



A Practical Guide to Setting Up a Business in Australia

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About Australia

History

The Commonwealth of Australia is located within one of the world's fastest growing regions. Australia was first settled by Europeans from the British Isles in 1788 and today has a population of over 20 million people. The population of Australia is mainly of British, Scottish, and Irish descent. Since the middle of the 20th century, migration has included large numbers of people from eastern, central and southern Europe, the Middle East, and Asia. Today, Australia boasts a multicultural society.

Geography

Australia is the sixth largest country in area in the world, with a land mass covering 7.7 million square kilometres. More than a third of the population lives in the two major cities, Sydney and Melbourne.

The capital is Canberra, which is located in between Sydney and Melbourne, in the Australian Capital Territory.

Industry

Australia possesses one of the most stable economies and systems of government of all countries in the world.

The currency is the Australian dollar (\$) or AUD) which is divided into 100 cents. Australia uses the metric system for all measurements.

The major industries include manufacturing, mining, industrial and transportation equipment, food processing, chemicals and steel. The major agricultural products include beef, wool, mutton, wheat, barley, sugar, fruit, cattle, sheep and poultry. The biggest export markets are Japan, USA, New Zealand and Korea. The country's principal partner for its imports is the USA, with whom it has a free trade agreement.

Australia has a highly educated, multi-skilled and multi-lingual workforce, excellent infrastructure, a high quality of living and an abundant supply of raw materials and natural resources. It also has one of the highest standards of technological advancement in the world, especially in the area of information technology.

Government and Parliament

Australia is a federation of six States (New South Wales, Victoria, Queensland, Western Australia, South Australia and Tasmania), two internal territories (the Northern Territory and the Australian Capital Territory), and a number of external territories.

There are three levels of government: Federal, State / Territory, and Local.

The Federal Parliament has two chambers, the House of Representatives and the Senate. The Federal Government is formed by the political party, or coalition of parties, that controls the House of Representatives. The Senate is elected on a State-by-State basis. Generally, Federal Parliament's powers are to make laws in foreign affairs, communications, currency, trade and commerce, banking, insurance and taxation. The Federal Parliament sits in the nation's capital, Canberra. The leader of the party in Federal Government is known as the Prime Minister.

State powers relate to the day-to-day lives of most Australians. The areas covered include health, school education, energy, mineral resources and agriculture.

Local Governments are responsible for local community matters including residential, commercial and civic town planning, construction and maintenance of local roads and local bridges, the development and maintenance of facilities such as community parks, recreation grounds and public libraries.

Legal system

Australian law is comprised of:

- § *statutes* passed by the Federal and State Parliaments;
- § regulations, ordinances and other types of delegated legislation passed under the power given in a statute; and
- § the *common law* which is a body of case law originally inherited from the English courts and adopted and developed by the Australian courts.

Each State has its own court system, consisting of the Supreme Court and a range of minor courts. The Federal Government has its own court system consisting of the Federal Court and the High Court of Australia. The High Court of Australia hears appeals (with special leave) from the Federal Court and the State Supreme Courts. In addition, there are numerous tribunals administering technical areas of law (for example, administrative appeals, tenancy and immigration issues).

Structuring a Business

Australia recognises a number of forms of business entities:

- § Sole traders
- § Partnerships
- § Corporations (including incorporated joint ventures)
- § Trusts
- § Joint ventures

Sole Trader

A foreign investor who is a natural person may trade under his or her own name in Australia. If the investor wishes to trade under another name, then a business name must be registered. A sole trader operating a business under his or her own name or a registered business name is personally liable for all obligations of the business.

Partnerships

A partnership is an association of two or more individuals or companies that carry on business together with a view to sharing profits. Subject to certain exceptions there cannot be more than 20 partners.

A partnership is not a separate legal entity and is not taxed as a separate taxpayer. The partners pay tax individually on their earnings from the partnership (as well as any other income).

Although not essential, a partnership agreement contains the fundamental terms of the agreement between the partners (if any). The partnership will be governed by the terms of the relevant partnership agreement among the partners, the relevant State Partnership Act and by the common law.

Partnerships are not registered. However, they must register their trading or business name if the partners decide not to conduct business in their own names. Business names are governed by State laws and separate registrations are necessary.

Each partner is *jointly and severally liable*¹ for the debts of the partnership and the liability is unlimited. In the case of limited partnerships, some of the partners' liabilities for the debts of the partnership are limited to a specified sum contributed by them to the partnership, provided they do not take an active role in running the business of the partnership.

Arrangements between partners will protect partners in their relationship with each other but will not affect third parties with no knowledge of the arrangements.

¹ Jointly and severally liable means that each individual partner is liable for all of the debts of the partnership

Corporations

Corporations are regulated and governed by the *Corporations Act 2001 (Corporations Act)*. The liability of shareholders can be limited by shares, by guarantee, or can be unlimited.

Under the Corporations Act, a company can be either a private (proprietary limited) company or a public (limited) company. A public company can be either unlisted or listed on the Australian Stock Exchange (*ASX*).

Company names must be registered with the Australian Securities and Investments Commission (*ASIC*). Business names are registered independently of company names.

Mining companies are usually incorporated with no liability. Joint ventures are often undertaken through a company structure (see Joint Ventures below). The majority of companies incorporated in Australia are proprietary companies limited by shares.

A private company:

- § must have at least 1 and no more than 50 shareholders;
- § is prohibited from offering shares or debentures or other forms of securities to the public; and
- § must have at least 1 director who is ordinarily resident in Australia.

