



Doing business in Australia

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Contents

Australia's advantages	2
Establishing a business presence	4
Companies	4
Partnerships	5
Joint ventures	5
Trusts	6
Trading with Australia	6
Australia's business rules	7
Foreign investment policy and rules	7
Acquisitions of companies and businesses	8
Taxation	9
Competition and consumer protection	15
Sanctions, bribery and export controls	16
Intellectual property	17
Employment and industrial relations	19
Environment	21
Immigration	21
Privacy	22
Freedom of information	22
About Minter Ellison	22
Contact	23

Australia's advantages

Foreign investment is welcome in Australia, with all levels of government keen to promote business, economic development and employment growth.

Australia's economy ranks among the 20 largest in the world, with a per capita GDP on par with the four dominant West European economies. Business in Australia is conducted in a transparent, well regulated and politically stable environment. The judiciary is open, independent and accessible. The climate is superb and living standards are high.

The 2011 World Bank Doing Business report judged Australia to be the second most straightforward and affordable country to start up a business and in the top 10 countries in terms of overall ease of doing business.

The Australian labour force is highly educated with a strong multicultural background. Approximately 42% of Australia's working age population has a university degree, diploma or trade qualification. Of the approximately 21 million people in Australia, more than 1.4 million are fluent in a major Asian language and more than 1.2 million are fluent in a major European language.

The Australian Government's trade policy combines multilateral, regional and bilateral approaches. Australia pursues every opportunity to open up global markets for exporters and to encourage investment flows across all sectors. As part of this commitment, the Australian Government has negotiated special access for Australian suppliers of goods and services to key export markets through free trade agreements (FTAs). The results of this policy have become particularly apparent in recent years, with Australia making significant advances in its pursuit to enhance trade by completing FTAs with ASEAN, New Zealand, the USA, Thailand and Singapore and other significant agreements with China, Malaysia and Japan.

Disclaimer

THIS BOOKLET PRESENTS THE LAW AT DECEMBER 2011. IT IS INTENDED AS AN INTRODUCTORY GUIDE TO DOING BUSINESS IN AUSTRALIA AND ANSWERS PRELIMINARY QUESTIONS FREQUENTLY ASKED BY THOSE UNFAMILIAR WITH THE AUSTRALIAN BUSINESS ENVIRONMENT. FACTORS WHICH MAY BE RELEVANT TO PARTICULAR CIRCUMSTANCES (INCLUDING INDUSTRY SPECIFIC REGULATION) ARE NOT COVERED.

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Government

Australia is a very stable democracy with a federal system of government, which is based on the United States model (where power is shared between a federal government and the government of each state/territory).

The Commonwealth of Australia federal government and each state or territory government operates in a manner similar to the United Kingdom's Westminster system, where the executive is directed by and reports to the parliament via ministers.

Under the Australian Constitution, federal parliament may legislate in, and therefore controls, taxation, foreign investment, defence, the banking and monetary system, telecommunications, interstate and overseas trade, trade mark and patent registration and foreign affairs.

The states and territories retain responsibility for education, health, policing, roads and traffic although the federal government's predominant revenue raising capacity has resulted in its growing influence over these areas.

Below the federal, state or territory governments are local governments comprised of locally elected representatives. These exist as city, town or shire councils and oversee local land use, development and planning laws.

Legal system

Australia's legal system is based on the British model where laws are developed and shaped not just by the Parliament of Australia and parliaments of the states and territories but also through the decisions of an independent judiciary.

The Australian judiciary consists of two branches: a federal branch and state and territory branches. The High Court of Australia is the highest court in the country and has ultimate appellate jurisdiction over federal, state and territory courts.

The Federal Court of Australia hears appeals from inferior tribunals and retains original jurisdiction over federal law matters including immigration, industrial relations and corporations.

All states and territories have a Supreme Court as their highest court, with appeal divisions in civil and criminal matters. Most states also have a district court, which has jurisdiction over civil matters (usually below a \$1 million limit) and criminal matters that are less serious indictable offences and a Magistrate's Court or Local Court, which has jurisdiction over smaller civil matters and summary matters.

Establishing a business presence

Business in Australia may be conducted through any of the following structures:

- company
- partnership
- joint venture
- trust
- sole trader.

A foreign company establishing a business presence in Australia usually:

- establishes or acquires an Australian subsidiary company or
- establishes a branch office registering itself as doing business in Australia.

The significant practical differences between establishing a subsidiary company in Australia and doing business through a branch office are that:

- a subsidiary company is a separate legal entity and is required to have at least one director who is a resident of Australia, whereas a branch office is not a separate legal entity and
- a subsidiary (depending on the type of company) only needs to lodge its own accounts with the Australian Securities and Investments Commission (ASIC) whereas a branch office must lodge the accounts for the foreign company.

Business in Australia may be conducted through any of the following structures:

- company
- partnership
- joint venture
- trust
- sole trader.

Companies

Regulation

Company law in Australia is regulated by a national scheme. *The Corporations Act* and the *Australian Securities and Investments Commission Act* govern companies, securities and futures law in Australia. This legislation was enacted by the federal parliament

following a referral of power from each of the Australian states.

The activities of companies listed on the Australian Stock Exchange Limited (**ASX**) are also regulated by the ASX's Listing Rules.

Types of companies

Four types of companies may be incorporated in Australia:

- a company limited by shares (public and proprietary)
- a company limited by guarantee
- an unlimited company (public and proprietary)
- a no liability company (available only where the entity's business is limited to mining).

The type of company used will depend on the nature of the business or activity.

There are more than one million companies registered in Australia, 98% of which are either public or proprietary companies limited by shares. Members of a company limited by shares contribute capital by subscribing and paying for shares in that company and their liability is limited to the unpaid amount on those shares.

Proprietary companies are the most common because they have simple and cost effective administration requirements. A proprietary company, which may be further classified as small or large, is a private company designed for a relatively small group of persons (maximum of 50 non employee members). A proprietary company can place restrictions on the transfer of its shares.

A public company may have a much larger membership and is not subject to these restrictions.

Registration

To register a company, an application is made to the Australian Securities and Investment Commission (**ASIC**). On registration, each company is allocated an Australian Company Number (**ACN**), a unique identifying number.

For taxation purposes, trading companies also require an Australian Business Number (**ABN**) which is issued by the Australian Tax Office.

Registration entitles a company to carry on business anywhere in Australia. Each company must:

- nominate the state in which it will be registered
- register its name (limited liability companies must include 'Limited' or 'Ltd' in their name and proprietary companies must also include 'Proprietary' or 'Pty')
- have a registered office, which must be located in Australia
- appoint the directors (at least one of which must be a resident of Australia) and other officers (which may include a Public Officer for tax administration purposes) prescribed for its type
- provide and keep updated information about its shareholders and ultimate holding company and
- lodge statements and financial reports as prescribed for its type and circumstances.

Provided that all necessary information is available, a company can be registered by ASIC within one business day.

Fundraising

A proprietary company is prohibited from raising funds from the public and a public company must comply with the fundraising provisions of the *Corporations Act*.

Subject to certain excepted circumstances (eg. an offer to 'wholesale' investors), an offer of securities must be accompanied by a disclosure document. Depending on the size and nature of the offering, the disclosure document may be a prospectus, profile statement or offer information statement.

Partnerships

In Australia, a partnership is the relationship which exists between persons carrying on a business in common, with a view to profit. In addition to any agreement between the partners, partnerships are regulated by the Partnership Acts of each state and territory. Because a partnership is not a separate legal entity:

- each partner is the agent of the other partners and may make contracts, undertake obligations and dispose of partnership property on behalf of the partnership in the ordinary course of the partnership business
- arrangements between partners will protect partners in their relationship with each other
- third parties without knowledge to the contrary, however, are protected from actions committed by partners beyond their authority
- each partner is personally liable, jointly and severally, for the liabilities of the partnership. The liability of each partner is unlimited except in the case of limited partnerships
- the property of the partnership is owned by the partners personally and

- the partnership must submit an annual tax return disclosing its income, outgoings and the distribution of profits to partners, although it is the partners individually who must pay tax on their share of partnership profits and not the partnership as a whole. Such profits will become part of each partner's other income (or losses).

