legislation includes the:

- *Racial Discrimination Act 1975* (Cth)
- *Sex Discrimination Act 1984* (Cth)
- *Disability Discrimination Act 1992* (Cth)
- *Australian Human Rights Commission Act 1986* (Cth)
- *Age Discrimination Act 2004* (Cth).

Each State and Territory also has comprehensive antidiscrimination and equal opportunity legislation.

Direct and indirect discrimination may be defined as follows:

**direct discrimination** is treating one person less favourably than another because of particular attributes, such as age, race, colour, descent, national or ethnic origin, immigrant status, sex, marital status, pregnancy or potential pregnancy, family responsibilities, breastfeeding, gender identity, sexual orientation, intersex status, disability, religious belief or activity, political belief or activity, industrial activity or association (whether as a relative or otherwise) with a person identified by reference to any of the above attributes

**indirect discrimination** is applying a standard, condition or practice to all employees equally, but in a way that ends up being unfair to a specific group of people because of a particular attribute of that group (as listed above), and the standard, condition or practice is unreasonable.

Discrimination and equal opportunity legislation affects all stages of the employment relationship, including job selection and recruitment of prospective employees, which employees receive training in the workplace and what sort of training is offered, conditions and benefits of employment, which employees are considered and selected for transfer, promotion, retrenchment and termination of employment. The discrimination laws do not only apply to the employment relationship, but also apply in other areas including the provision of goods and services, education, accommodation, clubs and associations, and superannuation.

All discrimination laws are complaint-based. An applicant may complain to an administrative agency which is required to provide a process of inquiry and conciliation at first instance. Where there is a continuing disagreement, a tribunal or court may hear and determine the issues and may apply penalties against the employer and/or award compensation to the applicant. Significant monetary compensation has been made against employers for such claims.

In addition to the anti-discrimination and equal opportunity legislation outlined above, the *Workplace Gender Equality Act 2012* (Cth) requires all non-public sector employers with 100 or more employees to report to the Workplace Gender Equality Agency. The relevant employers will be required to report against a set of standardised gender equality indicators (**GEIs**), which encompass issues such as the gender composition of the workforce and the governing bodies of relevant employers, the equal remuneration between women and men, the flexibility of working arrangements, and consultation procedures with employees on gender equality issues.

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**10**

***Intellectual property***

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# 10 Intellectual property

## **Intellectual property – An introduction**

Australia's legislation protects intellectual property such as trademarks, copyright, patents and designs. Remedies are also available under Australia's common law for goods or services that are "passed off" as those of another and under the *Competition and Consumer Act 2010* (Cth) for conduct of a corporation which is misleading or deceptive or likely to mislead or deceive. Australian common law will also protect confidential information and trade secrets in certain circumstances.

## **Trade marks**

The *Trade Marks Act 1995* (Cth) provides for the registration of a trade mark which is capable of distinguishing the designated good or service from the goods or services of other persons. The initial registration of a trade mark is for 10 years. Registration may be renewed for additional periods of 10 years upon payment of renewal fees.

Registration of a trade mark gives the owner the exclusive right to use the trade mark in relation to the goods or services covered by the registration and the right to take action for trade mark infringement.

It is not essential that a trade mark is registered in order for the owner to be able to enforce rights in it. However, it is much easier for the owner to do so if registration of the trade mark is held. An application for registration of a trade mark in Australia may be based either on use of the trade mark or on intention to use the trade mark. In the latter case, it is not necessary that the intention has matured into actual use by the date of registration.

Australia is a signatory to the Paris Convention for the Protection of Industrial Property. Therefore, a first application for registration of a trade mark in any other convention country may be used as a basis for an identical application in Australia claiming the priority date of the original application, provided that the Australian application is filed within 6 months of the original application.

## **Copyright**

Copyright in Australia is protected under the *Copyright Act 1968* (Cth) (**Copyright Act**). There is no registration system for copyright in Australia. Copyright protection is granted in respect of original literary, artistic, musical and dramatic works. Copyright lasts for the life of the author plus 70 years

or, if published, performed or broadcast after the author's death, 70 years from the first date of publication, performance or broadcast. There is no requirement that a "work" within the meaning of the Copyright Act is of artistic or literary quality, it is sufficient that it is original.

