



Morison KSi

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# Doing Business Guide Australia



## About This Guide

This guide has been produced by the Morison KSi Australian member firms for the benefit of their clients and associate offices worldwide who are interested in doing business in Australia.

Its main purpose is to provide a broad overview of the various issues that should be considered by organisations when considering setting-up business in Australia.

The information provided cannot be exhaustive and – as underlying legislation and regulations are subject to frequent changes – we recommend anyone considering doing business in Australia or looking to Australia as an opportunity for expansion, should seek professional advice before making any business or investment decision.

While every effort has been made to ensure the accuracy of the information contained in this guide, no responsibility is accepted for its accuracy or completeness.

The information in this guide is up to date as at the edition date.

For more information, please contact:

**Greenwich & Co**  
[www.greenwichco.com.au](http://www.greenwichco.com.au)

**Mr Scott Fleay**  
[scott.fleay@greenwichco.com](mailto:scott.fleay@greenwichco.com)  
+61 8 6555 9500

Level 2, 35 Outram Street,  
West Perth, West Australia, 6005,  
Australia

**Hayes Knight**  
[www.hayesknight.com.au](http://www.hayesknight.com.au)

**Ms Linda Jing**  
[linda.jing@hayesknight.com.au](mailto:linda.jing@hayesknight.com.au)  
+61 2 9221 6666

Level 2, 115 Pitt Street, Sydney,  
New South Wales, 2000, Australia

**Hill Rogers**  
[www.hillrogers.com.au](http://www.hillrogers.com.au)

**Mr Andrew Lam**  
[andrew.lam@hillrogers.com.au](mailto:andrew.lam@hillrogers.com.au)  
+61 2 9232 5111

Level 5, 1 Chifley Square, Sydney,  
New South Wales, 2000, Australia

**Leebridge Group**  
[www.leebridgegroup.com.au](http://www.leebridgegroup.com.au)

**Mr Adrian Rosa**  
[adrian.rosa@leebridgegroup.com.au](mailto:adrian.rosa@leebridgegroup.com.au)  
+61 3 9854 3100

Level 2, 35 Cotham Road, Kew,  
Victoria, 3101, Australia

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# Introduction

## Why Australia?

Australia is a stable, culturally diverse and democratic country with a strong, competitive economy, modern infrastructure and highly skilled workforce.

There is no better place than Australia to do business. Australia has a resilient and growing economy, stable political environment, excellent infrastructure with prominent future development plans and proximity to the fastest growing region in the world – the Asia-Pacific region.

With over two decades of uninterrupted economic growth, Australia is one of the most resilient developed nations in the world. Australia is now in its 26th year of consecutive annual economic growth, underpinned by strong institutions, exceptional service sectors and an ability to respond to global changes. The Australian economy is:

- The world's 13th largest and 3rd largest in the Asia Pacific region.
- Rated "AAA" by all three global rating agencies.
- Forecast to have average annual real GDP growth of 2.9 percent between 2017 and 2021 – the highest among major advanced economies.<sup>1</sup>

Australia is an innovative economy which supports world-class and significant research and development (R&D) activities and innovation, backed by high levels of R&D investment, generous R&D tax incentives for companies and strong intellectual property protection.

Australia is a diverse country with people from a rich variety of cultural, ethnic, linguistic and religious backgrounds. The Australian labour force is one of the

most educated, skilled, multicultural and multilingual in the world with almost 40 percent of the workforce holding a tertiary qualification or advanced diploma.

Australia is the fourth most popular study destination for international students and a 'first choice' education destination within the Asian region.

Australia's unique geographic location provides it with easy access to the fast-growing Asia-Pacific region and makes it an ideal bridge to the Asia-Pacific region.

Australia is one of the easiest places in the world to do business, backed by the transparent and well-regulated business environment. Australia is ranked fifth on the 2017 Index of Economic Freedom. It is ranked 15th for ease of doing business by the World Bank (DB 2017 Rank).

With almost all industries open to foreign competition and a skilled workforce readily available, Australia continues to be an attractive and dynamic destination for investment.

## The Economy

Australia has a prosperous and free market economy. In 2017, Australia's nominal GDP is estimated at AUD\$1.7 trillion. According to the International Monetary Fund, this makes Australia the world's 13th largest economy and the third largest in the Asia-Pacific region.

Australia is one of the wealthiest Asia-Pacific nations and has enjoyed more than two decades of economic expansion and growth, reflecting strong macroeconomic policy, structural reform and the long commodity boom.

Australia is internationally competitive in services,

technologies, and high-value-added manufactured goods. Mining and agriculture have historically been the main contributors to the economy. The economy is currently rebalancing and transitioning to a diversified economy following the end of the commodity boom. Australia's service sectors, in particular, the financial, professional, healthcare, education and tourism services sectors are making a significant contribution to the economy.