A public company:

- § must have at least 1 shareholder;
- § can offer shares or debentures to the public (if securities laws are complied with);
- § must have at least 3 directors, 2 of whom must be ordinarily resident in Australia;
- § must have at least 1 secretary who is ordinarily resident in Australia;
- § must appoint an auditor.

Both private and public companies:

- § must have a public officer who is ordinarily resident in Australia and who ensures that the company complies with its obligations under the *Income Tax Assessment Act* and is answerable to the Australian Taxation Office;
- § must have a registered office in Australia where communications can be sent and where one of its secretaries or its agent is present. The company must obtain the occupier's consent to use the premises as its registered address where the company itself does not occupy the premises.

Listed public companies are also required to comply with ASX Listing Rules²

Private companies are typically used in Australia when there are only a small number of shareholders and the company is not intending to engage in public fundraising. The procedure for a company to convert into a public company is simple if it becomes necessary.

² ASX Listing Rules – see section on Corporate Regulation on page 10

Foreign companies

A company or similar entity incorporated outside Australia may not carry on business in Australia unless it has registered under the Corporations Act.

The following requirements must be met:

- § at least 1 local agent must be appointed to act on behalf of the company;
- § the local agent must be either an Australian company or a natural person resident in Australia;
- § the local agent must be authorised to accept the service of process and communications on the company's behalf;
- § the foreign company must have a registered office in Australia; and
- § the foreign company must comply with certain reporting provisions imposed by the Corporations Act.

A foreign company is not required to register merely because it maintains a bank account, collects debts, invests its funds or holds property in Australia.

If a foreign company does not wish to register in Australia it may be possible to establish a representative office to engage only in activities which do not amount to carrying on a business. Alternatively a subsidiary company can be established in Australia.

When a body is registered it will be issued with an Australian Company Number by ASIC. If a body is registered as a branch office of a foreign company, it will be issued with an Australian Registered Body Number by ASIC.

Foreign companies may apply for listing and quotation on the ASX in Australia, whether or not they are currently listed on a recognised stock exchange. In addition to the Corporations Act, a listed foreign company must comply with the ASX listing rules.

Legal differences between a subsidiary company and a branch office

The table on the next page explains the legal differences between a subsidiary company and a branch office, to assist foreign companies to decide on the structure for doing business in Australia.

Commercial aspects	The legal differences between:	
	A subsidiary company	A branch office
Corporate law issues	<ul style="list-style-type: none"> - separate legal entity - registered with the Australian Securities and Investments Commission and given an Australian Company Number (<i>ACN</i>) - liabilities remain with the subsidiary in the absence of guarantees and like arrangements or unless the subsidiary trades while insolvent - may be public or private (restrictions on number of shareholders and issuing shares) 	<ul style="list-style-type: none"> - not a separate legal entity - foreign company is registered with ASIC and given an Australian Registered Business Number - liabilities are those of the foreign company
Foreign Investment Review Board³	<ul style="list-style-type: none"> - approval may be required before subsidiary is acquired or established - approval may be required before assets or land are acquired 	<ul style="list-style-type: none"> - approval may be required before assets or land are acquired
Taxation	<ul style="list-style-type: none"> - will be resident for Australian tax purposes - will be taxed on all income, wherever sourced - taxed on all income at the corporation tax rate - if a trading company, must obtain an Australian Business Number (<i>ABN</i>) 	<ul style="list-style-type: none"> - taxed on all Australian-sourced income at the corporation tax rate - may be affected by double taxation agreement - must obtain an ABN
Debt/equity and thin capitalisation	<ul style="list-style-type: none"> - rules specify whether dealings are treated as debt or equity for certain tax purposes (including characterisation and taxation of distributions) - thin capitalisation rules restrict deductibility of interest on loans - generally, debt funding cannot exceed 75% of the value of Australian assets (less certain liabilities) 	<ul style="list-style-type: none"> - generally as for a company
Ongoing administrative responsibilities	<ul style="list-style-type: none"> - must lodge annual returns and usually financial reports with ASIC - no need to lodge financial reports if relieved from doing so under the <i>Corporations Act</i> 	<ul style="list-style-type: none"> - foreign company must lodge financial reports, unless relieved from doing so under the <i>Corporations Act</i> generally, or on application
Exchange controls	<ul style="list-style-type: none"> - significant cash transactions and transfers must be reported 	<ul style="list-style-type: none"> - restrictions and reporting requirements apply to dealings between branch and head office

³ See Foreign Investment section on page 9

Joint ventures

Joint ventures can be either incorporated or unincorporated. Joint ventures are not recognised as separate legal entities if they are unincorporated and are usually organised for a specific commercial venture.

In an incorporated joint venture, the participants are shareholders of a separate corporate entity formed for the specific purpose of the joint venture. In such a case, the rights and obligations of the different shareholders can either be incorporated into the constitution of the joint venture company or in a separate shareholders' agreement.

A number of incorporated joint ventures have also used a trust structure where the participants are shareholders in a trustee company and the business is carried on by a unit trust constituted under a trust deed. The rights of the parties will generally be set out in a unitholders' and shareholders' agreement.

In an unincorporated joint venture, the rights and obligations of the participants are governed solely under the terms of the joint venture agreement and principles of partnership law and general law.

Trusts

Business may be conducted via a trust. The trustee holds title to the assets of the business and conducts the business of the trust on behalf of the beneficiaries. The trustee can be either an individual or a company. The duties owed by the trustees to the beneficiaries are contained in a trust deed, relevant State legislation and the general law. The most common forms are *discretionary trusts* (where the trustees have discretion to distribute profits to the beneficiaries) and *unit trusts* (where the beneficiaries hold their equity capital in the form of units in the trust and receive fixed proportions of the profits). Trusts may be public or private and public trusts may be listed on a stock exchange.