Apart from protection in works, the Copyright Act also recognises copyright in other types of subject matter such as photographs, sound recordings, cinematographic films and performers' rights.

Australia is a signatory to the Berne Convention for the Protection of Literary and Artistic Works and therefore works created in other countries which are also signatories to the Berne Convention will be entitled to the same protection in Australia as Australia gives to copyright claimed by its own nationals.

Australian copyright law also recognises moral rights and digital rights such as Electronic Rights Management information (**ERM**) and technological protection measures. Computer programs are generally protected as literary works.

Australia's copyright law deems that, in the majority of cases, a work created by an employee during the course of his or her employment will be owned by the employer whereas copyright created by an independent contractor will be owned by that independent contractor.

## **Patents**

In Australia, patents are granted under the *Patents Act 1990* (Cth) and give the successful applicant the exclusive right to exploit the patented invention and to authorise another to exploit the patented invention for 20 years.

Generally a patent will be granted if, when compared with the prior art base, the invention is novel, involves an inventive step, is useful and has not been previously used in the patent area by the patentee or their nominee for the purpose of trade or commerce.

Australia recognises innovation patents as well as invention patents. An innovation patent is granted after the applicant has satisfied the formalities check and will last for 8 years. The standard required of an innovation patent is lower than that of an invention patent. The requirement for an inventive step is replaced with the requirement for an innovative step. This simply requires that there be one difference from the prior art base that contributes substantially to how



the invention works. An innovation patent is granted without being examined. However, the registrant must request examination if they want to take action for infringement of the innovation patent.

Australia is a party to the Patent Co-Operation Treaty for the international registration of patents.

## ***Designs***

A registered design gives the owner protection for the visual appearance of a product. The initial registration is for a period of 5 years with an option to renew the registration for an additional period of 5 years.

The *Design Act 2003* (Cth) has raised the level of distinctiveness required for a design registration. The new threshold is a two step test. A design is not a registrable design unless it is both new and distinctive when compared with the prior art base. Generally a design will not be registrable if it has been published prior to the lodgement of the design application, for example, if it has been published on the internet.

## ***Domain names***

The “.au” domain is divided into a number of second level domain names such as “.com.au”, “.edu.au”, “.net.au”, “.asn.au”, “.id.au” and “.org.au”.

Registration of a domain name means that the registrant is granted a licence to use the domain name for the duration of the registration. The initial registration of a domain name is for 2 years. It may be renewed for additional periods of 2 years upon payment of a further registration fee. If the registration is not renewed the domain name becomes available for use by another trader.

## ***ICANN***

To reach another person on the Internet you have to type an address into your computer – a name or a number. That address has to be unique so computers know where to find each other. ICANN coordinates these unique identifiers across the world.

ICANN was formed in 1998. It is a not-for-profit partnership of people from all over the world dedicated to keeping the Internet secure, stable and interoperable. It promotes competition and develops policy for the internationalisation of the Internet’s unique identifiers.

## ***Confidential information***

Under Australia’s common law, where information is communicated to another person in confidence or where those parties are in a particular relationship of confidence, the common law may imply an obligation on the receiver of that information not to utilise or

disclose that information without the discloser’s consent.

It is often prudent for parties to a contractual arrangement to enter into a separate confidentiality agreement or deed or make it a term of that contract that any information disclosed for the purposes of the contract will remain confidential. There are some general exceptions to these obligations of confidentiality including where the information is otherwise publicly available or disclosure is required by law.

There are also statutory rules for the use, disclosure and storage of an individual’s personal information under Australia’s privacy laws.

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**11**

# *Consumer law*

# 11 Consumer law

## Competition and Consumer Act 2010

The *Competition and Consumer Act 2010* (Cth) (CCA) is a Federal Act which:

- contains a multitude of rights and remedies for consumers who:
  - buy goods or services that are defective
  - have been misled as to the quality of such goods or services
- protects consumers from being exploited by companies.