If a partnership carries on business other than under the names of the partners, its business name must be registered in each relevant state and territory.

Quite often, a partnership will appoint a company to carry on the partnership business and act as an agent for the partners.

A form of limited partnership may be formed in Victoria, Queensland, New South Wales, Western Australia, South Australia and Tasmania, but not in the Australian Capital Territory or the Northern Territory. A limited partnership must have at least one limited partner (a partner whose liability is limited) and one general partner (a partner whose liability is unlimited). A limited partnership is taxed as a company

Joint ventures

A joint venture is established by parties wishing to share the product of an enterprise as opposed to sharing the profits. Joint ventures are common in the mining industry. They are not separate legal structures and are governed by the terms of the agreement between the joint venturers and by the common law.

Joint venturers often appoint a company to manage the business of the joint venture.

Although not strictly correct, the term 'joint venture' is often used by business people to refer to:

- a special purpose proprietary company where two or more parties have subscribed for shares to carry out a project and
- a partnership between two or more parties carrying on a business with a view to making a profit.

A true joint venture does not itself receive income. Only the participants in the joint venture actually receive income, which arises when they sell the product they receive from the joint venture. The income arising from the products of a joint venture can be aggregated with all other income and expenses of a party.

Trusts

In a trust structure, the assets of the business are held by a trustee which carries on the business on behalf of the beneficiaries. A trust will be one of three types, being unit, fixed or discretionary. Trusts may be private or public. A public trust can be listed.

The usual unit trust structure provides for beneficiaries to hold units to which entitlements attach and which may be transferred in a similar way to shares in a company.

Income arising from a trust is taxed in the hands of the beneficiary rather than the trustee.

Trading with Australia

It is possible to do business in Australia without setting up formal structures, although having some form of legal identity or other formal arrangement is often advisable. The following issues should be considered:

- Tariffs apply to some goods imported into Australia, such as clothing, footwear and passenger cars and components. As the federal government seeks to establish enhanced trading relationships with many countries, tariffs and other duties are under constant review.
- Agency and distribution arrangements are not specifically regulated, although franchising is subject to separate regulation. The terms of any contract between agent and principal should address all aspects of the relationship.

Other legal issues which may arise include:

- protection of intellectual property rights (see page 17 of this guide)
- the law of the contract, the relevant forum for enforcing the contract and the possible impact of the United Nations Convention on Contracts for the International Sale of Goods
- security for payment, including title retention
- dispute resolution and the relevant forum for settling disputes

- currency of payment and protection against exchange rate fluctuations
- potential product liability claims and
- taxation, although Australia has an extensive system of agreements to avoid double taxation with its main trading partners (see page 9 of this guide).

Australia's business rules

Foreign investment policy and rules

The Australian Government's foreign investment policy, generally speaking, encourages foreign investment in Australia. The policy and the *Foreign Acquisitions and Takeovers Act (FATA)* (which provides the legislative support for the policy) are administered by the Foreign Investment Review Board (**FIRB**), a division of the Australian Treasury.

As Australia seeks to enhance trade with many countries, free trade and other bilateral agreements will be reached with the intention of promoting two way investment and setting the parameters for trade between Australia and its trading partners. For example, the Australia United States Free Trade Agreement and *US Free Trade Agreement Implementation Act* increase the notification threshold for acquisitions of substantial interests in Australian businesses by US investors from A\$244 million to A\$1062 million (from 1 January 2012). The thresholds applying to US investors are subject to annual indexation and should be checked accordingly.

Certain types of proposals by foreign interests to invest in Australia require prior approval (depending on the value of the assets or business being acquired) and therefore need to be notified to FIRB. Proposals likely to require prior notification to FIRB and approval by the Treasurer include:

- all acquisitions of vacant non residential land, residential land or shares in urban land corporations or trust estates
- all direct investments by foreign governments or their agencies

- acquisitions of substantial interests in existing Australian corporations or businesses with total assets over A\$244 million (or A\$1062 million for US investors)
- takeovers of off shore companies whose Australian subsidiaries or assets are valued at A\$244 million (or A\$1062 million for US investors) or more, where those Australian assets account for less than 50% of the target company's global assets and
- investments in 'sensitive' sectors.

Briefly, a foreign person acquires a substantial interest in the ownership of a corporation or business if that person (and any associates) acquires 15% or more of the ownership of the entity, or that person together with other foreign persons and each of their associates acquire 40% or more in aggregate of the ownership.

In most industry sectors, foreign investment proposals which require approval are approved unless determined to be contrary to the national interest. However, specific policies and rules apply in the case of proposals involving foreign investment in urban land (particularly developed residential real estate), or in the banking, civil aviation, airports, shipping, media and telecommunications industry sectors.

FIRB approval is usually given within 30 days of lodging an application.

The Treasurer has the power to block an investment or to require divestment if the FATA is breached or the investment is considered to be contrary to the national interest.

Exchange controls and cash transaction reporting

Most dealings in foreign currencies in Australia must be transacted with an institution holding an authority from the Reserve Bank of Australia or licensed to do so by the Australian Securities and Investments Commission.

Inward investment is not subject to exchange controls, though this does not preclude the need to obtain approval from the FIRB in certain situations (see page 7 of this guide). Outward exchange flows are not restricted. However both outward bound and inward bound exchange flows are subject to cash transaction reporting guidelines imposed on 'cash dealers' and other persons who send or receive international fund transfer instructions. Cash dealers which include banks, financial institutions, insurance companies, currency and bullion dealers and others, must report to the Australian Transaction Reports and Analysis Centre (**AUSTRAC**) details of certain transactions including:

- significant cash transactions involving the transfer of currency (coin and paper money of Australia or a foreign country) of A\$10,000 or more including foreign currency equivalents, unless the transaction has been specifically exempted
- international telegraphic or electronic funds transfers to and from Australia, unless the transaction has been specifically exempted and
- transactions which the cash dealer has reasonable grounds to suspect is relevant to criminal activity.

Acquisitions of companies and businesses

Acquisitions of shares and businesses in Australia are regulated by:

- the *Corporations Act*
- the *Foreign Acquisitions and Takeovers Act* (see page 7)
- the *Competition and Consumer Act* (see page 15)
- the Listing Rules of ASX and
- legislation affecting the relevant industry of the corporation or business being acquired.

Depending on the method of acquisition, the following issues may need to be considered when acquiring shares or businesses in Australia.

Takeovers

Acquisitions of substantial interests in Australian companies are regulated by the takeover provisions of the *Corporations Act*. Subject to a few exceptions (including unlisted companies with 50 or fewer members), if a person acquires a 'relevant interest' in more than 20% of the issued share capital of a company, that person must make a takeover bid. The concept of 'relevant interest' covers a broad range of direct and indirect interests in securities and a person can reach the 20% threshold without becoming a registered holder of securities.

If a person acquires interests in more than 90% of the voting shares of a company under a takeover offer, the compulsory acquisition provisions may be used to acquire the balance, if certain criteria have been met. Compulsory acquisition provisions can be used in other circumstances where thresholds are met.

Schemes of arrangement

It is common for Australian companies to merge with foreign companies by way of scheme of arrangement. These schemes are highly regulated by the *Corporations Act* and require shareholder and court approvals.

Reduction of capital

Some times a change of control may be achieved through a reduction of capital. Reductions of capital are regulated under the *Corporations Act*. A reduction of capital requires shareholder approval and must be fair and reasonable.

Other matters for consideration

Other restrictions that may apply to a particular transaction include:

- under the *Corporations Act*, the requirement for substantial shareholding notices to be lodged when a 5% threshold is reached. The threshold relates to the number of votes attached to shares in which a person and their associates have a relevant interest. It may be reached before shares are actually acquired or transferred
- under the Listing Rules, provisions regulating various activities, including the sale of a company's main undertaking or the issue of shares over a prescribed level. These activities require shareholder approval and must comply with certain ASX requirements
- a company can only financially assist a person to acquire shares in itself, if the assistance does not materially prejudice the company, the shareholders or the company's ability to pay its creditors or if the shareholders give their approval

- trading in securities while in possession of information which is not generally available to the public, but if it were available would have a material effect on the price of the securities, is prohibited by the *Corporations Act* under insider trading provisions and
- transactions between parties which are considered to be related, usually require shareholder approval.