Tax considerations

Generally companies pay tax independently of their shareholders. Joint ventures / partnerships and trusts, while separate legal entities, pass their tax liability directly to their participants / beneficiaries. These important tax consequences should be considered carefully before choosing the form of entity through which business will be conducted.

Foreign Investment

Foreign Investment in Australia is regulated by the *Foreign Acquisitions and Takeovers Act 1975 (FATA)*. The Foreign Investment Review Board (*FIRB*), a body within the Federal Treasury, is responsible for reviewing foreign investment proposals and advising the Federal Treasurer.

Under the FATA, a foreign interest is a natural person not ordinarily resident in Australia, or any corporation, business or trust in which there is a substantial foreign interest, even if the foreign interest does not have control.

Notification is required of proposed acquisitions by foreign interests of:

- § a substantial shareholding (15% or more by a single person, or 40% or more in aggregate by two or more persons acting together) in an Australian company whose assets are valued in excess of A\$50 million or (irrespective of value) where more than 50% of its assets are urban land
- § plans to establish new businesses involving a total investment exceeding A\$10 million;
- § portfolio investments in the media of 5% or more and all non-portfolio investments irrespective of size;
- § acquisition of vacant urban real estate irrespective of value;
- § acquisitions of residential real estate irrespective of value;
- § any direct investments by foreign governments or their agencies (regardless of size); and
- § tourism proposals involving an accommodation facility.

The Government normally raises no objections to proposals above the notification thresholds where the acquisition or investment is in a non-sensitive sector and the value of the relevant total assets/total investments are below A\$100 million. Any proposal requiring a total investment of more than A\$100 million will not raise an objection unless it is deemed contrary to the national interest.

Sensitive sectors include urban land, media, telecommunications, transport and defence.

Once the proposed acquisition is notified to FIRB, the Federal Treasurer has 30 days to decide whether to object to the proposed acquisition. Acquisitions made without approval are illegal.

Australian and foreign currencies can generally be taken in and out of Australia without restriction. Inward investment may still however require FIRB approval, and outward exchange flows are subject to cash transaction reporting guidelines.

Corporate Regulation

Companies and trusts

Companies and trusts, particularly those listed on ASX, are subject to a large range of corporate governance requirements in Australia. These requirements arise from four main sources:

- § the *Corporations Act 2001*
- § the ASX Listing Rules
- § the ASX Corporate Governance Council's "Principles of good corporate governance and best practice recommendations"
- § other industry standards which are adopted voluntarily.

A company listed on the ASX is required to observe the ASX Listing Rules in addition to the requirements of the Corporations Act.

The ASX Listing Rules are complex and include provisions requiring listed entities to:

- § make regular reports and disclosures
- § undertake certain transactions only after making disclosure or seeking shareholder approval, and
- § ensure that matters of administration and transactions conform to certain requirements and standards.

Australia has a high standard of corporate governance, with most major corporations and other entities aiming to achieve world's best practice.

Directors and trustees

Company directors owe stringent duties to their companies both under statute and common law.

These duties include obligations to:

- § act honestly
- § exercise due skill, care and diligence
- § put the interests of the company ahead of any other person's interest, and
- § prevent the company from trading whilst insolvent.

Trustees owe similar fiduciary duties to their trusts.

Banking and Finance

The central bank in Australia is the Reserve Bank of Australia. The Australian Prudential Regulation Authority determines whether to authorise a company to conduct banking business.

The Financial Services Reform Act 2001 provides that all persons who carry on a financial services business in Australia are required to have an Australian financial services licence or have the benefit of an exemption.

Australian financial services licences⁴ are issued by ASIC on satisfaction of the relevant licensing application criteria. Licence applications can require quite extensive documents in support. Licence holders have an extensive range of obligations imposed on them.

Breaches of the Australian financial services licensing regime can lead to criminal sanctions and the possibility that counterparties can terminate transactions.

Under the relevant Australian legislation:

- § a financial service provider may be deemed to carry on a financial services business in Australia even though it has no physical presence in Australia, and
- § there is no general licensing exemption based merely on the fact that a financial service provider only deals with institutional Australian counterparties (such as Australian banks, financial services licence holders, insurers and fund managers).

Lenders are, generally speaking, not covered by this licensing system, but most other types of financial services are covered (for example, deposit taking, foreign exchange contracts, derivatives, custody, managed investments, stockbroking, insurance and superannuation).

Examples of a foreign company which may be affected by the Australian financial services licensing regime include:

- § a foreign company issuing securities, shares, stocks, deposits, debentures, bonds, managed investment products or insurance to persons in Australia
- § a foreign company provider holding securities, shares, stocks, debentures, bonds, managed investment products, or interests in such products, on trust for persons in Australia.

A number of exemptions may be available to foreign financial service providers. These include:

- § transactions arranged or effected through an Australian financial services licensee.
- § certain products or services offered to Australian institutional clients by financial services providers who are regulated by certain approved foreign regulators, such as the Securities and Exchange Commission in the US or the Financial Services Authority in the UK, and comply with certain other conditions.

⁴ See also the Swaab Practical Guide to Financial Services Regulation

Taxation

Corporations tax

The management of Australia's tax system is shared by the Federal, State and Local Governments. Income tax (along with other Federal taxes such as sales tax and excise duties) are levied by the Federal Government. Stamp duty, payroll tax, land tax and motor vehicle tax are all levied by State or Territory Government. Council (land) rates are levied by Local Government.