The CCA prohibits a corporation, in trade or commerce, from engaging in conduct:

- that is misleading or deceptive or likely to mislead or deceive. The CCA also identifies specific types of conduct relating to false or misleading representations which give rise to a breach if engaged in by a corporation in trade or commerce and in connection with the supply of goods or services
- which is, in all the circumstances, unconscionable. The courts may take into account a number of factors in deciding whether conduct is unconscionable, for example, the relative bargaining strengths of the parties involved.

In addition, the CCA establishes the *Australian Consumer Law (ACL)*. The ACL implies a number of conditions and warranties into contracts for the supply of goods and services to consumers (as defined). The warranties include that:

- the supplier has proper title to the goods being sold
- the goods conform to any description of the goods given by the supplier
- the goods are of merchantable quality
- the goods and services are reasonably fit for the purpose which the consumer makes known (either implicitly or expressly) to the supplier
- in relation to the sale of goods by sample, the goods will comply with the sample.

Any attempt to exclude, restrict or modify these warranties is void. However, where the goods or services supplied are not of a kind ordinarily acquired for personal, domestic or household use or consumption, liability may be limited by the supplier in the manner specified by the ACL.

In certain circumstances, the supplier and the consumer may have recourse against the manufacturers and importers of a defective product.

The ACL also prescribes certain industry specific standards and product safety and information standards which suppliers of products may need to comply with. The government also has certain powers to safeguard the public against unsafe products, including, warning the public and recalling unsafe products.

Different limitation periods apply in respect of actions commenced under the ACL, depending on the cause of action.

The UN Convention on Contracts for the International Sale of Goods adopted at Vienna, Austria on 10 April 1980 prevails over any state legislation and the provisions of the ACL relating to the implied conditions and warranties of any provision of the ACL.

Currently, Australia's general consumer laws consist of over 10 separate pieces of legislation which cover the same broad subject matter including two national laws in the form of the consumer provisions in the ACL and the *Australian Securities and Investments Commission Act 2001* (Cth) and various state and territory Acts which cover fair trading, consumer protections and laws about the sale of goods.

The Act includes:

- a single national law for consumer protection and fair trading
- a national unfair contract terms law
- a national product safety regulatory system
- the ACL as a schedule to the Act
- further reforms designed to enhance the operation of the law which draw on best practice in existing state and territory laws.

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**12**

***Anti-trust and competition law***

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# 12 *Anti-trust and competition law*

The *Competition and Consumer Act 2010* (Cth) (CCA) also regulates and prohibits anti-competitive behaviour in Australia and prohibits the misuse of market power. Penalties apply for breaching the restrictive trade practices provisions, including fining corporations up to the higher of A\$10 million or 3 times the gain from the contravention or 10 per cent of the Australian corporate group's annual turnover in the preceding 12 months and individuals up to A\$500,000 for each contravention or other sanctions such as disqualification of directors and for serious cartel conduct jail terms of up to 10 years.

The CCA is regulated by the Australian Competition and Consumer Commission (ACCC), a governmental body which has a wide range of powers to obtain information, documents and evidence when investigating possible breaches of the CCA.

Certain practices are strictly prohibited under the CCA. These practices include the following:

- arrangements between competitors for price fixing or market sharing
- resale price maintenance
- third line forcing (making the supply of goods or services conditional upon the acquisition of another person's goods or services)
- exclusionary provisions (boycotts).

A defence is available to joint venture companies in relation to price fixing and exclusionary provisions if the company is able to prove that the price fixing or exclusionary provision is for the purposes of the joint venture, and does not have the effect of substantially lessening competition in the relevant market.

In relation to third line forcing, a company may provide goods or services on condition that a good or service is also purchased from another company, only if the other company from whom the good or service is to be purchased is a body corporate related to the initial supplier.

Certain other practices are only prohibited under the CCA if they have the effect (or in certain circumstances, the purpose) of substantially lessening competition in the relevant market.

Such practices include:

- supplying or acquiring goods or services on condition that other goods or services will not be acquired or supplied from other persons or particular places
- acquisitions of shares or assets.