Acquisitions of shares and businesses in Australia are regulated by:

- the *Corporations Act*
- the *Foreign Acquisitions and Takeovers Act* (see page 7)
- the *Competition and Consumer Act* (see page 15)
- the Listing Rules of the Australian Stock Exchange (**ASX**)
- legislation affecting the relevant industry of the corporation or business being acquired.

Taxation

Australia imposes taxation on the worldwide income of entities resident in Australia for taxation purposes and the Australian sourced income of non residents.

Australia's capacity to tax non residents may be limited where the non resident is resident in a country with which Australia has concluded a double taxation agreement (**DTA**) (see table).

Generally, DTAs allocate taxing rights to the country of residence of the taxpayer. However, the country of the source of the income may impose withholding taxes on dividends, interest and royalties and may also tax in full the actual or attributed profits of any commercial enterprise carried on through a 'permanent establishment' in the country.

Australia has a general non resident withholding tax regime.

Residence

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

- it is incorporated in Australia or
- where the company is not incorporated in Australia it carries on business in Australia and either:
- has its central management and control in Australia or
- its voting power is controlled by shareholders who are residents of Australia.

An individual is a resident of Australia for tax purposes if, generally, he or she:

- resides or is domiciled in Australia, unless the Commissioner is satisfied that the person's permanent place of abode outside Australia
- is in Australia for at least 183 days in a tax year, unless he or

Countries with which Australia has a double tax agreement

Argentina	Ireland	Russia
Austria	Italy	Singapore
Belgium	Japan	Slovakia
Canada	Kiribati	South Africa
Peoples Republic of China	Malaysia	South Korea
Czech Republic	Malta	Spain
Denmark	Mexico	Sri Lanka
Fiji	Netherlands	Sweden
Finland	New Zealand	Switzerland
France	Norway	Taipei
Germany	Papua New Guinea	Thailand
Hungary	Philippines	United Kingdom
India	Poland	United States
Indonesia	Romania	Vietnam

she does not intend to take up Australian residence and has a usual place of abode overseas or

- is a member or eligible employee under certain superannuation legislation or is the spouse or a child under 16 of a person covered by such superannuation legislation.

Source of income

The source of particular items of income is dependent in most cases on matters of practical fact and, with certain exceptions, is generally determined on a common law rather than statutory basis. Australian income tax law also lays down rules in a number of instances which deem income to have an Australian source (eg. royalties paid to non residents and premiums paid to insurance companies).

Taxable income

Taxable income is computed in the same manner for both individuals and companies. Tax is charged on taxable income which is calculated as the assessable income less allowable deductions.

Generally all losses and outgoings incurred in gaining or producing the assessable income, or necessarily incurred in carrying on business for that purpose are deductible except for losses and outgoings that are of a 'capital, private or domestic nature'.

Certain tax deductions can be claimed by a taxpayer notwithstanding that they are of a capital nature, such as for depreciation of plant (known collectively as capital allowances and generally claimed over the effective life of the plant) and certain expenses in establishing a business (generally claimed over 5 years).

Resident individuals

Taxable income	Tax on this income
\$0 – \$6,000	Nil
\$6,001 – \$37,000	15c for each \$1 over \$6,000
\$37,001 – \$80,000	\$4,650 plus 30c for each \$1 over \$37,000
\$80,001 – \$180,000	\$17,550 plus 37c for each \$1 over \$80,000
\$180,001 and over	\$54,550 plus 45c for each \$1 over \$180,000

The above rates do not include the Medicare levy of 1.5%

Non resident individuals

Taxable income	Tax on this income
\$0 – \$37,000	29c for each \$1
\$37,001 – \$80,000	\$10,730 plus 30c for each \$1 over \$37,000
\$80,001 – \$180,000	\$23,630 plus 37c for each \$1 over \$80,000
\$180,001 and over	\$60,630 plus 45c for each \$1 over \$180,000

Taxable income	Flood Levy on this income
\$0 – \$50,000	Nil
\$50,001 – \$100,000	Half a cent for each \$1 over \$50,000
Over \$100,000	\$250 plus 1c for each \$1 over \$100,000

The above rates do not include the government's Temporary Flood and Cyclone Reconstruction Levy ('Flood Levy'), which applies to taxable income for the 2011-12 year only. Individual taxpayers, who have taxable income over \$50,000 in the 2011-12 year will have to pay the Flood Levy. This includes foreign residents who have Australian income. Individuals who have taxable income of \$50,000 or less, or who are otherwise eligible for an exemption, will not be charged the Flood Levy.

Companies

Companies are generally taxed at the fixed rate of 30%. Special rates apply to life insurance companies, complying superannuation funds, friendly societies and other registered organisations.

Australian tax rates

This table summarises the principal rates of taxation that apply in Australia from 1 July 2008. The rates may be changed by the Australian federal government at any time.

The taxation year runs from 1 July in each year to 30 June in the following year, however, certain non resident entities may qualify for a substituted accounting period.

Consolidated groups

An Australian company can elect to form a consolidated group with its wholly owned subsidiaries. The effect is to treat the group as a single entity for Australian income tax purposes. This effectively means that intra group transactions will be ignored for income tax purposes.

Capital gains

Gains on the disposal of assets will be treated as either revenue gains (income) or capital gains. Whether an asset is on revenue or capital account will be contingent on the relevant facts and circumstances.

Capital gains are included in the calculation of the taxable income.

Capital gains derived by individuals and trusts (but not companies) that dispose of assets held for at least 12 months will generally be reduced by half. Capital gains derived by complying superannuation entities that dispose of assets held for at least 12 months will generally be reduced by one third. Capital gains derived by companies are not eligible for the capital gains tax concessions.

Non residents will only be subject to tax on capital gains made on the disposal of 'Taxable Australian Property'. Taxable Australian Property is defined broadly to include direct real property interests (including mining, quarrying or prospecting rights), indirect real property interests and assets used in carrying on business in Australia through a permanent establishment.

A non resident will have an indirect real property interest where it has a non portfolio interest (ie. 10% or more) in a company or trust that has Australian real property interests where those real property interests represent more than 50% of the market value of the underlying assets (**land rich entities**).

Roll over relief may be available in respect of capital gains made in relation to a takeover bid where shares or units in one entity are exchanged for shares or units respectively in another entity. The Australian rules also provide demerger relief in some instances. Where roll over relief is available, any capital gain made on the disposal of the original shares or units will be deferred until the disposal of the exchanged asset.

International transfer pricing

Australia has comprehensive transfer pricing rules. These rules operate where products and services are provided under an international agreement and the parties are not dealing at arms length in relation to the transaction. In these circumstances the Commissioner of Taxation may make a determination to substitute an arms length value as the consideration received or provided.

These provisions can affect pricing policies between an Australian company or branch and an overseas parent, subsidiary or associated entity. The Australian legislation uses the arms' length principle in determining how income and expenses should be allocated in international dealings. Broadly, the Australian tax authorities follow the OECD methodology.

Dividends

Dividends distributed from after tax profits are subject to Australia's 'imputation system'. Generally, the system operates to impute the tax paid by the company as a credit to shareholders. To the extent that the shareholder's tax liability is less than the credit, the shareholders may be entitled to a refund.

Dividends with an imputation credit attached are known as 'franked dividends'. Fully franked dividends paid to non residents are not subject to dividend withholding tax. However, unfranked dividends (dividends with no imputation credits attached) paid to non residents will be subject to dividend withholding tax at the rate of 30% which may be reduced by the application of a relevant DTA.

Branch operations

An overseas company carrying on business in Australia through a branch or a permanent establishment, is subject to Australian company tax at the current rate of 30% on profits attributable to that branch. There is no branch profits tax.

Interest

Generally, Australia levies a withholding tax rate of 10% on interest paid to a non resident provided the interest is not sufficiently connected to a non resident carrying on business in Australia through a permanent establishment. The interest withholding tax rate may be reduced by the application of a relevant DTA. An exemption from interest withholding tax applies to interest on notes and syndicated loans that meet public offer requirements. Interest derived by non residents carrying on business in Australia through a permanent establishment is subject to the corporate tax rate.