Australia has a relatively low level of public debt and an unemployment rate of approximately 5.6%, one of the lowest rates in the Organisation for Economic Co-operation and Development (OECD).

Australia is also a major financial hub in the Asia-Pacific region. As at November 2016, the Australian Stock Exchange (ASX) had 2192 listed companies with a domestic market capitalisation of AUD\$1.5 trillion, making it one of the world's top 10 listed exchange groups<sup>2</sup>. Australia was ranked fifth out of 57 of the world's leading financial systems and capital markets by the World Economic Forum.

The value of Australian trade in goods and services in 2016 was AUD\$673 billion, with the value of exports totalling AUD\$330 billion. The largest trading partners of Australia were China, the United States, Japan, Republic of Korea and the United Kingdom. China is currently the largest export market, followed by Japan, the United States, Republic Korea and the United Kingdom<sup>3</sup>.

Australia plays an active role in the World Trade Organisation, APEC, the G20 and other trade forums. Australia's free trade agreements with various countries continue to underpin the economic growth.

1. Source: Austrade
2. Source: Australian Stock Exchange.
3. Source: Department of Foreign Affairs and Trade

# Business Structures

## Choosing the right structure

Broadly, there are six operating structures under which a foreign investor may conduct a business in Australia. The business can be operated by an individual (i.e. sole proprietor), a trust, a joint venture, a partnership, a company, or a branch of a foreign company. Each structure has its own advantages and disadvantages and can give rise to different legal and taxation implications.

### Sole Proprietorship

Sole proprietorship is a structure where the business is owned and conducted by an individual. The individual may register a business name but that business name is owned by the individual and does not constitute a separate business structure. While sole proprietorship may provide an investor with more flexibility and control of the business operation, under this structure the sole proprietor is personally liable for liabilities incurred in the course of carrying on the business.

### Trust

A business may be carried on by a trust. A trust can be set up whereby the trustee owns the business assets and carries on the business on behalf of the beneficiaries of the trust. Depending upon whether the beneficiaries' entitlements to the trust assets and income are fixed or flexible, there are two types of trusts commonly used for trading purposes: discretionary trusts and unit trusts. The legal obligation of the trust lies with the trustee. A trust is not a separate legal or taxable entity but is required to lodge a tax return and in certain circumstances the trustee is required to pay tax.

### Joint Venture

Foreign investors may enter into a joint venture agreement with Australian entities to carry out commercial activities. A joint venture is not a legal entity although for some tax purposes (e.g. GST) it can be separated from the parties involved. The rights and responsibilities of each party to the arrangement are generally set out in a joint venture agreement. Each party is taxed in its own right. A joint venture would typically be set up for a short term project rather than a continuous business. Hence it is often seen in the mining and property development sectors.

### Partnership

A partnership is a relationship that exists between persons carrying on a business in common with a view to profit. It is not a separate legal structure and the business is carried on in joint names. Partners are jointly and severally liable for the partnership's debts and have unlimited liability. In some Australian states, a limited liability partnership may be set up whereby some partners have limited liability. However generally there

are restrictions applied to those limited liability partners as to their involvement in the business of the partnership. Taxation treatment can also vary. Flexibility and low cost are the main merits of this business structure.

### Company

This is by far the most common business structure adopted among foreign investors in Australia. A company is a separate legal entity and governed under the Corporations Act as well as its own constitution. There are four types of companies, being a company limited by shares, a company limited by guarantee, a company with unlimited liability, and a no liability company. The most common type of company is a company limited by shares, which may either be a proprietary company or a public company.

A private company must have at least one director who ordinarily resides in Australia. For a public company there must be at least three directors and one secretary, of which two directors and one secretary must reside in Australia. A private company is restricted to having no more than 50 non-employee shareholders. Moreover, a private company is prohibited from public funding. A public company may be listed on the Australian Stock Exchange (ASX), in which case it must also comply with the ASX Listing Rules.

### Branch of a foreign company

A foreign company may carry on a business in Australia through an Australian branch. A branch is treated as an extension of the foreign company. As it is not a separate legal entity in its own right, the foreign company remains accountable and responsible for all the debts and liabilities of the branch. An Australian branch of a foreign

company is obliged to comply with all the disclosure and reporting requirements as prescribed under the Corporations Act.