Generally, any contracts, arrangements or understandings which have the purpose, or likely effect, of substantially lessening competition are also prohibited.

Conduct which may be in breach of the restrictive trade practices provisions of the CAA may nevertheless be permitted in certain circumstances if a party undertakes a notification or authorisation process with the ACCC.

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**13**

***Environmental law in Australia***

# 13 Environmental law in Australia

## Commonwealth regime

The Australian Constitution gives the Commonwealth discrete powers to regulate environment and planning issues, but most of the responsibility for such issues remains with the States.

The Commonwealth has traditionally taken partial or full control of certain subject matter which is covered by international treaties, such as threatened and migratory species, World Heritage, Ramsar wetlands, nuclear actions and the marine environment. However, the role of the Commonwealth has expanded over time, largely through co-operative agreements with the States, but also through application of the corporations power under the Australian Constitution. For example, new legislative schemes have been developed in water resources to coordinate water allocations between States, set standards for water efficiency and recycling and to allocate Commonwealth funding for improvements to water infrastructure.

The Commonwealth and the States have cooperated to introduce national arrangements for inter-State markets for electricity and natural gas, as well as to create common voluntary standards for lifecycle management of packaging (the National Packaging Covenant).

In the area of climate change, the Commonwealth has introduced national mandatory reporting of greenhouse gases produced, and energy produced and consumed through the *National Greenhouse and Energy Reporting Act 2007* (Cth) (**NGER Act**) which applies to businesses which trigger certain thresholds. Australia also has mandatory reporting requirements for large users of energy under the *Energy Efficiency Opportunities Act 2006* (Cth).

The Commonwealth has legislated to require retailers of electricity to purchase sufficient renewable energy certificates and for businesses to report on measures for improving energy efficiency.

In addition to action at a Federal level, various State governments have also undertaken environmentally based initiatives. New South Wales for example, introduced a mandatory greenhouse gas emissions trading scheme, principally for the electricity sector, in 2003. This trading scheme and other State-based initiatives will be phased out once the Commonwealth Government legislates to introduce an emissions

trading scheme or other measure that will put a price on carbon. A number of Australian States have also introduced mandatory renewable energy targets, which place obligations on energy suppliers to source certain levels of electricity from renewable sources.

On 3 December 2007, Australian Prime Minister at the time Kevin Rudd signed the instrument of ratification of the Kyoto Protocol. By ratifying the Kyoto Protocol, Australia has committed to meeting its Kyoto Protocol emissions target, being 108 per cent of 1990 emission levels by 2012, and has set a target to reduce greenhouse gas emissions by 60 per cent on 2000 levels by 2050. Under the current Government, Australia also has a medium term policy commitment to reduce emissions by 5 per cent by 2020 against 2000 level carbon emissions.

## State and Territory regime

The States and Territories retain most responsibility for the regulation and management of:

- pollution
- contaminated land
- natural resources
- cultural heritage
- land use and development.

Statutory requirements may vary significantly between the State and Territory jurisdictions.

Most industrial emissions into the air, water and land are prohibited by law unless they are regulated by a licensing system.

There are regulatory controls over noise and the transport, storage and use of hazardous chemicals.

State authorities may order the investigation and remediation of contaminated sites.

Severe criminal and civil penalties may be imposed on corporations (as well as holding corporations in some cases), directors, employees and contractors for pollution and contamination offences. Liability normally attaches to the party which caused the breach but land owners may also be convicted, without fault being proved, for certain offences.

There is a system of national parks in each State which preserves public land with high biodiversity.

Destruction of most native fauna and native vegetation is prohibited on private land. There are exceptions for clearing of vegetation for certain agricultural activities, which vary in different States and according to the conservation value of the land.

Disturbance of aboriginal relics is prohibited without a licence. State legislation also controls disturbance of relics of European settlement with high cultural value.

Regulation of subdivisions, rural, commercial, industrial, tourist and residential development, building construction and waste disposal is normally the responsibility of elected local governments, which are established under State legislation. State governments often retain regulatory control of major private and public infrastructure developments, including energy, water, mining, road and rail projects.