Interest income derived by Australian residents will be included in the Australian resident's assessable income and subject to tax at individual or company tax rates.

Interest incurred is generally deductible when incurred. However, Australia's thin capitalisation rules may apply to limit interest deductions subject to a number of safe harbours.

Royalties

Royalties are payments made for the use of rights. The payments may be periodic, irregular or one off.

Royalties are deemed to have a source in Australia if they are paid to a non resident by a resident of Australia, unless the resident pays the royalty in the course of carrying on a business outside Australia at or through a permanent establishment in another country.

Royalties are also deemed to have a source in Australia if they are paid or credited to a non resident by another non resident, and are, or are in part, an outgoing incurred by the non resident payer in the course of carrying on a business in Australia at or through a permanent establishment in Australia.

Under domestic law royalty income derived by a non resident from Australian sources is subject to Australian withholding tax at a rate of 30% on the gross royalty payment. Where a DTA applies, the rate of Australian withholding tax is generally reduced. The entity paying the royalty is required to withhold and remit the Australian withholding tax to the Australian Taxation Office.

Royalty income derived by Australian residents will be included in the Australian resident's assessable income and subject to tax at individual or company tax rates.

Managed Investment Trusts

Where a non resident has an interest in an Australian fixed trust that qualifies as a managed investment trust (**MIT**), MIT withholding tax may apply on the distributions made by the trust to non residents. Where the non resident is located in an information exchange country a reduced rate of withholding of 7.5% may apply. Where the non resident is located in a jurisdiction with which Australia does not have an information exchange agreement the rate of withholding is a 30% final tax.

For the purposes of computing the distribution subject to MIT withholding tax, dividends, interest and royalties are excluded (they will be subject to the dividends/interest/royalty withholding taxes detailed above), as well as non Australian sourced amounts. Further, where the MIT distributions includes capital gains in relation to assets that are not Taxable Australian Property such gains will continue to be disregarded and will also not be subject to MIT withholding.

Eligible MITs can elect for common asset classes (shares, trust units and land) to be treated as capital assets for tax purposes. This provides greater certainty and can enable foreign investors an exemption from Australian tax on such assets and reduce the gain otherwise taxable to Australian investors.

Losses

Generally, a company or a trust can carry forward its tax losses on revenue account indefinitely, and

can set off those losses against both income and capital gains. Capital losses can also be carried forward indefinitely, however, they can only be set off against capital gains.

Broadly, the capacity of a company or a trust to utilise its carried forward tax losses is contingent on it satisfying the continuity of ownership test. This test requires that more than 50% of all voting, distribution and capital rights be held by the same natural persons in the year of loss, in the year of recoupment and all intervening years.

If a company or a listed trust fails to satisfy the continuity of ownership test it may utilise its carried forward tax losses if the company or listed trust carries on the same business it carried on immediately before the failure of the continuity of ownership test. However, if an unlisted trust fails the continuity of ownership test it will lose its capacity to carry forward its losses.

Where a company that has tax losses joins a tax consolidated group, its losses are transferred to the tax consolidated group. These transferred losses will be available to the consolidated group based on the relative value of the company to the rest of the consolidated group. The use of the transferred losses are also subject to the continuity of ownership test and/or the same business test.

Residency, doubled taxation and foreign tax offsets

The taxation of worldwide income earned by Australian residents may in certain circumstances result in double taxation problems. Australia manages double taxation by either a foreign tax offset or a tax exemption.

A foreign tax offset is a non refundable credit allowed for foreign tax that

is paid by an Australian resident on foreign sourced income which is also assessable in Australia. While the offset is based on the amount of foreign tax paid, it is generally capped at the amount of Australian income tax payable on that foreign sourced income. Excess foreign tax offsets cannot be carried forward to use in later years.

Generally, Australian tax rules provide an exemption for dividends from controlled foreign companies, branch profits from operations in foreign jurisdictions and capital gains derived on the sale of shares in a foreign entity which carries on an active business.

Tax concessions

Australia offers general incentives to encourage investment in Australia. Some specific concessions are however available, including:

- deductions for certain set up or relocation costs in establishing a regional headquarters in Australia
- exemption from dividend withholding tax for certain foreign source dividends
- a 45% refundable tax credit for eligible entities with turnover of less than A\$20 million per annum undertaking eligible research and development activities and (a 40% non refundable tax credit for all other eligible entities)
- concessionary tax rates for income derived by offshore banking units
- capital gains on the sale of shares in a foreign company held by an Australian company will be disregarded where the foreign company has an active underlying business.

Investors proposing to use Australia as an intermediary in their investment strategy should seek professional

advice as to the availability of taxation concessions (including those mentioned above) in respect of 'foreign income dividends' and offshore banking units.

Goods and services tax

A goods and services tax (**GST**) has applied in Australia since 1 July 2000 to the supply of goods, real property and other supplies (such as intangible rights and services). Broadly, the GST is similar in operation to the value added tax systems operating in Europe.

GST is payable at a flat rate of 10% of the value of a taxable supply.

A taxable supply arises where:

- the supply is made for consideration
- the supply is made in the course of an 'enterprise' the supplier carries on
- the supply is 'connected with Australia' and
- the supplier is registered or required to be registered.

An entity is required to be registered for GST if it carries on an enterprise (which includes but is not limited to a business) that has an annual turnover in excess of A\$75,000 from supplies that are connected with Australia.

The definition of supply under the GST law is drafted broadly as 'any form of supply whatsoever' and includes the supply of goods, services, real property, advice, information and rights. It also includes an obligation to do anything or refrain from an act or to tolerate a situation. Similarly, consideration is defined broadly to include 'any payment, act or forbearance' made in connection with the supply or for the inducement of the supply. This includes the provision of non monetary consideration.

The supply will be 'connected

with Australia' if:

- in the case of goods, the goods are delivered in Australia, made available in Australia or are imported into or exported from Australia
- in the case of real property (including an interest in, or right over, land), if the real property is located in Australia
- in the case of anything other than goods and real property, if the 'thing' is done in Australia or supplied through an enterprise carried on through a permanent establishment in Australia (as defined for this purpose). If the 'thing' is neither done in Australia nor supplied through an enterprise carried on through a permanent establishment in Australia, and the thing is a right or option to acquire another thing which would be connected with Australia, then the supply will be connected with Australia.

Whether a supply is 'done' in Australia will depend on its nature – for example, the Australian Taxation Office regards a supply of rights to be 'done' in the place where the agreement to supply those rights is made.

A GST registered supplier's entitlement to claim an input tax credit (effectively a GST refund) for the GST component of the cost of things acquired in the course of carrying on their enterprise will depend on the type of supply the acquisition is used to make.

For GST purposes there are:

- Taxable supplies – for which GST is payable by the supplier when it makes the supply, but the supplier is entitled to an input tax credit (ie. a GST refund) for GST incurred on things acquired to make the supply. Examples of taxable supplies include

commercial rent and most types of services consumed in Australia.

- GST free supplies – for which no GST is payable by the supplier when it makes the supply, but the supplier is entitled to an input tax credit (ie. a GST refund) for GST incurred on things acquired to make the supply. Examples of GST free supplies include certain types of food, education courses and the export of goods or outbound supply of intangibles such as rights or services for use or consumption outside of Australia.
- Input taxed supplies – for which no GST is payable by the supplier when it makes the supply, but the supplier will not be entitled to an input tax credit for GST incurred on things acquired to make the input taxed supply. Examples of these supplies include financial supplies and residential rent.

The importation of goods into Australia may also attract 10% GST on the value of the goods at the time of the importation. If the importer is registered for GST in Australia and imports the goods in carrying on its enterprise, it may be entitled to claim back the GST incurred on the importation (ie. a GST refund). Some GST registered importers, upon application, may qualify for deferred payment of GST on importations.

A GST registered entity is required to submit GST returns to the Australian Tax Office either quarterly or monthly depending on its annual turnover. An entity with an annual turnover of A\$20 million or more is required to submit returns monthly. Entities with an annual turnover of less than A\$20 million may submit returns quarterly or may elect to submit returns monthly.