Taxable income is determined on the basis of assessable income less allowable deductions. Income derived by an Australian resident taxpayer from all sources worldwide is to be included in its assessable income. Income derived by a non-resident taxpayer from Australian sources is to be included in the assessable income of the non-resident taxpayer, and capital gains in respect of certain assets may give rise to assessable income, irrespective of source. (Non-resident taxpayers should also consider the possible application of any relevant double tax treaty).

As a general rule, a company will be treated as a resident of Australia if it is:

- incorporated in Australia, or
- not incorporated in Australia, but carries on business in Australia and has either its central management and control in Australia or its voting power controlled by shareholders who are residents of Australia.

A subsidiary that is incorporated in Australia will be treated as a resident of Australia for Australian tax purposes. Normally, a foreign corporation operating a branch in Australia will be treated as a non-resident for Australian tax purposes.

The corporate income tax rate for both resident companies and non-resident companies is currently 30%.

The normal accounting period for Australian income tax purposes is a 12 month period ending 30 June of each year. If a company required to lodge tax returns in Australia is, or has a parent which is, a foreign corporation with a different accounting year, the Commissioner of Taxation normally permits it to adopt a 12 month accounting period ending on some other date.

A company incorporated in Australia will need to register for a *Tax File Number* (used in dealings with the Australian Taxation Office) and an *Australian Business Number* or *Australian Registered Body Number* (which must appear on invoices issued by the company).

All Australian business entities must lodge *Business Activity Statements (BAS)* with the Tax Office. The BAS require detailed accounting information (including relating to GST and PAYG – see below) and must be lodged regularly.

Capital Gains Tax (CGT)

Unlike foreign jurisdictions, there is no separate CGT imposed in Australia. Instead any net capital gains made by the taxpayer in a year of income are included in the assessable income of a taxpayer.

In general terms, the Australian CGT provisions apply to the disposal of an asset acquired (or deemed to have been acquired) after 19 September 1985.

Generally, a net capital gain arises if the capital gain or gains made by a taxpayer in a year of income exceeds the capital loss or losses (if any) made by the taxpayer in that year or carried forward from previous years.

Very broadly, a capital gain arises to a taxpayer on a disposal of an asset if the proceeds received on its disposal exceed the original cost of that asset to the taxpayer.

A capital loss may arise to a taxpayer on a disposal of an asset if an amount received on disposal is less than the reduced cost base of the asset to the taxpayer⁵. Capital losses can only be offset against capital gains, ie they are not deductible against other income. However, an unused capital loss may be carried forward to a subsequent year of income, subject to certain requirements. (Capital losses cannot be carried back to an earlier year).

The CGT rules provide for various concessions and exemptions, including CGT *rollover relief*⁶ where any capital gain can be deferred if shares are sold in exchange for other shares.

Pay-As-You-Go regime

Tax instalments are now determined, and collected progressively in the income year, based on income that is derived by an entity.

Withholding tax

Withholding tax is imposed on the payment of interest, dividends and royalties from residents to non-residents. It is also imposed on payments of interest and royalties from a resident to a non-Australian permanent establishment of a resident, and from an Australian permanent establishment of a non-resident to another non-resident.

A foreign corporation which operates a branch in Australia must pay income tax in Australia on its Australian source income, but should not generally be subject to any Australian withholding tax when the branch remits the profits offshore.

If interest (or, broadly, an amount in the nature of interest) is paid by an Australian company to a non-resident taxpayer, this amount will be subject to withholding tax at 10% of the gross amount of the interest.

Australia has double tax treaties with many countries. Companies which are tax resident in a treaty country may be entitled to the benefit of these treaties depending on the terms of the particular treaty.

Thin capitalisation rules

The thin capitalisation rules can apply to both foreign controlled Australian operations or investments (inward investment) and to Australian entities investing overseas (outward investment). The rules seek to limit the amount of debt used to fund Australian operations or investments. This is achieved by disallowing debt deductions (such as interest payments or loan fees) that an entity can claim against Australian assessable income where the entity's debt, as a proportion of its assets, exceeds certain limits (for example, 75%, for most non-financial entities).

⁵ CGT Indexation allowances for the years the asset was held by the taxpayer will reduce the capital gain

⁶ Rollover relief - these concessions are commonly used in business succession plans

The thin capitalisation rules apply to companies, trusts, partnerships and individuals, and to associate entities. Different rules (and debt limits) apply depending on whether the entity is an inward investing entity or an outward investing entity.

Taxation of individuals

As with corporations, the taxable income of an individual resident taxpayer is determined on the basis of the assessable income less allowable deductions in the year of income.

The rates of taxation of individuals in Australia are progressive with a maximum rate of 47% currently applying to taxable income in excess of A\$95,000 for the 2005/06 tax year and A\$125,000 for later tax years.

Resident individuals are also liable to pay a Medicare health care levy based on the amount of their taxable income. The Medicare levy, currently 1.5% of taxable income, is collected with income tax collections.

Employees will generally be taxed on any employee shares or options that they receive. A tax deferral or tax exemption concession is available if the plan meets certain conditions. The relevant rules are complex and prescriptive.

Fringe Benefits Tax (FBT)

FBT is levied on employers in respect of the value of taxable benefits (such as motor vehicles, schooling or loans at discounted rates of interest) provided to employees or their associates in relation to their employment. The benefit is then exempt from tax in the hands of the employee.