### ***Control and ownership of infrastructure***

The Commonwealth government provides some funding for national highways but the State and local governments retain primary responsibility for the regulation, maintenance and development of the road network. There are also privately owned or operated toll roads in some State capital cities.

Most Australian rail networks are owned by State governments. Some lines are owned by the Commonwealth or private companies.

Port facilities in each of the States' maritime capitals are regulated by the States.

Airports are controlled by Commonwealth legislation and are largely managed by private corporations.

The States are mostly responsible for the regulation of water resources and creation of infrastructure such as dams, pipelines and canals, although the Commonwealth plays a significant role in the Murray Darling Basin. Licences are usually required to draw water from rivers and aquifers.

Urban water supply and sewerage infrastructure is regulated by State legislation and is mostly owned by State governments. There is increasing private investment in this sector, particularly in water treatment.

Electricity and gas generation and distribution is owned and managed by a mix of State and privately owned corporations with regulators at both the State and Commonwealth level.



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# **14**

## ***About PwC***

# 14 About PwC

## ***PwC – An introduction***

PwC Australia is a regulated Multi-Disciplinary Partnership in certain States of Australia.

PwC represents a new approach to the provision of consulting services, developed in direct response to the needs of our clients and an increasingly competitive corporate environment.

We are dedicated to providing the services that a modern business needs. We are particularly well placed to meet the needs of our international clients, providing assistance on local or cross-border tax and legal issues.

What differentiates us from other professional service providers in Australia is our multi-disciplinary approach to and involvement in the delivery of both legal and non-legal professional services to clients with practice groups within PwC. This context of service delivery gives us a unique perspective into our clients' wider business issues and enables us to deliver legal advice in the context of what works for our clients and their businesses. The PwC legal team will work in tandem with the other practice groups to provide all encompassing advice and solutions to your business issues – no matter how complex they are.

## ***We work with you***

We believe that best practice legal solutions are developed within a wider business context. Our lawyers speak the language of business, working with you to develop an understanding of your commercial objectives and express advice in commercial terms. We bring together teams of specialists to work alongside clients as trusted business advisers. We structure and project manage transactions from start to finish. Our ultimate aim is to help clients transform their businesses and increase their value.

Our clients come to us from every industry including financial services, information technology, pharmaceutical, communications, entertainment, energy, mining and consumer and industrial. We offer every client industry-focused legal solutions, tailored to their business requirements.

## ***Managing relationships***

Relationships with our clients are managed through a Client Relationship Partner. This partner has sole responsibility for ensuring that high quality, commercial legal solutions are provided to meet client needs on a local and international level. The Client Relationship Partner is supported by a team of

lawyers who have an in-depth knowledge of the client and the industry in which the client operates. Our relationships with clients are built on trust, communication and dedicated client service.

## ***The best legal solutions developed in a wider context***

We bring together the best of our specialists in Legal services and other disciplines such as tax, consulting, assurance and deals to work alongside you as trusted business advisers.

We work with you to understand your commercial objectives. We express our advice in commercial terms, and offer you seamless end-to-end service across the life cycle of your project.

We structure and manage transactions from start to finish. Our aim? To help you navigate today's complex legal requirements with a forward-looking edge within your broader business needs.

While technical excellence is at the core of what we do, the breadth of our business and market insight differentiates us from traditional law firms to deliver clients an unparalleled focused, integrated service.

Our legal practice has five pillars: corporate advisory, regulatory, projects and finance, employment and workplace relations and legal tax services.

For more information about our legal services and our team visit: [www.pwc.com.au/legal](http://www.pwc.com.au/legal)

## ***Outsourced CFO – your complete finance function***

As a foreign investor in Australia, you need to ensure you comply with the local financial reporting, GST and taxation regime. You will also want accurate and timely financial information to manage your business.

We can provide you with access to an all-encompassing finance function.

Our Outsourced CFO group has a dedicated team of professionals, all with a long-standing history of providing a high quality service to clients with no finance function in Australia. Working with us means knowing your finance function in Australia is being managed expertly and safely.

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WL127044044