State taxes

Each of Australia's six states and two territories (**states**) imposes their own form of taxes. The more significant types of state-based tax are:

- stamp duty (which includes transfer duty, 'land rich' or 'land holder' duty, motor vehicle registration duty, insurance duty, and mortgage duty)
- land tax and
- payroll tax.

Stamp duty

In all states (with the exception of South Australia), stamp duty is a tax imposed on transactions (called 'dutiable transactions') concerning 'dutiable property'. Although the definition of 'dutiable property' varies between jurisdictions, it generally includes land, and in some states, business assets (such as plant and equipment, goodwill, and intellectual property), and particular rights. Transfers of dutiable property and declarations of trust over dutiable property are two types of dutiable transactions.

Generally, stamp duty will not be payable on the establishment of a business. However, as stated above, a stamp duty liability will arise in some states where an existing business is purchased and the assets of the business include dutiable property. Stamp duty on the transfer of business assets has now been abolished in some states and is due to be abolished in all states by 2013. However, stamp duty will remain payable on the transfer of land and interests in land in all states.

If financing is required to establish the business, then stamp duty will be payable where that transaction is secured by property located for stamp duty purposes in New South Wales. This is known generally as 'mortgage duty'.

In South Australia stamp duty is a tax on instruments, such as contracts and transfer forms (as opposed to transactions).

The rate of transfer duty imposed by stamp duties legislation is imposed on a sliding scale that varies between jurisdictions, ranging from a top rate of 4% in Tasmania to a top rate of 6.75% in the Australian Capital Territory based on the dutiable value of the dutiable transaction.

The transfer of shares in a private company or private unit trust (that is a company or unit trust that is not listed on a recognised stock exchange) also attracts duty ('marketable securities' duty) where the securities are registered in New South Wales or South Australia at a rate of generally 0.6% of the dutiable value of the shares or units.

In addition to the direct acquisition of land, a liability to stamp duty may also be triggered upon the acquisition of shares in a private company or private unit trust at the same rate as for a transfer of land (as opposed to marketable securities duty rates) as the transaction effects an indirect acquisition in land. Although the provisions vary between the states, in many jurisdictions 'land rich' duty or 'land holder' duty is triggered when an entity (either alone or when aggregated with related entities) acquires a 50% or greater interest in a company (or a 20% or greater interest in a unit trust) that holds directly (or indirectly) interests in land. In some jurisdictions duty on the acquisition of an interest in a private unit trust is treated as if it were a direct acquisition of the trust property. In addition, most states now impose land holder duty on the acquisition of a 90% or greater interest in a listed entity which owns land above a certain value.

Further, all states impose insurance duty. Insurance duty is levied on the

amount of the premium paid in relation to a contract that effects general insurance or the sum insured in relation to policies of life insurance. Generally the insurer pays the insurance duty, although the cost is generally passed on to the insured.

The Commonwealth and state governments have entered into an agreement for the abolition of certain state taxes by an end date of 1 July 2013.

However, the state taxes that remain in perpetuity include duty on the direct transfer of real property, land rich or land holder duty, and duty on insurance.

Land tax

Each of the states (with the exception of the Northern Territory) imposes an annual land tax on the owners of freehold land in the relevant jurisdiction. 'Land' generally includes vacant land, land that is built on, and lots in building unit plans. Land tax is assessed on the taxable value of an owner's total land holdings. The taxable value is the aggregate of the relevant unimproved value of all land owned less any exemptions or deductions.

Land tax is then imposed on the taxable value of the relevant land above a certain threshold amount (for example \$387,000 in New South Wales) at marginal rates of approximately 1.6% on the value exceeding the threshold.

Payroll tax

All employers are subject to payroll tax based on the amount of wages they pay to employees. Each state has set certain exemption thresholds. These thresholds mean that payroll tax is not payable until the total amount of Australian wages paid by an employer reaches the threshold.

Proposed tax reform

A brief outline of major proposed reforms is set out below.

- new taxation arrangements for the resources sector, which includes extending the current Petroleum Resource Rent Tax to apply to the North West Shelf project and onshore oil and gas production, including coal seam methane and oil shale, and introducing a Minerals Resource Rent Tax to apply to coal and iron ore projects, from 1 July 2012.
- introduction of a carbon tax from 1 July 2012 for certain industries including mining, electricity generation, stationary energy, non-legacy waste and industrial processes.
- amendments to prevent the Australian revenue authority from raising assessments for certain investment income of foreign funds for the 2010-11 and previous years (addressing investment uncertainty for US-based fund managers investing in Australia arising from the application of US accounting standard 'FIN 48')
- changes to the tax treatment of certain investment income of foreign funds where those funds are taken to have a permanent establishment in Australia by virtue of the fact they have engaged an Australian based intermediary
- codification of the sovereign immunity exemption available under international law – which exempts dividend and interest income derived by a foreign government
- changes to Australia's foreign source income deferral rules, which include new controlled foreign company rules and foreign accumulation fund rules
- ratification under Australian law of DTAs negotiated with Chile and Turkey.

Competition and consumer protection

The *Australian Competition and Consumer Act (CCA)* (formerly known as the *Trade Practices Act*) regulates competition and consumer protection law in Australia. The competition provisions of the CCA are based on anti trust legislation in the USA and are not dissimilar to the anti trust provisions of the European Community's Treaty of Rome. The CCA prohibits:

- anti competitive behaviour
- misuse of market power
- anti competitive mergers
- unfair business practices when dealing with small businesses.

It also imposes obligations on businesses designed to protect consumers and provides an access regime for essential facilities and a specific access and competition regime for the telecommunications industry.

The ACCC is responsible for administering and enforcing the CCA. It has the power to authorise, on public benefit grounds, conduct which may otherwise breach the CCA.

Anti competitive behaviour

The Competition and Consumer Act prohibits anti competitive behaviour such as:

- agreements between competitors to fix, maintain or control prices
- agreements between competitors to split up a market or customers
- agreements between competitors not to deal with particular suppliers, customers or other competitors
- the supply of goods or services on condition that the customer

purchase goods or services from a third party and

- inducing resellers to not sell products below a specified price.

The CCA also prohibits agreements, arrangements or understandings which have the purpose, effect or likely effect of substantially lessening competition in a market.

Misuse of market power

It is illegal for a corporation that has a substantial degree of market power to take advantage of that power for the purpose of:

- eliminating or substantially damaging a competitor
- preventing someone from entering the market as a competitor or
- deterring or preventing a person from competing.

Mergers and acquisitions

The CCA prohibits the acquisition of shares or assets of a company if the acquisition is likely to have the effect of substantially lessening competition in a market in Australia.

The acquisition of a foreign company by another foreign company may be subject to the CCA if, as a consequence, a controlling interest in a company in Australia is acquired.

Unfair business conduct aimed at small businesses

The CCA aims to protect businesses, particularly small businesses, by prohibiting:

- misleading conduct in business transactions – this is extremely broad and includes not only the making of untrue statements about present matters, but also

the making of unfounded or unreasonable predictions or statements as to future matters and

- unconscionable conduct in business transactions.

Unconscionable conduct includes the use of a strong bargaining position to extract unreasonably onerous terms from another business.

Industry codes

The CCA provides a regime for the declaration of industry codes whereby a code can be established to regulate the conduct of participants in an industry towards consumers or other participants in the industry. Industry codes can be voluntary or mandatory, focusing on general competition and consumer protection issues.

Consumer protection

The consumer protection provisions of the CCA aim to protect consumers by:

- prohibiting misleading conduct – this is extremely broad, and includes not only the making of untrue claims or statements but also omitting to give all relevant details and failing to correct mistaken impressions
- prohibiting unconscionable conduct – it is illegal in business dealings to take advantage of a consumer's vulnerable circumstances. These include a consumer having poor reading or writing skills, poor English language skills or lacking business know how
- voiding unfair contract terms in consumer contracts where such terms would produce a significant imbalance in the parties' rights and obligations arising under the contract, are not reasonably necessary to protect the legitimate interests of a party and would

cause detriment to a party if they were to be applied or relied on

- implying guarantees into sales transactions with consumers – the CCA implies warranties into sales transactions relating to the quality and standard of goods and services supplied. These warranties cannot be excluded from supply transactions with consumers and
- liability of manufacturers and importers for defective goods – the CCA essentially defines defective goods as those which are unsafe. Liability for defective goods can rest with a manufacturer, an importer, or someone who allows their name or logo to appear on a good sold in Australia.

