

Doing business in Australia

An introductory guide



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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 2013, Australia's total population exceeded 23 million people.

The Australian lifestyle

Australia has one of the world's best lifestyles with life expectancy at 84.2 years for females and 79.7 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.¹

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.²

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 Australian government (Government) recognises the need for a regulatory framework to keep pace with financial market developments. In 2001 the Government completed a major reform of Australia's Corporations law aimed at streamlining regulation while maintaining market integrity and investor protection.

Exchange rate control has effectively been abolished. The Reserve Bank of Australia (Reserve Bank) has effectively suspended most of the provisions of the *Banking (Foreign Exchange) Regulations 1959* (Regulations) (in force under the Banking Act 1959) through granting general authority and exemptions. While the terms of the Regulations ought to still be considered on a case by case basis to avoid potential exposure, they apply in very few cases.

¹ 2010 Worldwide Quality of Living Survey
by Mercer Human Resource Consulting

² 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.³

Australia's economy has grown (on average) by approximately 3.3 per cent per annum since 1990. In 2012 - 2013, the Gross Domestic Product of Australia was approximately AU\$1,525 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 5.7 per cent in October 2013.

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.⁴

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 14th.⁵ Australia's telecommunications costs are among the lowest in the region.

Australia's corporate tax rate of 30 per cent is very competitive when compared with other major economies, with higher company income tax rates applying in the United States, China, Japan, Germany, France and India.

Australia is a leading financial centre in the Asia Pacific region. The Australian Securities Exchange is among the 10 largest listed exchanges in the world with a market capitalisation of AU\$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.⁶

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.⁷

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

³ Organisation for Economic Cooperation and Development

⁴ Axiss Australia, Australia: The new centre of global finance

⁵ DTZ - The Global Office Occupancy Costs Survey 2011

⁶ World Stock Exchanges, and www.asx.com.au

⁷ Axiss Australia, Australia: The new centre of global finance

Foreign investment in Australia

Foreign investment - An introduction

The Government welcomes and encourages foreign investment consistent with community interests. Australia's screening process for foreign investment is transparent and very liberal. The Government has the power to block proposals that are required to be notified 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 direct investment in Australia and makes recommendations to the Government 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).

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.

Substantial foreign interest

A substantial foreign interest exists where a single foreign person (and any associates) holds 15 per cent or more of the ownership or voting rights of any corporation's business or trust or where several foreign persons (and any associates) hold 40 per cent or more in aggregate of the ownership or voting rights of any corporation, business or trust.

Investments requiring prior approval

Types of investment proposals which are subject to the FATA or the Foreign Investment Policy and which require FIRB approval 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 \$248 million. For New Zealand and US investors, different exemption thresholds apply, namely \$248 million for investments in prescribed sensitive sectors, or \$1,078 million in any other case⁸
- the acquisition of assets resulting in control of an Australian business valued at more than \$248 million. The thresholds for New Zealand and US investors are the same as for the acquisition of shares referred to above
- takeovers of offshore companies whose Australian subsidiaries or gross assets exceed \$248 million. For New Zealand and US investors, the \$1,078 million threshold referred to above applies, except for offshore takeovers involving prescribed sensitive sectors where the \$248 million threshold applies
- direct investments by foreign governments or their agencies irrespective of size
- 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, where the property is subject to heritage listing, is valued at \$5 million or more and the acquirer is not a US [or New Zealand] investor
 - developed non-residential commercial real estate, where the property is not subject to heritage listing and is valued at \$54 million or more (\$1,078 million for New Zealand and US investors)
 - vacant non-residential land (irrespective of value)
 - residential real estate (irrespective of value)
 - shares or units in Australian urban land corporations or trust estates (irrespective of value)
 - proposals where any doubt exists as to whether they are notifiable, (funding arrangements that include debt instruments having quasi-equity
 - characteristics will be treated as direct foreign investment).