Goods and Services Tax (GST)

GST is a broad-based tax calculated at the rate of 10% on the value of the supply of a broad range of goods, services, rights and other things supplied in, or in connection with, Australia (referred to here as *GST items*).

GST is paid at each step in the supply chain. The liability to pay GST to the Australian Taxation Office is on the supplier or provider of the GST items.

If businesses are registered for GST purposes, in most cases they can claim an *input tax credit* for certain acquisitions. The input tax credit generally has the effect of offsetting the GST included in the price of GST items they acquire for use in carrying on their business. In this way, the GST is intended to flow through the supply chain to the end consumers who bear the cost of the GST.

An entity must register for GST if it is carrying on an enterprise in Australia and its current or projected annual turnover is A\$50,000 or more (A\$100,000 or more for non-profit organisations).

There are categories of GST-free items including some itemised foods, exports, most health services, most educational services, most childcare services and some non-commercial activities of charities and religious services.

Customs duty

Customs duty is imposed on various goods imported into Australia at rates prescribed in the customs legislation.

Pay-roll tax

Pay-roll tax is imposed by the various States and Territories on wages paid or payable by an employer to an employee. There is a requirement for employers to register under relevant legislation. Calculation of pay-roll tax is dependent on thresholds and rates, which vary between jurisdictions. Each jurisdiction has differing exceptions and exemptions from pay-roll tax. Payments to individual contractors may also be subject to pay-roll tax under extended definitions in the relevant legislation.

Stamp duty

Stamp duty is levied on a varying basis by each of the Australian States and Territories on a wide range of documents and transactions, such as transfers of property (including businesses and other business assets), sales of marketable securities which are not quoted on the ASX⁷ (including shares and units in unit trusts), leasing and hiring arrangements and most secured lending transactions. An important exemption to note is that the transfer of shares in company incorporated in the State of Victoria is not subject to stamp duty.

Land tax

Land tax is imposed by each of the States and the Australian Capital Territory (but not the Northern Territory) on the ownership of land within the State or Territory.

Municipal rates

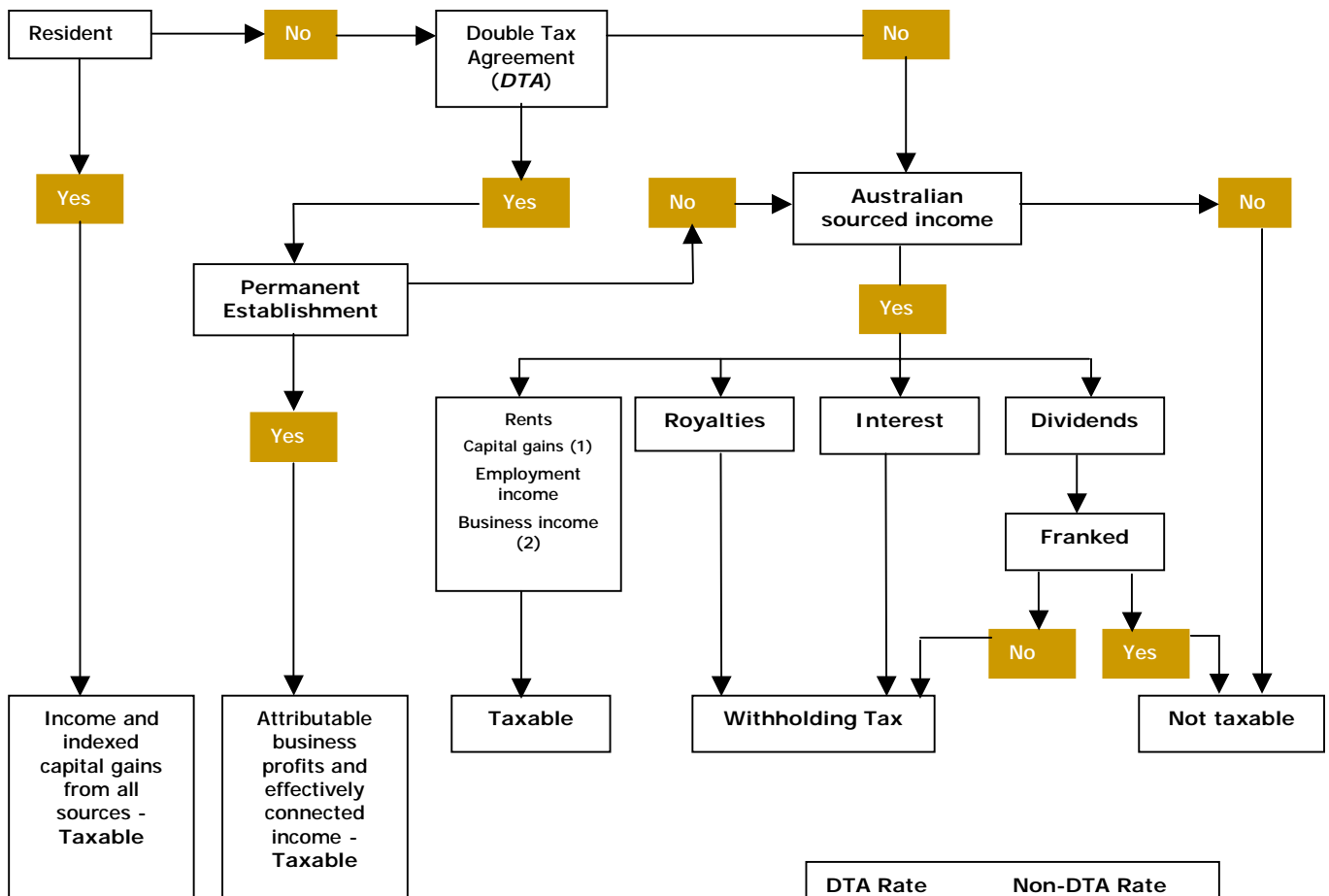
Municipal rates are the most common levy imposed on the value of land serviced by local or municipal governments.