## Registration Requirements

### Register with ASIC

The Australian Securities & Investments Commission (ASIC) is an independent Commonwealth Government body. It is set up under the Australian Securities and Investments Commission Act to be Australia's corporate, markets and financial services regulator. Foreign investors carrying on a business in Australia under a sole proprietorship, trust, partnership or joint venture do not need to register with ASIC (although trusts will often use a company as trustee). The registration requirements for companies are as follows:

#### Australian branch

In order for a foreign company to carry on business in Australia through a branch, it must register as a foreign company with ASIC. A foreign company wishing to apply for registration should ensure that the company's name is available in Australia and may reserve its name for registration. It must lodge with ASIC an application form, together with a certified copy of its certificate of registration and constituent documents. The foreign company must also appoint a local agent who may be either a natural person or a resident company to represent the foreign company in Australia. The foreign company must also have a registered office in Australia to which all communications and notices may be addressed and which must be open and staffed for certain prescribed hours. Once registered, the foreign company will receive a unique Australian Registered Body Number (ARBN).

#### Australian company

A foreign investor can establish a new Australian company by registering the Australian company with ASIC. When registering, the foreign investor can only choose a company name not already registered by a company or business in Australia. If the company carries on a business in a name that is different from the company name, the company must register the business name as well. Once the company is registered, it will be issued a certificate of registration and an Australian Company Number (ACN).

### Register for taxation

#### Register for an Australian Business Number (ABN)

An Australian Business Number (ABN) is a unique identifier for use in dealings with the Tax Office and other government agencies. An ABN is required for certain tax purposes, for example Goods and Services Tax (GST), Pay As You Go Withholding etc. ABN registration is not compulsory. However, if an entity is required to register for GST, it must apply for an ABN. In addition, if an entity carries on an enterprise in Australia and makes a supply of goods or services, the customer will generally be required to withhold tax of 47% (from 1 July 2017) from the payment if the entity does not quote an ABN.

An entity can apply for an ABN through the Australian Business Register website or by lodging a paper application form with the Australian Taxation Office.

#### Register for Goods and Services Tax (GST)

An entity must register for GST if it carries on an enterprise and its annual turnover from transactions connected with Australia is AUD\$75,000 or more (AUD\$150,000 or more for non profit organisations).

An entity that does not exceed the registration threshold may voluntarily register for GST. A branch of a foreign company is entitled to be registered for GST purposes. An entity must have an Australian Business Number (ABN) to register for GST. The entity can apply for GST using the same form as that for the ABN registration and both registrations can be done at the same time.

#### Register for a Tax File Number (TFN)

A TFN is a unique number issued by the Tax Office to entities. A TFN can be obtained at the same time as an ABN, using the same application form. A TFN is mainly used for dealing with the Tax Office and for lodging income tax returns. If a TFN is not quoted, withholding tax would normally be withheld by investment bodies from interest, unfranked dividends and managed fund distributions at the rate of 47% (or 45% for foreign residents).

#### Register a domain name

It is important to register a domain name, which provides a business with an online identity. It is also a marketing tool to develop the business's online presence and brand. Investors can buy a .com.au or .net.au domain name. The Australian domain names are administered by .au Domain Administration Ltd (auDA). For global domain names, they are administered by Internet Corporation For Assigned Names and Numbers (ICANN).

# Labour and Personnel

The Australian employment environment is governed by common law and a statutory and regulatory framework which includes the National Employment Standards (NES) and industrial agreements.

## Common Law

Prior to commencement of any employment, it is prudent to have an employment agreement prepared (i.e. employment contract) to limit an organization's exposure to employment liability. An employment contract is the most obvious source of common law obligations and it is recommended this contract be in writing.

A standard employment contract would typically cover the working conditions, terms for termination, employer protection clauses and various employee entitlements. The use of an employment lawyer is recommended when preparing an employment contract.

## Statutory and Regulatory Framework

Workers employed in the private and public sectors are usually subject to federal workplace legislation, principally the Fair Work Act 2009 ("Fair Work Act").

Under the Fair Work Act, there are 10 legislated National Employment Standards (NES) which provide all employees with the following entitlements under the federal system:-

- **Maximum weekly working hours** – Employees must not be required to work more than 38 hours per week, although there are provisions for some flexibility.
- **Flexible working arrangements** – Employees may request a change in working arrangements from his/her employer, after at least 12 months of service to perform certain domestic duties.
- **Parental leave and related entitlements** – Up to 24 months of unpaid parental leave (per employee) is available for the birth or adoption of a child. This applies to all full and part-time employees with 12 months of continuous service and to casual employees who have been employed for at least 12 months and who have a reasonable expectation of ongoing employment.
- **Annual leave** – Employees are entitled to 20 days of paid annual leave (calculated pro rate for part-time employees) per year.
- **Personal leave and compassionate leave** – Employees are entitled to 10 days per year, which can be taken as sick or carer's leave. This leave is cumulative.
- **Community service leave** – Employees are entitled to be absent from their place of

employment if they are engaged in eligible community service (i.e. jury service).