⁸ The figures quoted are subject to annual indexing and were current as at 30 November 2013

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, banking, media, telecommunications, shipping, civil aviation and airports. Normally, these categories include sectors where other government departments or interested parties would be involved in the screening process or have major carriage of the assessment of the application.

Australia – United States Free Trade Agreement (AUSFTA)

AUSFTA came into force on 1 January 2005, and is seen as the most important bilateral economic agreement ever undertaken by Australia. For the purposes of foreign investment in Australia, a US investor is a:

- national or permanent resident of the US
- US enterprise
- branch (of an entity which is itself not a US enterprise) located in the US and carrying on business there.

As stated above, different monetary thresholds apply to US investors in respect of investment proposals in Australia.

For US investors subject to AUSFTA, there are certain prescribed sensitive sectors in which special Government guidelines and scrutiny apply to proposed investments. These sensitive sectors are:

- media
- telecommunications
- transport (including airports, port facilities, rail infrastructure, international and domestic aviation and shipping services provided within, or to and from, Australia)
- the supply of training or human resources, or the manufacture or supply of military goods, equipment or technology to the Australian Defence Force or other defence forces
- the manufacture or supply of goods, equipment or technology able to be used for a military purpose
- the development, manufacture or supply of, or the provision of services relating to, encryption and security technologies and communication systems
- the extraction of (or holding rights to extract) uranium or plutonium or the operation of nuclear facilities.

Acquisitions in these sectors are subject to different thresholds under the FATA.

Real estate

The Australian government has a specific policy in relation to residential and commercial real estate. 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. Acquisitions of residential real estate requiring notification 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
- mining tenements
- forestry.

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.⁹

In most cases, approval is granted within 30 days of receiving a statutory notice (with FIRB having a further 10 days to advise the parties of the decision). FIRB may extend the period by a further 90 days if necessary.

⁹ FIRB Annual Report 2007-2008, p.7

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.¹⁰

The Government has specific policies for real estate and agriculture.

The screening process undertaken by FIRB in assessing applications provides a clear and simple mechanism for reviewing the operations of foreign investors in Australia whenever they seek to acquire business interests or purchase real estate in Australia.¹¹

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.

If:

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

¹⁰ FIRB Annual Report 2011-2012, p.7

¹¹ "Australia's Foreign Investment Policy" dated September 2009 at <http://www.firb.gov.au>

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 be listed on the Australian Securities Exchange Limited (**ASX**).

Proprietary companies

Proprietary companies are often used for private ventures or as subsidiaries of public companies.

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)
- results in the liability of the shareholders upon winding up of the company being limited to the amount unpaid on their shares (if any)
- 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

- must have at least one Australian resident director but need not have a secretary
- must have the words “Proprietary Limited” or “Pty Ltd” in its name if it is a limited proprietary company.

Companies incorporated in Australia will be issued with a unique nine-digit Australian Company Number (**ACN**).

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

- the consolidated revenue for the financial year of the company and any entities it controls is \$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 \$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 two out of the above three criteria it is regarded as a small proprietary company.

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 its name if it is a limited public company.

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. If a foreign company chooses to establish a branch office in Australia, it must be registered as a foreign company under the Corporations Act.

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 other prescribed documents.

A registered office also needs to be established in Australia and a local agent must also be appointed.

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

Once registered, the branch must file the foreign company's annual accounts 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). If the representative office engages in activities other than those which would not amount to 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”.

All companies registered under the Act are entitled to an Australian Business Number (**ABN**) which a company will need to register for the purposes of the Goods and Services Tax (**GST**).

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 obtained under individual Australian State or Territory legislation, and must be registered in each Australian State and/or Territory in which the company intends conducting business under the business name.

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.

The constitution of a company sets out the:

- company’s name
- terms of the liability of its members
- rules by which the company is to be internally regulated.

Process of incorporation

The process involved in incorporating a proprietary company is:

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

Step 2: The foreign company 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 corporation, including:

- the registered office and principal place of business in Australia
- the share structure
- shareholders
- the proposed directors/secretaries of the Australian subsidiary (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 for an ABN and Tax File Number (TFN)
- keep an up to date company register. This register will contain company records and will need to record minutes of all directors and shareholders’ 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 wholly owned by a foreign entity). 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 will apply if they are lodged out of time.