Summary of liability to pay Australian taxes

The table on the next page shows a summary of the liability of a person to pay tax in Australia, to assist a foreign entity to decide on the structure for doing business in Australia.

⁷ See also references to the ASX on page 5

Summary of liability to pay Australian taxes



DTA Rate	Non-DTA Rate	
Royalties	10%*	30%
Interest 10%	10%	
Dividends	15%*	30%

*Generally, but check applicable DTA

Notes: 1 On asset with the necessary connection with Australia
2 If no DTA applies

Intellectual Property

In Australia, statute law gives protection to trade marks, copyright, patents and designs. The common law gives protection for confidential information and trade secrets and provides remedies for *passing off*⁸ goods or services as those of another.

Trade marks

Trade marks may be registered in Australia under the *Trade Marks Act 1995*, provided the mark is distinctive of your goods or services, and is not similar to an existing registration or application for the same or similar goods. Initial registration is valid for a term of 10 years and is renewable for further terms of 10 years (so that protection can be obtained for an indefinite period). The processing of a trade mark application can take up to 12 months but the rights date from the date of filing. Australia is a party to the Paris Convention, which enables an applicant for the registration of a trade mark in Australia to claim an earlier registration date if a trade mark application was made in another convention country no later than 6 months before the Australian application. Australia is also a member of the Madrid Protocol, which can make an application by an overseas owner less administratively complex.

Copyright

The *Copyright Act 1968* grants copyright owners the exclusive right to reproduce, publish, perform, communicate, sell and do other acts in relation to original literary, artistic, musical and dramatic works and sound recordings, films and broadcasts. This Act also protects computer programmes as copyright works. Copyright is not obtained by registration, but arises automatically when an original work is created. In general, copyright lasts for the life of the author plus 70 years. Copyright in literary, dramatic, musical or artistic works (other than a photograph) lasts for 70 years after the death of the author except where the work was not published, broadcast, performed in public or sold to the public during the author's lifetime, in which case, it is 70 years after the first of these events to occur. Copyright in photographs, cinematograph films, television broadcasts and sound recordings lasts for 70 years after first publication. Because Australia is a signatory to the Berne Copyright Convention, works created in other convention countries will be treated as if they were created in Australia and will receive the protection of Australian copyright law.

Patents

Under the *Patents Act 1990*, the patent holder has the exclusive right to exploit an invention and to prevent others from making, using or selling a patented product or process for a maximum period of 20 years from the date of the patent (normally when the complete specification is filed). Any novel product or process that is capable of industrial or commercial application and which constitutes an inventive improvement over what was known previously is patentable. Australia is a member of the Paris Convention. This convention enables the protection of industrial property patented in another member country provided an Australian application is made within 12 months of the initial application. Australia is also a member of the Patent Co-Operation Treaty, which can extend this period by a further 18 months. Protection is granted from the date of the initial application.

Designs

The *Designs Act 2003* provides for registration of the overall visual appearance of a product. In order to qualify for registration, the design must be new and distinctive. A design can be registered for a period of five years and can be renewed for a further five years. Priority can be claimed for designs filed internationally six months prior to the application date in Australia.

⁸ Passing off means trading on another's reputation, by stating or implying that your goods and services are those of that other person. Similar protection is given (by statute) under section 52 of the Australian *Trade Practices Act 1974*.

E-commerce

E-commerce involves the use of computers and other wireless electronic devices to conduct business using electronic communications networks, such as the internet and 3G technologies.

Electronic transactions

The *Electronics Transactions Act 1999* (which is mirrored by legislation in the States and Territories) governs electronic transactions and provides for contracts transacted electronically to be as legally enforceable as written contracts, provided that certain rules are followed. For private parties, each party must consent to the use of electronic communications for a transaction to be valid. Consent can be implied. Some laws (for example, the Uniform Consumer Credit Code) are excluded.

The Australian Government has an e-Authentication Framework, which represents a consistent whole-of-government approach to authentication for, and managing the risks of, online dealings between business and government.

Spam

The *Spam Act 2003* and associated regulations govern the sending of electronic messages with a commercial purpose to persons in Australia. An electronic message includes email, SMS, MMS or instant messaging, but excludes voice calls and faxes. Essentially, a person or organisation can only send a commercial electronic message if:

- § the recipient has consented to receiving messages (consent can either be express or can be inferred from the recipient's conduct or the parties' business or personal relationship)
- § it contains an electronic means of unsubscribing from receiving messages in the future, and
- § it identifies the sender and contains the sender's contact details.

Under the Spam Act, a single message may be spam. The message does not need to be sent in bulk or received in bulk.

The prohibition on sending commercial electronic messages does not apply to the sending of an electronic message which is purely factual and not for the purpose of promoting or selling goods or services.

Cybercrime

A number of activities which are damaging to organisations and individuals engaged in e-commerce are criminal offences. It is now an offence (punishable by up to 10 years imprisonment) to use a telecommunications service to gain unauthorised access to data, to make unauthorised modifications of data, or to impair electronic communication to or from a computer.

Responsibility for content

Under *the Broadcasting Services Act 1992* the Australian Broadcasting Authority can order the removal of offensive material (such as pornography) on a website hosted in Australia. It can also order Australian Internet Service Providers to prevent access to an overseas website containing offensive material.