Sanctions, bribery and export controls

Sanctions

There are two types of sanctions enforced under Australian law:

- multilateral sanctions based on resolutions made by the United Nations Security Council (UNSC); and
- unilateral autonomous Australian sanctions.

Measures imposed under these regimes tend to be 'targeted' sanctions rather than outright trade embargoes on particular countries. Sanctions almost always focus on prohibiting trade in goods and services that relate to military or paramilitary activities, as well as nuclear, chemical or biological weapons programs. Australian sanctions also usually prohibit certain financial transactions by restricting dealings with the assets of designated individuals or entities. Permits may be sought for

trade that is affected by sanctions, but permits are frequently denied.

UNSC-based sanctions generally mirror those imposed by other UN members in terms of the scope of measures imposed and the countries, individuals, and entities they apply to. However, to address situations of concern to Australia where there is no UNSC Resolution (or to further supplement UNSC-based sanctions which are in place), Australia's may impose 'autonomous' sanctions. As at October 2011, Australian autonomous sanctions apply to Burma, North Korea, Fiji, the former Federal Republic of Yugoslavia, Iran, Libya, Syria, and Zimbabwe. In terms of their impact on business, the scope of autonomous sanctions is often similar to the scope of UNSC sanctions.

It is an offence for corporations to engage in conduct which contravenes a sanctions law. As this is a strict liability offence the prosecution does not need to prove the company intends to engage in the prohibited conduct. However, both regimes provide a defence where a corporation can prove it took reasonable precautions, and exercised due diligence, to avoid contravening a sanctions law. This makes it important for corporations to have in place an effective compliance program.

Anti-bribery and corruption

Australia is a signatory to the United Nations Convention Against Corruption and the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, which require steps to be taken to combat corruption in both the public and private sectors. Bribery of foreign public officials is prohibited under the *Criminal Code Act* and involves the following elements:

- an Australian citizen, resident, corporation anywhere in the world
- offers a 'benefit' to another person
- the benefit is not legitimately due
- with the intention of influencing a foreign public official in the exercise of their duties.

Bribery of Australian officials is also an offence. Australian laws also address other corrupt conduct, in some cases dealing with private-private bribery, for example through the giving of secret commissions.

Unlike some legislation overseas such as the UK *Bribery Act 2010*, Australia's foreign bribery laws allow for the payment of 'facilitation payments' to secure minor government actions. It is also a defence to prove that the conduct in question was permitted under a written law of the country where it takes place.

In order to address corruption risks, it is appropriate for businesses in Australia to promote a corporate culture which discourages bribery and other corrupt practices. As other western countries also become 'active enforcers' of their own foreign bribery laws, multinationals operating in Australia are frequently integrating aspects of Australian-law compliance into their global anti-bribery and corruption programs.

Export controls

Although it is relatively straightforward to export most goods and services from Australia, for a small category of defence and dual military-civilian use products, Australia maintains strict export controls.

Certain defence and dual-use goods may not be exported from Australia without a permit. Dual-use goods to which these rules apply include a fairly wide range of products including certain computing and telecommunications equipment. This means the scope of Australian export controls goes well beyond the defence sector. Particularly strict controls apply to goods and services that may assist in the development of weapons of mass destruction and weapons delivery systems.

Under reforms that are expected to come into effect in 2012, the scope of Australian export controls will be expanded to control 'intangible' exports of controlled technology (for example through emailing plans or discussing know-how with foreign persons). The reforms will also control 'brokering' of controlled technologies whereby an Australian national or an entity present in Australia arranges for controlled products to be traded between points outside of Australia.

Under these reforms, there will also be a special regime created for US-Australia defence trade. Certain entities engaged in this trade will be able to gain accreditation to an 'approved community'. Such accreditation is intended to streamline access by community members to highly controlled US defence technologies

Intellectual property

Australia's laws provide comprehensive protection for intellectual property including:

- copyright
- patents for inventions
- trade names and trade marks
- domain names
- trade secrets and confidential information and
- registered designs.

Australia's intellectual property laws meet its international trade and treaty obligations, for example, under the General Agreement on Tariffs and Trade TRIPS Agreement, and have also been amended in the light of the free trade agreement between Australia and the USA.

Australia's intellectual property laws address the significant developments in technology and the internet, primarily through provisions of the *Copyright Act*.

Copyright

Copyright is the exclusive right to reproduce, publish, perform, communicate and adapt original literary (including computer programs), artistic, dramatic and musical works, together with other protected subject matter such as films and sound recordings.

Copyright arises automatically on creation of a work and generally continues for 70 years after the death of the author.

Australia is a member of the various international conventions on copyright and so affords reciprocal protection for copyright recognised in other member countries.

The *Copyright Act* has been through a number of reforms to address copyright issues arising in the ‘internet age’ and as a result:

- protects copyright owners from the unauthorised digitisation of their works and unauthorised communication of their works over the internet and other electronic means
- limits the liability of internet service providers and software manufacturers for copyright infringement by users of their facilities and software and
- prohibits the making, sale, distribution and use of circumvention devices for the purpose of circumventing a technological protection measure.

Prohibition of unauthorised imports is subject to significant exceptions. The *Copyright Act* permits the parallel importation of overseas published books and sound recordings, as well as, more recently, electronic literary and music items and computer software.

Australia’s copyright laws also provide for the protection of moral rights, which give authors both the right of attribution and the right to have copyrighted works treated with integrity.

Patents

A standard patent confers on the patentee the exclusive right to exploit commercially the patented invention for a term of 20 years.

The invention must be detailed in a specification (which may be provisional, later followed by a complete specification) describing the invention and concluding with claims that determine the ambit of the monopoly afforded by the patent.

The invention must be novel and amount to a manner of manufacture as that phrase is understood. The invention must also involve either an inventive step (for a standard patent) or an innovative step (for an innovation patent). The specification must be clear, not ambiguous and the claims fairly based on the matter disclosed.

Trade names and trade marks

Australia protects reputation and goodwill in names through passing off law and consumer protection laws which prohibit misleading commercial conduct.

In addition, Australia has a registered trade mark system for names, logos, devices, sounds, smells, colours and shapes that distinguish the goods or services of an owner from those of other owners.

Australia follows the international system of classification of goods and services. Early trade mark registration is desirable for those seeking to enter the Australian market. Australia also has state based systems of business names laws for persons carrying on business under a name other than their own name.

Domain names

Various classes of domain names ending in .au may be registered. Domain names ending in .com.au and .com are the most popular as addresses for commercial entities operating in Australia.

For a .com.au domain name, a substantial and close connection must exist between the commercial entity and that entity’s domain name, which can be demonstrated by reference to the trade marks, ‘nicknames’ or acronyms of an entity not just its company or business name.

Registration of a .com.au domain name does not create any proprietary rights in the name. Australian courts will, however, recognise rights in domain names where there is a reputation or goodwill in the name (see trade names and trade marks above).

Trade secrets and confidential information

Both through contract and where information is imparted in confidential circumstances for a limited purpose, effective protection can be provided for technical know how, customer lists and other confidential information against disclosure and use for an unauthorised purpose.

Registered designs

The *Designs Act* provides for the registration and protection, for a period of up to 10 years, of any design that is both ‘new’ and ‘distinctive’. A design is the ‘overall appearance of a product resulting from one or more visual features of a product’ including shape, configuration, pattern and ornamentation.

Registration in Australia requires that the design be novel and not have been publicly used in Australia or published in a document anywhere in the world prior to applying for registration in Australia.

The *Designs Act* makes the registration and protection of a design much simpler. Registered designs are also afforded greater protection as owners only need to show that another design is ‘substantially similar’ to prove infringement rather than proving that the infringing design is a ‘fraudulent and obvious imitation’ of the registered design.

Importantly, the new Act introduces a defence for spare parts. This defence allows third parties to manufacture legitimate spare parts for complex products without infringing the registered design in the complex product.

Employment and industrial relations

The Australian workplace operates subject to a combination of federal, state and territory legislation, industrial instruments (including awards and enterprise agreements) and typically employment contracts.