ASIC must be notified of changes to the following:

- company name, such notifications are to be made within 14 days of the change
- company details (for example registered office or principal place of business), such notifications are to be made within 28 days of the change
- company constitution, such notifications are to be made within 28 days of the change
- directors details (for example name, address, new appointment or resignations), such notifications are to be made within 28 days of the change
- share structure or shareholder details, such notifications are 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

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.

Smaller stock exchanges exist, however they do not have the depth and breadth of the ASX. The ASX was formed in 1987 through the amalgamation of six independent stock exchanges and became a listed company on 13 October 1998. On 25 July 2006, the Australian Stock Exchange Limited merged with Sydney Futures Exchange (**SFE**) Corporation Limited, making the combined entity the 9th largest listed exchange in the world.

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.

Admission categories

An Australian incorporated company wishing to list on the ASX must fall within one of the following categories:

- *general admission* – a company seeking admission under this category must satisfy either the "Asset test" or the "Profit test"
- *foreign exempt* – a company seeking admission under this category must be listed on an overseas exchange which is a member of the International Federation of Stock Exchanges
- *debt issuer* – a company seeking admission under this category will issue debt securities only.

General admission

For an Australian registered company to be generally admitted to the official list, the following 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 \$1 million
- 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 \$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 \$3 million after deducting the costs of fund raising, or a market capitalisation of at least \$10 million (based on the offer price under the prospectus) and either:
 - 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
 - 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 \$1.5 million, or an amount that would be \$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 \$15 million after deducting the costs of fundraising
- be a pooled development fund and have net tangible assets of at least \$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.

- The company must have at least 300 shareholders with holdings valued at a minimum of \$2000 each, and at least 50% of the company’s shares must be held by parties unrelated to the company and its directors.
- If between 50% and 75% of shares are held by related parties, the company must have at least 350 shareholders.
- If more than 75% of the company’s shares are held by related parties, the company must have at least 400 shareholders.¹²

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.

Foreign exempt entity

Under the Foreign Exempt Entity provisions of the Listing Rules, a foreign entity that is listed on a reputable overseas exchange may apply to be listed on the ASX in the Foreign Exempt Entity category. The rationale behind this rule is to give Australian investors access to a wider range of securities.

The threshold for admission to this category requires the entity to have either net tangible assets of AU\$2 billion or operating profit for each of the past three years of at least AU\$200 million.

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. 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 principle listing).

The ASX uses “CHES”, an electronic sub-register system, to facilitate the transfer of legal title and the settlement of transactions. For foreign companies whose local laws do not recognise the use of CHES to effect the transfer of legal title, a depository system is used, with Chess Depository Interests (known as **CDIs**) being issued to security holders in Australia.

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>

¹² See asx.com.au/Listings

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 six weeks), 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 six weeks (in limited cases, up to three 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.

The Immigration Department revamped Australia's Business Skills visa program in July 2012, resulting in the amalgamation of 13 subclasses of visa into three.

Subclass 188 – this provisional visa subclass provides three 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.

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 citizen, permanent residents or eligible New Zealand 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 2013-2014 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.

After substantial changes in July 2013, the Australian Government has announced further review of the program in 2014 with a report due mid-year.

All businesses sponsoring temporary residents are subject to potential monitoring by inspectors regarding their compliance as against an extensive number of legally enforceable obligations. One major ongoing obligation that employers should be alert to 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.

Given the frequency of changes to the 457 visa program and the possibility of changes occurring from 1 July 2014, 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.

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 and originating from a country which participates in the international double-tax arrangements to which Australia is a party

Direct tax

Income tax

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

- incorporated in Australia
- not incorporated in Australia, however, it 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 company is liable to pay Australian tax on all of its worldwide assessable income at the general corporate tax rate of 30 per cent.