- **Long-service leave** – Employees are entitled to paid leave of two months after 10 years of service or 13 weeks after 15 years of service.
- **Public holidays** – Employees are entitled to be absent on prescribed public holidays.
- **Notice of termination and redundancy pay** – Employers must provide employees a minimum period of prior notice in writing before terminating employment. This notice period depends on the employee's period of service and the terms of termination/redundancy.
- **Fair work information statements** – The statement, including information about NES, awards and other matters must be given to all new employees by the employer as soon as practicable after the employee starts employment.

Employees are also protected by unfair dismissal laws and legislation prohibiting sexual harassment and discrimination in the workplace.

## Compliance obligations of employers

In addition to common law and the statutory and regulatory framework there are various compliance obligations imposed on employers regarding their employees which are regulated by various state and federal authorities. These include:-

### Pay As You Go Withholding (PAYGW)

The PAYG tax system requires employers to withhold tax from the remuneration paid to employees according to the tax rates prescribed by the Commissioner of Taxation. The tax withheld under the PAYG

system is remitted to the Australian Taxation Office on either a monthly or quarterly basis, depending on the total annual salary paid and tax withheld. Employees receive a credit for this tax when they lodge their personal income tax return for the relevant income year.

### **Superannuation guarantee contributions (SGC)**

Federal legislation requires employers to provide a prescribed minimum level of superannuation contributions for each of their employees. The prescribed minimum level of superannuation support is currently 9.5% of an employee's ordinary time earnings. If an employer provides less than the required minimum level of support, they will be liable to pay a non-deductible Superannuation Guarantee Charge. Superannuation guarantee contributions are required to be made to the employee's superannuation fund on a quarterly basis.

### **Payroll tax**

Payroll tax is a state tax levied monthly by each state based on the payroll of employers whose total annual Australian wages exceed a specified threshold. There are special rules in relation to grouping of associated employers for payroll tax purposes. Generally an employer or a group of related businesses whose total Australian wages exceed the prescribed monthly exemption threshold is required to register with the relevant state/territory revenue authority for payroll tax. The exemption threshold is different in each state and territory.

### **Fringe Benefits Tax (FBT)**

FBT is a federal taxation system under which employers are taxed on the value of certain benefits

provided to their employees or their associates. Fringe benefits are taxed at a rate of 47% after the value of the benefits has been grossed up. Generally, employers are entitled to claim an income tax deduction for the cost of providing fringe benefits and the amount of FBT paid.

The FBT system contains a number of exemptions and concessions relating specifically to employees who are either required to relocate or live away from their usual home in order to carry out their employment duties.

An entity is required to lodge an annual FBT return if it has an FBT liability for the year, which runs from 1 April to 31 March.

### **Work Cover**

Each state and territory has separate legislation dealing with workers compensation insurance. An insurance policy is required to be taken out by employers to cover their employees in the event they suffer a work related injury or illness. These policies ensure that injured or ill workers will receive financial compensation for lost wages, medical expenses and permanent incapacity.

### **Occupational health and safety**

Each state and territory has responsibility for making laws about occupational health and safety (OH&S) and for enforcing those laws. Occupational health and safety legislation imposes strict obligations on all employers to ensure the health, safety and welfare of their employees while at work. Businesses must ensure that they do not create health and safety problems for employees, customers and the general public. The rules apply even if the business does not have any employees.

*"Each state and territory has responsibility for making laws about occupational health and safety (OH&S) and for enforcing those laws"*

### **Employee incentives – Employee Share Schemes**

One of the most effective and often underutilised ways employers can incentivise key staff is the use of employee share schemes.

The common arrangements involve employers providing employees with shares or options to acquire shares in the employer company or the holding company of the employer at a discounted price. The discount received by the employee in relation to the shares or options is generally taxed in the income year in which the shares or options are granted unless specific conditions can be met to qualify for deferred taxation.

Employers offering shares or options under employee share schemes are required to comply with certain reporting obligations.

# International Mobility

There are multiple visa options for expatriates living in Australia and overseas entities wishing to operate in Australia. The migration program provides an avenue for permanent or temporary stay for skilled individuals to be sponsored by their employer. Some of the skilled visa options for employer sponsored entities in Australia are set out below<sup>1</sup>:

*Table 1. Skilled visas for Australia – employer sponsored categories*

Visa Type	Current Requirements	Visa Duration
Temporary Work (Skilled) visa  <b>(subclass 457)</b>  (Most common visa used)	<ul style="list-style-type: none"> <li>Occupation must be on the list of eligible skilled occupations.</li> <li>Command competent English language.</li> </ul> From 1 July 2017 the following additional changes have been implemented: <ul style="list-style-type: none"> <li>English language salary exemption which exempts applicants with salary exceeding AUD\$96,400 has been removed.</li> <li>Training benchmarks to be replaced by a requirement to pay a contribution to the Skilling Australians Fund (SAF).</li> <li>Mandatory provision of penal clearance certificates.</li> <li>Mandatory skills assessment applied to wider range of occupations.</li> <li>Sponsorship accreditation arrangements will be accommodated for low risk sponsors.</li> </ul> From March 2018 the subclass 457 visa will be abolished and replaced with the new Temporary Skill Shortage (TSS) visa which will provide two options: a two year short-term stay or a four year medium-term stay.	From 1 day up to 4 years
Employer Nomination Scheme (ENS) visa  <b>(subclass 186)</b>	<ul style="list-style-type: none"> <li>3 years work experience within nominated skill occupation, subject to assessment by relevant Australian authority.</li> <li>Occupation must be on the list of eligible skilled occupations.</li> <li>Age 50 and below (for employee).</li> <li>(If you are older than 50 years of age, you can still apply).</li> <li>Command competent English language.</li> <li>Market rate salary.</li> </ul> From 1 July 2017 the following additional changes have been implemented: <ul style="list-style-type: none"> <li>Minimum of International English Language Testing System (IELTS) score of 6 in each component.</li> <li>Skill assessment exemption for applicants with salary exceeding AUD\$180,001 has been removed.</li> <li>Applicants must be below 45 years of age (with current age exemptions still available).</li> <li>Require evidence of 'genuine need' to employ applicant.</li> <li>Identity of nominees must be disclosed in application.</li> </ul>	Permanent
Regional Sponsored Migration Scheme (RSMS) visa  <b>(subclass 187)</b>	<ul style="list-style-type: none"> <li>Regional work placement.</li> <li>Possess work experience in relation to nominated skill.</li> <li>Skill assessment by relevant Australian authority.</li> <li>Occupation must be in the Australian and New Zealand Standard Classification of Occupations (ANZSCO) skill level 1-3 list.</li> <li>Age 50 and below (for employee)</li> <li>(If you are older than 50 years of age, you can still apply).</li> <li>Command competent English language.</li> </ul> From 1 July 2017 similar additional changes as implemented to ENS visa applicants above.	Permanent

It is recommended that appropriate migration law advice be obtained by international entities intending to employ overseas employees and apply for skilled visas in Australia.

1. Source: Department of Immigration and Border Protection.

# Taxation System

Australia operates a self assessment tax system where taxpayers need to lodge an income tax return for each financial year and pay tax in accordance with the return. Residents are liable to tax on their worldwide income while non-residents are only liable for tax on Australian sourced income. In Australia, capital gains tax is incorporated into the income tax provisions which means that net capital gains are included in taxable income. An entity's tax obligations will vary depending upon the type of business structure being used.

## Taxation of income and capital gains

### Individuals

An individual is an Australian resident for tax purposes if the person resides in Australia under ordinary concepts. In addition, an individual who does not ordinarily reside in Australia may be considered an Australian resident for tax purposes if the person stays in Australia for more than 183 days during an income year or is domiciled in Australia (there are some exceptions). If an individual is classified as a tax resident of Australia and another country, it will be necessary to refer to the relevant clauses of Australia's double tax agreements (if applicable).

An individual who is living and working in Australia on a temporary visa will typically be classified as a temporary resident for tax purposes, which means they are not taxed on most foreign sources of income.

Individual taxpayers are subject to a set of progressive tax rates. Australian residents are not taxed on the first AUD\$18,200 that they earn for a financial year. Australian residents are liable to pay a Medicare levy equal to 2% of taxable income (non-residents are not required to pay this additional levy). The rates that apply from 1 July 2017 are set out below (excluding the Medicare levy):

With regard to capital gains tax, resident taxpayers may be eligible for a 50% discount on a capital gain if the asset has been held for more than 12 months. Non-residents and temporary residents are only subject to CGT in Australia on assets that are classified as "taxable Australian property". Land and buildings situated in Australia are classified as taxable Australian property. In addition, shares in a company or units in a trust are treated as taxable Australian property if both of the following conditions are satisfied:

- The shareholder / unit holder has at least a 10% interest in the company or trust (including shares

Table 2. Personal tax rates for residents (2017-18)

Taxable Income (AUD\$)	Tax Payable (AUD\$)
\$0 - \$18,200	Nil
\$18,201 - \$37,000	19c for each \$1 over \$18,200
\$37,001 - \$87,000	\$3,572 plus 32.5c for each \$1 over \$37,000
\$87,001 - \$180,000	\$19,822 plus 37c for each \$1 over \$87,000
\$180,001 and over	\$54,232 plus 45c for each \$1 over \$180,000

Table 3. Personal tax rates for non-residents (2017-18)

Taxable Income (AUD\$)	Tax Payable (AUD\$)
\$0 - \$87,000	32.5c for each \$1
\$87,001 - \$180,000	\$28,275 plus 37c for each \$1 over \$87,000
\$180,001 and over	\$62,685 plus 45c for each \$1 over \$180,000

/ units held by associates); and

- The company / trust holds land and buildings located in Australia (directly or indirectly) and more than 50% of the value of the company's / trust's assets relates to that Australian property.