Employment related legislation

The primary legislation regulating the employment relationship is the *Fair Work Act 2009 (FWA)*. This legislation sets minimum terms of employment (via the 10 National Employment Standards), provides for some specific employee protections, regulates unions and the collective bargaining process, sets out the role of the independent employment tribunal (Fair Work Australia (Fair Work)) and deals with a range of other matters.

There are also state employment laws which affect employers in relation to some issues (for example long service). There are also laws covering superannuation, health and safety, workers compensation, discrimination and equal opportunity and other issues.

National Employment Standards (NES)

The NES set out ten minimum standards or entitlements in relation to:

- hours – a 38 hour working week plus reasonable additional hours

- annual leave – 4 weeks paid leave per year, untaken leave is carried forward and is paid out on termination
- personal/carer's leave, which includes sick leave - 10 days paid leave per year, untaken leave is carried forward but not paid out on termination
- parental leave - 12 months unpaid leave with a right to request an extension of up to 12 months (the government also recently introduced a government funded parental leave pay scheme)
- notice of termination and redundancy - up to 5 weeks notice and 16 weeks redundancy pay based on length of service
- long service leave – usually based on state legislation and provides for extended paid leave for long service (eg. 2 months leave after 10 years service)
- public holidays – 8 core public holidays plus some additional state specific holidays
- community service leave – which is generally unpaid
- rights to request flexible work arrangements
- provision of the Fair Work Information Statement – identifying key features of the FWA.

Awards

Awards are legally enforceable industrial instruments which establish minimum terms and conditions of employment for those employees to whom they apply.

From 1 January 2010, more than 120 new Modern Awards came into operation that replaced in excess of 1600 old awards (although other historical awards continue to apply in some cases).

Modern Awards tend to be industry or occupation specific and quite complex rules apply to their interaction which can make it difficult to determine which applies.

All Modern Awards contain terms dealing with broadly similar matters, including:

- minimum wages – including job classification structures
- arrangements relating to hours of work – including span of hours, rest breaks
- type of work performed – such as full time, part time or casual employment
- overtime, penalty rates and other monetary entitlements
- consultation and dispute settling procedures.

Enterprise agreements

Enterprise agreements are enterprise specific agreements negotiated between an employer and its employees (or unions on their behalf). The FWA governs all aspects of the negotiation, approval and operation of enterprise agreements.

Enterprise agreements will usually operate to the exclusion of a Modern Award. However, before an agreement can take effect, it must pass a test (called the 'better off overall test') to ensure the employees are not disadvantaged when compared against the terms of the applicable Award.

There are complex rules about the permitted content of enterprise agreement, how they are negotiated, how they may be approved and terminated.

Employment contracts

Subject to legislation and to applicable industrial instruments,

employers are able to (and typically do) make contracts of employment with employees, covering a range of matters. Policies and practices covering employment and industrial relations issues may also be implemented.

It is important for anyone planning to establish or purchase a business in Australia to ascertain the terms of any awards, agreements and employment legislation which may apply to existing or prospective employees. The terms of contracts of employment and relevant policies and practices should also be reviewed or be carefully considered when being drafted.

Superannuation

Superannuation is, in effect, a mandatory requirement prescribed under the federal superannuation guarantee scheme. Employers are required to make compulsory superannuation contributions at the rate of 9% of the employee's earnings (salary and in some cases bonus and commission). The required statutory contributions are capped at a 'maximum earnings base'.

However, certain exceptions apply in respect of some employees, including:

- non resident employees paid for work done outside Australia and
- resident employees employed by non resident employers for work done outside Australia.

Employers are required to give their employees a choice as to the fund into which their contributions are to be paid. If the employee fails to nominate a fund, their contributions are paid into the employer's default fund.

The federal superannuation scheme operates alongside any other superannuation entitlements an employee may have under an industrial instrument or their contract.

Occupational health and safety

Employers have a duty to ensure the health, safety and welfare of their employees while they are at work. If harm results to an employee through a breach of this duty, the employer may be liable to the employee both in contract and in tort.

There is also federal, state and territory legislation (which differs in each case) regarding occupational health and safety. In the event that an employer breaches its obligations under that legislation, it can be prosecuted. It is also possible, in some cases, for officers or senior managers of the employer corporation to be prosecuted.

From 1 January 2012, new 'work health and safety' laws will be introduced by most states and territories based on standard safety laws, regulations and codes of practice. As part of this, a corporation's officers will have positive due diligence obligations to ensure that the corporation meets its health and safety obligations.

Workers' compensation

All employers must have in place a statutory workers compensation insurance policy which provides for compensation for employees who are injured in the course of employment. Workers compensation legislation also includes protections against unfair termination of employment as a result of an employee's work related injury/illness. The legislation also imposes a positive duty on employers to find appropriate alternative employment for a partially incapacitated employee.

Discrimination and Equal opportunity

Both federal and state legislation prohibits discrimination (in a range of aspects of employment including recruitment, promotion and termination) on the basis of certain unlawful grounds including sex, race, disability, religion and age.

Furthermore, sexual harassment in an employment context is unlawful under federal and state legislation.

The *Equal Opportunity for Women in the Workplace Act 1999* requires all private sector employers with more than 100 employees to institute workplace programs providing women with equal opportunity in the workplace. The program requires that employers prepare a profile of the company, outlining the occupational and gender characteristics of the workplace, which is made publicly available.

Redundancy procedures and payment

A redundancy generally arises if the duties of a position are no longer required to be performed. If an employee's employment is terminated for redundancy, the employee may be entitled to a redundancy payment under the NES, an applicable industrial instrument or, possibly, in their employment contract or a binding policy/procedure.

Modern Awards include consultation procedures that would apply on a redundancy. Additional notification and consultation obligations (involving unions) can apply where an employer proposes to make 15 or more redundancies.

Unfair dismissals

Under the FWA, an employee may commence proceedings if they consider that the termination of their employment was ‘harsh, unjust or unreasonable’. The remedies are reinstatement or compensation if reinstatement is not appropriate. Compensation is capped at approximately \$60,000 – which increases from July each year).

To be eligible to make an unfair dismissal claim, an employee must have been employed for at least six months and earn less than approximately \$120,000 per year – which increases from July each year) unless they are covered by an industrial award – in which case, the level of their remuneration is irrelevant. An employee dismissed because of a ‘genuine redundancy’ is not eligible to make an unfair dismissal claim.

Transfer of undertakings and employees

Unlike in Europe, there is no equivalent to the Transfer of Undertakings Regulations (or TUPE). If a business is sold or outsourced, employees will only transfer if the ‘new employer’ makes an offer of employment which the employee accepts. Where employees transfer in these circumstances, the new employer may become liable for their accrued leave entitlements. In addition, any enterprise agreement covering the employees is also likely to transfer to the new employer.

Environment

All three levels of government in Australia are involved to varying degrees in making and enforcing environmental laws.

At the federal level, businesses which conduct environmentally harmful activities are required to obtain approval for those activities as well as comply with mandatory reporting requirements. Legislation provides an assessment and approval process for actions that may have an impact on matters of national environmental significance or actions that may impact on the conservation of biodiversity and heritage. There is also a mandatory reporting scheme for corporate greenhouse gas emissions and energy production and consumption.

At the state and local level, development approval is required for the vast majority of businesses, however the type of approval will depend on the size and nature of the development. Each state has its own contaminated land regime which includes a contaminated land register and, in most cases, a duty of notification to the relevant authority where contamination is found. State legislation also makes pollution a strict liability offence, except as permitted under environmental licences. Owners and occupiers of relevant properties may have similar liability. These offences are prosecuted by state environmental authorities.

Immigration

Entry, work and residence entitlements are governed by the *Migration Act* and administered by the Department of Immigration and Citizenship (**DIAC**). Non Australian citizens who are not Australian permanent residents are generally required to hold a valid visa with work entitlements in order to work in Australia.

Visiting Australia for short term business purposes

There are a variety of visas available should an overseas business require overseas employees to visit Australia for short term business purposes.