Capital gains tax

Capital assets held by an Australian resident company will generally incur tax payable on any capital gain on their disposal at the corporate tax rate.

Disposal of shares in an Australian subsidiary by a non-resident shareholder should be exempt from Australian capital gains tax if these shares have been held on capital account and the Australian subsidiary does not qualify as Taxable Australian Property (that is, the market value of the subsidiary's land assets does not exceed the market value of its non-land assets). Subject to some limited exclusions (eg residential property under \$2.5m), as from 1 July 2016, purchasers will be obliged to withhold 10% of any sale proceeds from the disposal of Taxable Australian Property and remit this to the Australian Taxation Office, with the vendor needing to file a tax return to claim back any withheld amounts in excess of their final tax liability.

Dividends paid by an Australian company

If fully franked dividends (that is, dividends derived from profits on which Australian corporate tax has been paid) 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 lender entity. 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, such interest is taxable by assessment in Australia.

Under debt and equity classification rules applying from 1 July 2001 there may be situations where interest payable is treated as if it were a dividend. Similarly, dividends paid on shares that are classified as debt interests will not be frankable.

Legislation also limits the amount of interest that can be deductible under the "Thin Capitalisation" rules, where broadly, debt exceeds 75 per cent of net assets (excluding debt). A 60 per cent rate applies to income years on or after 1 July 2014.

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.

Transfer pricing

Australian transfer pricing rules adopt the arm's length concept as promulgated by the Organisation for Economic Co-operation and Development (**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 \$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 and audit and makes a transfer pricing adjustment. To be eligible for penalty reductions, transfer pricing documentation meeting specific requirements set out in the law must be prepared prior to lodging the income tax return.

Group taxation

A tax consolidation regime applies for income tax and capital gains tax purposes for 100 per cent owned group companies, partnerships and trusts for such entities that are 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. Transactions between group companies are then ignored for income tax purposes.

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.

Capital investment

The incentives for capital investment that may apply are listed below:

- Generally, capital expenditures incurred after 14 May 2013, on the exploration for petroleum and other minerals are deductible over the lesser of 15 years or life of assets. However, certain capital expenditures, such as genuine farm-in/farm-out arrangements and costs of mining rights acquired directly from government are eligible for an outright deduction.
- 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% refundable tax offset (equivalent to a 150% deduction) if their turnover is less than \$20 million per annum or a 40% non-refundable tax offset (equivalent to a 133% deduction) for entities with turnover above \$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% 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.
- Non-resident pension funds that are
 - tax-exempt in their home jurisdiction
 - residents of Canada, France, Germany, Japan, United Kingdom, United States or some other prescribed country
 - satisfy certain Australian registration requirements

are exempt from income tax on the disposal of investments in certain Australian venture capital equity held at risk for at least 12 months. From 1 July 2002, this exemption was extended to certain other tax-exempt non-resident investors.

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. The ESVCLP program replaced the earlier Pooled Development Funds (PDF), which was closed to new registrations from 1 January 2007.

An ESVCLP is a venture capital fund, legally structured as a limited partnership and registered with Innovation Australia 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 Innovation Australia 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 \$50 million
- ESVCLPs must divest an investment once its value exceeds \$250 million
- 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 \$10 million (and not greater than \$100 million)
- 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 Innovation Australia. 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.

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 allowance

Where business taxpayers acquire a 'depreciating asset' or make improvements to an existing depreciating asset which is used for the principal purpose of carrying on a business, the Investment Allowance may provide a significant one-off tax benefit.

For small business entities with a turnover of less than \$2 million a year, a tax deduction of 50 per cent of the cost of the asset will be available where the business commits to investing in the asset between 13 December 2008 and 31 December 2009 and first uses the asset, or installs it ready for use by 31 December 2010. Small business entities can claim this deduction where the investment in the asset is greater than \$1,000.