### Companies

A company is taken to be an Australian resident if it is incorporated in Australia. If a company is not incorporated in Australia but carries on business in Australia, the company is still taken to be an Australian resident for tax purposes if either of the following conditions is met:

- The company's central management and control is in Australia; or
- The company's voting power is controlled by Australian resident shareholders.

If a company is classified as a tax resident of Australia and another country, it will be necessary to refer to the relevant clauses of Australia's double tax agreements (if applicable). Non-resident companies are generally only taxed on Australian sourced income and income generated through a permanent establishment in Australia.

Resident and non-resident companies are generally subject to a tax rate of 30% on their taxable income. From 1 July 2016, a reduced corporate tax rate of 27.5% applies to companies that carry on a business with an aggregated turnover of less than AUD\$10 million (known as "small business entity"). This 27.5% corporate tax rate will be extended to corporate tax entities that are base rate entities from the 2017-18 income year. A base rate entity will be an entity that carries

on a business and:

- For the 2017-18 income year – has an aggregated turnover of less than AUD\$25 million and
- For the 2018-19 income year and later income years – has an aggregated turnover of less than AUD\$50 million.

The 27.5% rate for base rate entities will subsequently be cut to:

- 27% for the 2024-25 income year;
- 26% for the 2025-26 income year; and
- 25% for the 2026-27 and later income years.

The Australian Government introduced a second Bill that will progressively extend the lower corporate tax rate to all corporate entities.

Companies are also assessed on net capital gains but are not eligible for the 50% discount that is available to individuals and trusts.

One of the distinct features of Australia's tax system is "imputation". The imputation system was put in place to ensure that profits earned by a resident company are not taxed a second time when the company's taxed profits are distributed to shareholders as dividends. Resident shareholders are entitled to a tax offset when they receive a "franked" dividend from a company (ie, a dividend that has imputation or franking credits attached to it by the company). A company has to maintain a franking account and a franking tax return may need to be lodged with its income tax return.

A wholly owned group of resident companies may make an irrevocable election to form a consolidated group for income tax purposes. The group is treated as a single taxpayer. The head company is responsible

for lodging a tax return on behalf of the group and transactions between group members are ignored for income tax purposes.

The standard income year for Australian taxation purposes starts on 1 July and ends on 30 June of the following year. However, a company can apply for a substituted accounting period from the Australian Taxation Office (eg, if the company's foreign parent company has a different reporting period). Each company, including where a foreign company operates in Australia through a branch, must appoint a resident public officer for tax purposes.

### Trusts

Trusts are generally treated as "flow-through" entities for tax purposes. Income received by a trust is generally taxed in the hands of the beneficiaries when the income is distributed or appointed to them rather than being taxed in the hands of the trustee. However, the trustee would be subject to tax at the highest marginal rate (ie, 47%) if any of the income of the trust for the year is not distributed to beneficiaries. The terms of the trust deed provide when and how the trustee makes a distribution. Generally a distribution must be made by 30 June each year to ensure the trustee is not taxed at the highest marginal rate. Where a distribution is made to a non-resident beneficiary, the trustee will be assessed on behalf of the non-resident at non-resident tax rates.

### Discretionary Trusts

A discretionary trust is a popular type of trust particularly in a family business situation. The trustee has discretionary powers conferred by the trust deed to appoint income and capital distributions to beneficiaries each year. This

can assist the family group with minimising their overall tax liability as the trustee can distribute income to beneficiaries on lower marginal tax rates.

### Units Trusts

Unit Trusts are usually established as an alternative structure to a company. Investment funds commonly adopt a unit trust structure and the trust deed may allow units to be bought and sold in much the same way as shares in a company. Distributions of income or capital from a unit trust generally depend on the number and/or classes of units held by the unit holders.

### Partnerships

Under general law a partnership is a relationship between people carrying on a business in common with a view to profit. For tax purposes, the definition of "partnership" also includes persons in receipt of income jointly whether carrying on a business or not. This means that investment properties held jointly by more than one person will be treated as a partnership for tax purposes.

Partnerships are treated as "flow-through" entities for tax purposes. Although a partnership is required to furnish a tax return, the partnership is not liable to pay tax on the partnership income as the partners are assessed individually on their share of net income of partnership. Tax losses are shared by the partners (unlike with companies and trusts where the losses cannot be distributed). The rules ensure that any non-resident partners are not assessed on their share of any foreign income derived by the partnership.