Internet gambling is prohibited under *the Interactive Gambling Act 2001*. Accordingly, organisations must not supply certain types of gambling services to persons in Australia via the internet.

Domain names

Organisations intending to use a website with an Australian domain (ending in the *.au* suffix) can register a domain name with a number of domain name providers, provided they satisfy certain eligibility requirements. Organisations must be careful not to infringe the rights of anyone who holds a trade mark registered in Australia which is the same as, or deceptively similar to, the desired domain name.

Organisations should also monitor the use of their own trade marks in order to protect themselves from *cybersquatters*. Cybersquatters deliberately use another person's trade mark as a domain name (or part of a domain name) in an attempt to mislead people into confusing the site with that of the trade mark holder, extort the trade mark holder into paying a high fee for the domain name, or otherwise attempt to disrupt the business of the trade mark holder.

Workplace surveillance

In New South Wales, employers' monitoring of employees by cameras, tracking devices or computers is regulated. Notice of intended surveillance is required. That notice must indicate the type of surveillance, when it will commence, whether it is continuous or intermittent, and whether it is ongoing or for a limited time. Covert surveillance is prohibited unless authorised (subject to a defence related to security of premises or personnel) and carried out solely for establishing whether or not an employee is involved in an unlawful activity at work. employers are also prohibited from preventing or restricting e-mail delivery or website access. However, if you have an Internet and e-mail policy that employees have been notified of and the restrictions are contained in this policy, an exemption can apply.

Consumer Protection

Trading

The *Trade Practices Act 1974* provides remedies against corporations which engage in conduct that is unconscionable, misleading or deceptive.

Products

Consumers benefit from a number of *warranties*⁹ in the purchase of goods and services which cannot be modified or excluded by the seller. The *Trade Practices Act* also imposes a strict product liability regime on manufacturers and importers and is similar to the laws and regulations of the European Union.

Restrictive trade practices

The *Trade Practices Act 1974* restricts commercial arrangements which effectively limit or reduce competition in Australian markets. Restrictive trade practices are administered by the Australian Competition and Consumer Commission (ACCC).

Arrangements between competitors, price fixing, certain types of exclusive dealing, abuse of market power and mergers which substantially lessen competition are prohibited.

The ACCC also has a policy to investigate acquisitions which would result in the purchaser having a market share in Australia or 40% or more, or 15% or more where the combined market share of the four largest entities in the market would be 75% or more. The ACCC has power to grant exemptions or void a transaction and impose penalties of up to A\$10 million.

Privacy

Australian privacy law regulates the collection, storage, use and disclosure of personal information by organisations carrying on business in Australia, and the rights of individuals to access information held about them. Special rules apply to:

- § the use and disclosure of credit information by credit providers and credit reporting agencies
- § the collection and use of tax file numbers
- § the collection of sensitive information, including information about health, race, sexual preferences, criminal record, and religion or political affiliation, and
- § sending personal information outside Australia.

An organisation subject to *the Privacy Act 1988* must also publish a privacy policy, and establish complaints handling and access procedures. There are a number of broad exemptions under the Privacy Act, such as an employee records exemption and an exemption for small businesses.

Telemarketing

The Australian government is currently considering proposals to prohibit unsolicited hard-sell telephone calls to any household after certain times in the evening, and to implement a national "do not call" register. This would allow consumers put their names on a list which telemarketers would be prevented from contacting. In line with similar registers in the United Kingdom and the United States, certain calls from charities, market researchers, educational groups and government agencies would be likely to be exempt.

⁹ Warranties means statements made by the seller which can be relied on by the consumer

Employment

Terms of employment

In Australia, the terms and conditions of work of employees as at February 2006 are governed by:

- § Federal awards, State and Territory awards, enterprise agreements and registered agreements;
- § express or implied terms of the relevant contract of employment; and
- § Federal and State and Territory legislation governing employment terms and working conditions, including legislation regulating annual leave and long service leave entitlements.

Awards are decisions of Industrial Tribunals which bind employers in industries to which they relate. They prescribe minimum terms and conditions of employment such as pay, ordinary weekly hours of work, overtime penalties, allowances, annual leave, paid public holidays, sick leave and other employment matters. Each State and Territory's awards (and other industrial instruments) prescribe minimum terms and conditions of employment for that State or Territory. These awards will reflect the laws of the particular State or Territory which has jurisdiction over the activities in which the award is made.

State and Territory laws generally regulate an employee's eligibility for long service leave (generally after 10-15 years of continuous employment), rights on termination or retrenchment (including rights to seek reinstatement or damages) and matters of health and safety in the workplace.

Compulsory superannuation

Under Federal legislation, employers are required to make certain minimum superannuation contributions on behalf of their employees. The minimum contribution rate is presently 9% of the employee's salary or wages (capped to a maximum contribution in respect of high earning employees).

Workers compensation

State laws regulate the liability of an employer to rehabilitate and provide (generally through their insurers) workers' compensation payments to employees suffering from work-related injuries or diseases. Depending on the system applicable in the State where the worker was engaged or the work is performed, employers are either required to contribute a levy to the State or to keep and maintain insurance cover for the full amount of the employer's statutory liability.

Occupational health and safety

State laws impose strict obligations on employers to consult with employees and maintain a safe workplace to ensure the health, safety and welfare of employees and other people in the workplace. Breach of the legislation exposes the employer, and potentially its managers and directors, to quasi-criminal prosecutions and monetary penalties, or prosecution for crimes such as dangerous industrial conduct or industrial manslaughter which are proposed to be introduced in some States.