For other business entities with a turnover of \$2 million or more a year, a tax deduction of 30 per cent of the cost of the asset will be available where the business commits to investing in the asset between 13 December 2008 and 30 June 2009 and first uses or installs the asset by 31 December 2010. An additional 10 per cent may be deducted where the asset is acquired and is first used or installed between 1 July 2010 and 31 December 2010. A further 10 per cent deduction can be claimed where the business invests in the asset between 13 December 2008 and 30 June 2009 and first uses or installs it after 30 June 2010, but on or before 31 December 2010.

A minimum expenditure threshold of \$10,000 applies to be eligible to claim the 30 per cent or 10 per cent deduction for those entities with a turnover of \$2 million or more a year.

This Investment Allowance can be claimed through the income tax return in which the capital allowance for the depreciating asset is also claimed for the asset.

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.

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.

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% and 6.85%, once an employer's national payroll exceeds each state's agreed tax-free threshold. These thresholds range from \$750,000 to \$1.75m.

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 \$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. Textiles, clothing and footwear generally attract a tariff rate of 10 per cent. 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 there are no substitutable goods produced in Australia in the ordinary course of business.

In addition, AusIndustry administers a program called the Enhanced Projects By-law Scheme (EPBS) (Item 44 of the By-Laws), which allows for the duty free import of goods for capital works projects (in eligible sectors) with a capital expenditure of over A\$10 million, provided certain criteria are met. The program is frequently used by companies in the resources and manufacturing industries. In order to obtain concessions from the scheme, applicants must demonstrate that the procurement practices provided a full, fair and reasonable opportunity to Australian companies to bid for the supply of goods and services for the project. The recent *Australian Jobs Act 2013* (which commenced on 27 December 2013) has brought in several changes to the EPBS, including revised guidelines for the application process and additional compliance requirements for projects valued at A\$2 billion or more (from 1 July 2013). The *Australian Jobs Act 2013* also imposes new requirements for all major projects in Australia with a capital expenditure of A\$500 million or more, regardless of whether the project proponents intend to utilise EPBS for those projects.

Australia currently has several FTAs in place and under negotiation. Most recently, Australia concluded the FTA negotiations with the Republic of Korea in early December 2013, with the Korea-Australia Free FTA to be entered into force in the near future. Other recent FTAs include the Malaysia-Australia FTA (which entered into force on 1 January 2013) and the ASEAN - Australia - New Zealand FTA (AANZFTA) (which entered into force on 1 January 2010).

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

FTAs concluded but not yet in force

include:

- Korea-Australia FTA

FTAs under negotiation include:

- Australia-China FTA
- Australia-Gulf Cooperation Council FTA
- Australia-India Comprehensive Economic Cooperation Agreement

- Australia-Japan FTA Negotiations
- Indonesia-Australia Comprehensive Economic Partnership Agreement
- Pacific Agreement on Closer Economic Relations
- Regional Comprehensive Economic Partnership
- Trans-Pacific Partnership Agreement.

In addition to the administrative processes involved with importing goods, importers should take care to ensure that they meet their customs compliance requirements (particularly in light of the increased penalty rates introduced by the *Customs Amendment (Infringement Notices) Regulation 2013* from 1 February 2014)..

There has been increased focus by the Australian Customs and Border Protection Service on the treatment of transfer pricing adjustments for customs valuation purposes. In April 2013, the Australian Customs and Border Protection Service released a Practice Statement to address the impact of transfer pricing arrangements on the customs value of imported goods. 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 Australian Customs and Border Protection Service to confirm that the appropriate customs valuation methodology is applied to the imported goods.

The Australian Customs and Border Protection Service 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 (i.e. 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.

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 supplies 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 nonprofit bodies).
- GST is payable at the rate of 10 per cent on the supply by a 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 (**VoTI**). The VoTI includes the customs value of the goods, as well as the customs duty and the cost of transporting the goods to Australia and insuring such goods for that transport (to the extent these are not already included in the customs value). The Australian Customs and Border Protection Service 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 \$20 million, unless they elect to lodge returns on a monthly basis. Suppliers with a GST turnover of \$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 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 are 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 is generally payable by the resident agent and not the non-resident. This rule applies equally for claiming GST on acquisitions and paying/claiming import GST.