### Goods and services tax (GST)

GST is a broad-based consumption tax imposed on certain supplies which are connected with Australia. GST is payable where the entity making the supply is registered or required to be registered for GST. GST is also payable on importation of goods. GST is calculated as 10% of the value (excluding GST) of the consideration that an entity receives for making the supply. An entity may claim input tax credits for the GST paid to acquire goods and services where the acquisitions relate to its business operations (except in relation to making input taxed supplies).

Certain supplies are treated as input taxed supplies (eg, residential rent). This means that the supply is not subject to GST but the supplier cannot claim input tax credits for acquisitions they made in relation to making the input taxed supply. Certain other supplies are simply GST-free (eg, exports, health, education).

Once an entity is registered for GST it is required to lodge a business activity statement (BAS) with the tax office on either a monthly or a quarterly basis. If the entity's annual turnover is over AUD\$20 million, it must lodge its BAS on a monthly basis. An entity would report its obligations for a range of taxes on the BAS including GST, Pay As You Go withholding and instalments, non-resident withholding tax and FBT instalments.

### Customs duty

Customs duty is generally payable at the time goods are entered into Australia. It is generally levied on the customs value of goods in accordance with Australian law and may not necessarily be the same as the sale price of the goods. A customs broker may be engaged to prepare the required documentation and organise clearance of goods

from customs. Australia has entered into a number of free trade agreements with some countries, which confer duty free trade on most imports from those countries.

### Stamp duty

Stamp duty is a state and territory tax which imposes tax on certain transactions and documents either at a fixed rate or on a sliding scale depending on the value of the transaction involved. Stamp duty would typically apply to the transfer of land, a business or shares in a company that owns substantial land in the relevant state or territory. The rules vary from state to state and exemptions are available in certain circumstances.

### Transfer pricing

Australia's transfer pricing rules operate as an anti-avoidance mechanism to prevent profits being shifted out of Australia. Under these rules the Commissioner of Taxation has the power to substitute arm's length amounts if international related parties have not been dealing at arm's length. When an Australian entity or branch undertakes transactions with a foreign related party, it is important to document that the prices for goods or services have been established on an arm's length basis using an acceptable transfer pricing methodology.

### Thin capitalisation

The Australian tax system also places a limit on the interest deductions that can be claimed by an Australian taxpayer in certain circumstances. The rules are designed to ensure that the Australian operations of an international group are not too heavily funded by debt. These rules do not apply if the interest deductions to be claimed by the group in Australia do not exceed AUD\$2 million in the year.

### Diverted profits tax (DPT)

The diverted profits tax came into effect from 1 July 2017 and imposes a 40% tax rate on the diverted profits. The diverted profits tax only applies to significant global entities.

An entity is a significant global entity for an income year if it is:

- a 'global parent entity' whose 'annual global income' is AUD\$1 billion or more; or
- a member of a group of entities consolidated (for accounting purposes) where the global parent entity has an annual global income of AUD\$1 billion or more.

The DPT aims to ensure that the tax paid by significant global entities properly reflects the economic substance of their activities in Australia and aims to prevent the diversion of Australian profits offshore through arrangements involving related parties. It also encourages significant global entities to provide sufficient information to the ATO to allow for the timely resolution of tax disputes.

### Multinational Anti-Avoidance Law (MAAL)

The Multinational Anti-Avoidance Law is part of the Australian government's efforts to combat tax avoidance by multinational companies which are significant global entities using artificial and contrived arrangements to avoid the attribution of profits to a permanent establishment in Australia.

If the MAAL operates, an entity may have their tax benefit cancelled by the Commissioner of Taxation. In addition, the entity will be subject to increased penalties for tax shortfalls arising from the application of the MAAL.

# Banking and Finance

## Australian banking system

The Australian banking sector is well established and offers a stable and well regulated environment supporting businesses and investment activities.

The Reserve Bank of Australia is Australia's central bank. Its role is set out in the Reserve Bank Act 1959 which includes setting the nation's monetary policy and issuing currency. It also seeks to foster financial system stability and promotes the safety and efficiency of the payments system.

The Australian banking market is dominated by four major banks:

- Australia and New Zealand Banking Group (ANZ)
- Commonwealth Bank of Australia (CBA)

- National Australia Bank (NAB)
- Westpac Banking Corporation (WBC)

The main competitors to the 'Big Four' include a number of smaller domestic banks and foreign banks. Generally, foreign banks in Australia tend to have a more significant presence in the merchant banking sector than in the retail banking sector. The large foreign banks in Australia include Citibank, HSBC, ING, Bank of China, Bank of Cyprus Australia Limited, Laiki Bank (Australia) Ltd etc.

## Setting up a bank account

There are various types of bank accounts made available for business investors. Those who want a basic service can open a savings account or a cheque account. For a fully functional business entity, it would be appropriate to have a business bank account. A business bank account holder can apply for various bank products. These may include loans, mortgages and insurance. International transfers and foreign exchange services may also be offered by the banks.