Work is permitted in strictly limited circumstances primarily where it is either highly specialised in nature or in connection with an emergency, and it is ‘not ongoing’. Under DIAC policy, ‘not ongoing’ is defined as encompassing a position that is filled on a short term basis, preferably not exceeding 6 weeks (although longer periods up to the maximum stay period of up to three months could be considered as falling within the ‘business visitor visa’ program).

Business Long Stay – Subclass 457 visa

The Temporary Business (Long Stay) (Subclass 457) visa is the visa program most commonly used by businesses to sponsor overseas employees wishing to work in Australia on a temporary basis.

The Subclass 457 visa enables overseas residents to, for a period of three months to four years:

- work in Australia (but only for the sponsor employer)
- bring any family members with them and
- have no limit placed on travel in and out of Australia.

Visa application process

Step 1: The employer applies for approval as business sponsor.

Step 2: The employer nominates the position to be filled.

Step 3: The prospective employee applies for the Subclass 457 visa.

The processing time for a Subclass 457 visa is currently promoted by DIAC as two to three months. However, processing times can be much quicker (two to six weeks) where all the relevant documents have been collated prior to lodgement and submissions are carefully drafted to address all criteria.

Permanent residence in Australia

An Employer Nomination Scheme (Subclass 121/856) visa permits businesses to facilitate highly skilled workers (generally under 45 years old) from overseas, or in Australia on temporary visas, obtaining permanent residency when the employer has been unable to fill a vacancy from within the Australian labour market or through its own training programs. It requires evidence of at least a three year contract with the nominating employer but the visa holder becomes a permanent resident and can effectively remain in Australia indefinitely. No sponsorship obligations are imposed on the employer pursuant to this visa scheme.

Alternatively, there are a variety of general skilled migration visas available, each depending on individual skills and circumstances.

Privacy

The *Privacy Act* is the primary means of privacy protection in Australia. It contains 10 National Privacy Principles which set out broad principles on how private sector organisations should use personal information. These provide individuals with a right to know what information an organisation holds concerning them and a right to correct that information. Currently, organisations are subject to an exemption in respect of information held about employees. Additionally, private sector organisations have privacy obligations including credit reporting requirements and tax file number requirements.

Freedom of information

The federal *Freedom of Information Act* and various state legislation grants the right to every person to access certain information in the possession of the government and its agencies. The legislation requires government agencies to publish information about their operations and powers affecting members of the public as well as manuals and other documents used in making decisions and recommendations affecting the public.

Government agencies are also required to provide access to documents in their possession unless the document is exempt from disclosure under the legislation. Exemptions exist where it is necessary for the protection of the public interest and for the protection of the private and business affairs of persons and organisations in respect of whom documentation is collected.

About Minter Ellison

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- Top ranked law firm by revenue in BRW's 2011 survey of Australia's top 500 private companies.
- Asia Pacific's largest law firm by lawyer numbers and revenue.
- Insolvency Deal of the Year 2011 at the ALB Australasian Law Awards: Alinta Energy restructure.
- Australian Deal of the Year 2011 and Equity Deal of the Year 2011 at the ALB Australasian Law Awards: QR National IPO.
- Insolvency Deal of the Year 2010 at the ALB Australasian Law Awards: ABC Learning Centres.
- Project of the Year 2010 at Infrastructure Partnerships Australia Awards: Port of Melbourne Channel Deepening project.
- Law Firm of the Year 2007/2008/2009 and 2011 at the Australian and New Zealand Insurance Industry Awards.
- Best Deals 2010 awarded by Asian Counsel magazine: Victoria's desalination plant.
- Real Estate and Construction Law Firm of the Year (Hong Kong) 2010: awarded by Asian Counsel magazine.
- Market leader in online and policy compliance services: Safetrac.
- Founding participant and GOLD ranked in the Corporate Responsibility Index.

For more information about Minter Ellison please visit www.minterellison.com

Contact

Sydney	Leigh Brown Andrew Cunningham	+61 2 9921 4941 +61 2 9921 4844	leigh.brown@minterellison.com andrew.cunningham@minterellison.com
Brisbane	Ross Landsberg	+61 7 3119 6410	ross.landsberg@minterellison.com
Melbourne	Mark Green	+61 3 8608 2380	mark.green@minterellison.com
Canberra	Paul McGinness	+61 2 6225 3257	paul.mcginness@minterellison.com
Adelaide	Nigel McBride	+61 8 8233 5697	nigel.mcbride@minterellison.com
Perth	Adam Handley Richard Guit	+61 8 6189 7864 +61 8 6189 7894	adam.handley@minterellison.com richard.guit@minterellison.com
Darwin	Cris Cureton	+61 8 8901 5920	cris.cureton@minterellison.com
Gold Coast	John Witheriff	+61 7 5553 9400	john.witheriff@minterellison.com
Auckland	Mark Weenink	+64 9 353 9998	mark.weenink@minterellison.co.nz
Wellington	Mark Weenink	+64 9 353 9998	mark.weenink@minterellison.co.nz
Jakarta, Indonesia	David Inglis	+61 3 8608 2906	david.inglis@minterellison.com
Ulaanbaatar	Elisabeth Ellis	+976 7012 7770	elisabeth.ellis@minterellison.com
Beijing	Nigel Clark	+44 7966 262 711	nigel.clark@minterellison.com
Hong Kong	Sam Farrands	+852 2841 6810	sam.farrands@minterellison.com
Shanghai	Yi Yi Wu	+86 21 6288 2171	yi.yi.wu@minterellison.com
London	Michael Whalley	+44 20 7448 4801	michael.whalley@minterellison.com

Minter Ellison Offices

AUSTRALIA

Adelaide * GRENFELL CENTRE 25 GRENFELL STREET ADELAIDE SA 5000 • TELEPHONE +61 8 8233 5555

Brisbane WATERFRONT PLACE 1 EAGLE STREET BRISBANE QLD 4000 • TELEPHONE +61 7 3119 6000

Canberra 25 NATIONAL CIRCUIT FORREST, CANBERRA ACT 2603 • TELEPHONE +61 2 6225 3000

Darwin * LEVEL 4, 66 SMITH STREET DARWIN NT 0800 • TELEPHONE +61 8 8901 5900

Gold Coast * 159 VARSITY PARADE VARSITY LAKES QLD 4227 • TELEPHONE +61 7 5553 9400

Melbourne RIALTO TOWERS 525 COLLINS STREET MELBOURNE VIC 3000 • TELEPHONE +61 3 8608 2000

Perth ALLENDALE SQUARE 77 ST GEORGES TERRACE PERTH WA 6000 • TELEPHONE +61 8 6189 7800

Sydney AURORA PLACE 88 PHILLIP STREET SYDNEY NSW 2000 • TELEPHONE +61 2 9921 8888

NZ

Auckland MINTER ELLISON RUDD WATTS * LUMLEY CENTRE 88 SHORTLAND STREET AUCKLAND 1010 NEW ZEALAND • TELEPHONE +64 9 353 9700

Wellington MINTER ELLISON RUDD WATTS * 125 THE TERRACE WELLINGTON NEW ZEALAND • TELEPHONE +64 4 498 5000

UK

London 10 DOMINION STREET LONDON EC2M 2EE UNITED KINGDOM • TELEPHONE +44 20 7448 4800

ASIA

Beijing UNIT 1022 LEVEL 10 CHINA WORLD TOWER ONE 1 JIANGUOMENWAI AVENUE BEIJING 100004 PEOPLE'S REPUBLIC OF CHINA • TELEPHONE +86 10 6535 3400

Hong Kong 15TH FLOOR, HUTCHISON HOUSE 10 HARCOURT ROAD CENTRAL HONG KONG • TELEPHONE +852 2841 6888

Shanghai SUITE 4006-4007 40th FLOOR CITIC SQUARE 1168 NAN JING ROAD WEST SHANGHAI 200041 PEOPLE'S REPUBLIC OF CHINA • TELEPHONE +86 21 6288 2171

Ulaanbaatar 901 SAN BUSINESS CENTER PRIME MINISTER AMAR STR.-29 BAGA TOIRUU-14200 SUKHBAATAR DISTRICT-8TH KHOROO MONGOLIA • TELEPHONE +976-7012 7770

* MINTER ELLISON LEGAL GROUP MEMBER