Equal employment opportunity

Federal and State laws also:

- § prohibit discrimination against employees and job applicants on certain grounds including race, sex, pregnancy, age, sexual preference, politics, religion, trade union membership or disability
- § make provision for equal opportunity and affirmative action in respect of the employment of women (but do not impose quota requirements), and
- § prohibit sexual harassment and vilification in the workplace and render employers vicariously liable for the unlawful conduct of employees.

Industrial disputes and union coverage

Labour laws provide for conciliation and arbitration of industrial disputes. While employee membership of trade unions is not compulsory, existing industrial regulation in Australia depends on representation of employees by organised industry or craft unions operating on a national or State basis.

New Industrial Relations Legislation¹⁰

In December 2005 the Government passed legislation which will have a significant impact on the structure of the industrial relations system in Australia when its key operative provisions take effect. Whilst the legislation is subject to a challenge in Australia's highest court, it is anticipated the legislation will take effect in March/April 2006.

The key features of the legislation are:

- § dismantling the States' jurisdiction with respect to awards and other industrial instruments
- § moving all awards to the Federal jurisdiction and then consolidating them
- § limiting the involvement of unions and encouraging direct negotiations between employees and their employers
- § having a minimum safety net standard for certain key employee conditions
- § removing the application of State legislation to most employers with respect to annual leave
- § removing State jurisdiction over claims by dismissed employees except where the employer is not a company, and
- § limiting and for some employees removing, rights to sue for unfair dismissal in the Federal jurisdiction.

¹⁰ See also the note relating to Workplace Surveillance on page 18

Migration

Immigration and entry into Australia is controlled by the Department of Immigration and Multicultural Affairs.

A visa is required by most people coming to Australia for whatever reason.

Temporary residence for persons who are interested in carrying on business in Australia is generally encouraged. In this instance an interested person will need to apply for a temporary short-stay visa or a long-stay business visa.

A **Temporary Short-Stay Business Visa** is issued for either single or multiple entry for a maximum stay of 3 months. The visa can be valid for up to 5 years.

A **Long-Stay Business Visa** is issued for stays of more than a 3 months and of a maximum of 4 years. Persons who may apply for this visa are mainly business executives, managers, specialists who are sponsored by Australian business and independent executives for the purpose of establishing their own business using their own capital.

Australia welcomes business people who have established businesses in Australia and who wish to live here permanently to develop their business. In some categories, applications must be lodged offshore. Approved applicants are given a multiple entry visa which is usually valid for 5 years. Following this period, an application may be made for a further return visa.

The **Business Migration Scheme** is designed to benefit Australian society and economy. Business migrants must meet a strict selection criteria including passing a points test in which points are awarded for levels of skill and work experience, age and English language proficiency. The major source countries are Hong Kong, Indonesia, Taiwan, South Africa, Malaysia, Singapore, the United Kingdom, South Korea and the United States.

An applicant under the Business Migration Scheme must have established a successful business or investment record, as well as provide evidence that they have the necessary skills and capital to assure the success of the business to be established in Australia.

The special skills and attributes of the business migrant (their knowledge of overseas markets, business networks, cultural practices, knowledge of language other than English, as well as their specific business skill and experience) will benefit Australia in the development of international export markets, create employment, introduce new technology and add commercial activity and competitiveness.

Under the **Employer Nomination Scheme** Australian employers may nominate overseas personnel for migration if they are unable to fill a vacancy from the Australian labour market. The Australian employer must satisfy the following conditions:

- § the position must be highly skilled;
- § the position requires relevant qualifications;
- § the position accords with Australian wages and conditions;
- § the sponsor must have a reputable history of training; and
- § the employment must benefit Australia.

Environmental Regulation

Historically, State and Territory Government has been the primary source of environmental legislation and activity. The Federal Government has no express power over environmental matters under the Australian Constitution. State and Territory Government has sought to legislate on a broad level, including such matters as land use and development, environmental impact and pollution.

Land Use and Development

Land is classified into different zones which are identified to certain categories of use such as:

- residential
- commercial
- industrial
- rural
- public

Local Government exercises a broad discretion with respect to the day-to-day decisions relating to the issue of permits for the use and development of land which conforms to local requirements for land and environmental management.

Environmental Impact Assessments

Many applications for land development require environmental assessments. The nature of the assessment will vary depending on the type of development and the zoning category of the relevant land. Sometimes a very detailed environmental impact statement is needed. On other occasions, a statement of environmental effects will be sufficient.

Pollution Legislation

Each State and Territory has its own laws addressing environmental management issues and protection and imposing controls and penalties for infringement of anti-pollution laws. Generally, these laws may include provisions for:

- § absolute liability for each offence (where a company's intentions are irrelevant in determining its liability)
- § personal liability of directors and managers (unless they can establish a lack of knowledge of the facts leading to the incident, an inability to influence decisions concerning the infringement and the exercise of reasonable care to prevent the infringement)
- § retrospective liability for past owners, current owners and innocent occupiers of land.

Implications

Potential environmental liability has increased the need for various risk management strategies, such as detailed due diligence enquires. Banks and financiers now consider environmental regulation in their evaluation of lending arrangements.

The corporate team at Swaab Attorneys is committed to working with companies to help them meet their ambitions. If we can help you with any of the issues raised in this Guide, please contact either Fred Swaab or Alistair Jaque. We would be very pleased to discuss any issues with you.

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This Guide is intended to give an overview of the issues involved in setting up a business in Australia. It is not intended to be fully comprehensive or to be a substitute for legal advice.