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.

Proposed changes to the GST legislation

- As part of the new Australian Government's confirmation (On 6 November 2013 and 14 December 2013) regarding various announced but unlegislated taxation measures, the Government has confirmed its intention to proceed with the following changes to the GST legislation:
 - introduction of Division 142 which will restrict refunds of overpaid GST;
 - changes to the "connected with Australia" rules to reduce the number of non-residents being unnecessarily drawn into Australia's GST system; and
 - replacing the GST-free concessions for the supply of going concerns and farm land with a reverse charge mechanism.

Personal tax

Australian tax implications of resident status

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

- Residents 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 \$180,000 (tax on the first \$180,000 is \$54,550 for the year ended 30 June 2011).
- 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 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.
- Residents may be subject to an accruals taxation system in respect of investments in certain foreign trusts, controlled offshore companies and interests in certain foreign investment funds and foreign life assurance policies. Temporary residents are exempt from this regime.
- There is a requirement for each employer to make a compulsory contribution into an Australian approved retirement fund on behalf of each employee (excluding certain senior expatriate executives). The amount is currently 9.25 per cent of salary up to a specified salary cap, \$48,040 per quarter for the year ended 30 June 2014. There are plans to incrementally increase the contribution rate to 12 per cent by 1 July 2021. However, certain exemptions may apply for inbound expatriates.

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 an Australian employment lawyer and/or taxation adviser prior to finalisation. This is important for purposes of

identifying possible questions of residency and putting in place tax effective remuneration packages, particularly living-away-from-home benefits.

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, one of the main exemptions relating to living away from home allowance has been curtailed as of 1 October 2012.

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. Foreign residents and temporary residents are 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 Foreign 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 however, are not subject to these rules.

Before becoming a resident

Anyone contemplating becoming a resident of Australia should always seek specific advice regarding the application of Australia's tax rules and planning opportunities.

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.

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. Typically, policies do not contain binding obligations on the employer.

The statutory and regulatory framework

Workplace relations legislation has undergone significant change in Australia in the past 10 years. One of the most important changes is that in most cases, workers employed in the private sector and the Federal public sector are now 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 (AU\$16.37 per hour for the 2014 financial year)
- 10 new National Employment Standards (NES) which are statutory minimum terms and conditions of employment (effective from 1 January 2010);
- A new system of modern awards (effective from 1 January 2010) designed to consolidate and replace the previous complex system of multiple Federal and State awards. 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. There is a new test which requires that each employee covered by an enterprise agreement must 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. Enterprise agreements applicable to transferring employees will transmit to the new employer and will now 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 new and expanded 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 new 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).

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 individual 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 care or support because of family or domestic violence.
3. A right to unpaid parental leave of up to 12 months, 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 employee provided a minimum accrual of 4 weeks is retained.
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. 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 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. 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.

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

A new system of modern awards commenced on 1 January 2010, replacing the previous system of awards. While under the previous system there was a large number of awards (Federal awards being employer specific and NAPSAs occupation specific), there are much fewer modern awards and these are industry or occupation specific.

Approximately 120 modern awards have been introduced, covering a wider range of industries and occupations than those covered by awards previously.

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 (AU\$129,300 a year for the 2014 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 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 has also introduced good faith bargaining, and new requirements for enterprise agreement content and approval including:

- the introduction of a BOOT test in comparing the relevant provisions of a modern award with the terms of a proposed enterprise agreement;
- removal of the concept of "prohibited content", such as discriminatory terms, a penalty provision for absence from work and provisions conferring support for union membership;
- 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; and

the inclusion of a “flexibility term” which allows certain arrangements to be made with individual employees (such as an arrangement to work flexible hours or part-time), and mandating 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.

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

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 AU\$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:

- AU\$64,650 (ie 26 weeks’ wages at the 2014 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

With effect from 1 January 2014, employees will have the right to seek redress for workplace bullying through specific legislation.

Bullying is defined as repeated unreasonable behaviour by an individual or group that creates a risk to another worker's health and safety. Commencing 1 January 2014, an employee who is bullied at work will be able to apply to the FWC for an order to stop the bullying.

Other Legislation

Paid Parental Leave

The Federal *Paid Parental Leave Scheme* is for working parents of children born or adopted on or after 1 January 2011.

The 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.

In September 2013 a new Federal Government was elected. It has promised to amend the paid parental leave scheme to provide more generous entitlements to eligible employees but the details of and commencement date of the new scheme have not been released

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.

From 1 July 2013, the rate of superannuation increased from 9% to 9.25% of an employee's ordinary time earnings, subject to the superannuation guarantee maximum contribution base (currently AU\$48,040 per quarter for 2014 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 National Privacy Principles (NPPs) which set out various requirements in relation to personal data. The NPPs 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.

Amendments to the Privacy Act have been passed, which from March 2014 will replace the NPPs with a more comprehensive set of standards (**Australian Privacy Principles**). Employee records will continue to be excluded, however.

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 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* (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, disability 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.

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 (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. There is no requirement that a "work" within the meaning of the Copyright Act be of artistic or literary quality, it is sufficient that it be 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 a work created by an employee during the course of his or her employment to 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 disclosed to the public.

Australia introduced innovation patents in July 2001 to replace petty patents. An innovation patent is granted after the applicant has satisfied the formalities check. It is assumed that the standard required of an innovation is much lower than that of an invention although the actual standard has not yet been established by the courts. 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. 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” 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 on 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.

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, that 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, based on the existing consumer provisions of the Trade Practices Act
- a national unfair contract terms law
- a national product safety regulatory system
- establishes the *Australian Consumer Law* (ACL)
- further reforms designed to enhance the operation of the law which draw on best practice in existing state and territory laws.

Anti-trust and competition law

The *Competition and Consumer Act 2010* (Cth) (**CCA**) also regulates and prohibits anticompetitive 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 \$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 \$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.

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.

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.

Global tax and legal services

Our advice is tailored to meet the needs of our clients' complex business issues.

Legal services are offered in the following areas:

- Corporate & Commercial, Employment Law, Real Estate.

Corporate and commercial

The Corporate and Commercial team provides commercially-focused expert legal advice and services. Our clients include public and private companies in a wide range of industries and sectors, not-for-profit organisations, and high net worth individuals. We are a results-driven team and our pragmatic and commercial approach and consistent professionalism are highly valued by our clients. Our objective is to provide high quality legal services that exceed our clients' needs and expectations. The Corporate and Commercial team's areas of expertise include:

- acquisitions, divestments and mergers
- group restructures
- private equity
- joint ventures, partnerships and co-ownership structures (establishing and restructuring)
- debt/equity financing
- corporate governance
- Corporations Act and regulatory advice.

Employment

The Employment Law team provides legal and strategic advice on all areas of employment and industrial law to private sector clients across a broad range of industries, government agencies and statutory authorities. Our objective is to provide tailored solutions to help our clients effectively manage all stages of the employment relationship and to comply with legislative requirements. The Employment Law team can provide assistance in managing employment issues, workplace reform and strategy, and industrial disputes as and when they arise. The team has a reputation for handling sensitive issues with the utmost professionalism. Our integrated business solutions means we can work with the specialist human resource consultancy team within PwC, providing a total solution for our clients on human resource related issues.

Real Estate

The Real Estate team provides legal advice and transactional services in relation to the formation of real estate funds, real estate capital transactions, asset structures, mortgage securities, real estate development, title structures, land use and asset and property management to investors, developers, government agencies, fund managers and institutions. This covers the whole range of asset classes including residential, commercial, industrial and large-scale public and private building and infrastructure projects. Our objective is to deliver efficient and innovative solutions to our clients, from real estate business and fund establishment, mergers and joint ventures to acquiring, developing, titling, leasing and disposing of real estate assets.

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