Fees and conditions for opening up a business bank account vary from one bank to another. Choosing the best business bank account should be a priority before starting a business in Australia.

The requirements for opening a bank account may vary depending upon which bank the investor deals with and the type of bank account. Generally, opening a bank account is a relatively easy process.

Many banks offer an internet banking facility so that investors can open up an Australian bank account over the internet. However, there is government legislation requiring the bank to obtain identification from customers before opening any new

bank account. Generally, the bank may conduct a search to verify the details the entity provides to the bank. Investors are responsible for ensuring that the personal details provided are accurate and up to date.

In addition, where investors do not provide the bank with their tax file number, the bank is obliged to deduct tax from any interest earned on the account.

When entities with foreign directors open an Australian bank account, banking institutions will often require identification of these directors to comply with Australia's anti-money laundering rules. This often requires these foreign directors to attend at a foreign branch of that bank to certify original forms of identification documents. It is recommended that overseas companies or local companies with overseas based directors start the process of opening a bank account as early as possible.

For newly incorporated Australian companies, their accountants should be able to provide the company with a banking package upon incorporation which contains most of the information required to open a local bank account.

Many of the foreign banks mentioned above may have expedited processes to speed up the process of establishing a bank account if the business already has links to those banks offshore.

## Australia financing sources

Australia is fast becoming a major financial hub of the Asia-Pacific and offers many fundraising avenues for local and international businesses. The most common funding sources are debt funding, equity funding or combination of both.

### Debt finance

Debt finance is generally provided by external financial institutions such as banks, building societies or credit unions. Financial institutions offer a range of finance products including business loans, asset financing, lines of credit and overdraft facilities for both short and long term solutions.

In recent years, Australian banks have tightened their lending policies. For newly established Australian subsidiaries of foreign companies, debt funding by parent companies is common due to subsidiaries' lack of credit history and inability to obtain funding from banks.

Other forms of debt financing include trade credit via suppliers, high-interest loans through private funds and from friends and family.

### Equity finance

For many start-up companies, providing equity through self funding is often the first step in seeking finance. The funds are mainly from personal finances and revenue from the business.

Private equity and venture capital are increasingly popular forms of equity funding, especially in the high technology sector. Private investors and venture capitalists will contribute funds to a business in return for a share in the profits and equity of the business and may also provide access to an extensive network of contacts, professional management, mentoring and other valuable contributions beyond the equity raised. There are a number of firms offering structured incubator and accelerator programs that provide some of these valuable services.

There are also a number of "angel investor" groups that can provide early stage seed funding.

*"CSF has the potential to provide finance for innovative business ideas and additional investment opportunities for retail investors, while ensuring investors continue to have sufficient information to make informed investment decisions"*

### Other sources of finance

Crowd-sourced funding (CSF) is an emerging form of funding in Australia. An amendment to the *Corporations Act 2001* has recently been made that allows entrepreneurs to raise funds from a large number of investors. CSF has the potential to provide finance for innovative business ideas and additional investment opportunities for retail investors, while ensuring investors continue to have sufficient information to make informed investment decisions. Only public unlisted companies can raise funds via CSF. There are regulatory requirements imposed on the fundraising companies and also the CSF intermediaries facilitating CSF offers.

Companies may also seek an Initial Public Offering (IPO) by floating shares on a stock market to raise capital from public. This can be a more expensive and complex option. Some companies may also achieve a listing through being acquired by an existing listed vehicle. This process is commonly known as a 'backdoor listing'.

# Reporting Requirements

## Registered foreign company

A registered foreign company is required to lodge copies of its financial statements and any other documents it is required to prepare by the law applicable in the company's place of origin at least once every calendar year and at intervals of not more than 15 months. However, the Australian Securities and Investments Commission (ASIC) can declare that certain foreign companies are exempt from the general financial reporting requirements. This relief would not be available if the foreign company will lodge less information than an equivalent Australian company. If relief is granted, the foreign company should only need to lodge an annual return setting out the details of the foreign company, its directors and its local agent. In addition, a registered foreign company must comply with various notification obligations under the Corporations Act.

## Australian company

The requirements relating to financial reporting and audit for an Australian proprietary company depend on whether it is classified as "large" or "small". Under the Corporation Act, a proprietary company will be classified as large if it (including controlled entities) satisfies any two of the following criteria:

- Consolidated gross operating revenue for the financial year is at least AUD\$25 million;
- The value of consolidated gross assets at the end of the financial year is at least AUD\$12.5 million; and
- The company and its controlled entities (if any) have 50 or more employees at the end of the financial year.

All Australian proprietary companies that are controlled by a foreign company must prepare and lodge with ASIC a financial report, a directors' report and an auditor's report within four months after the end of the company's financial year. The financial report, directors' report and auditor's report must also be given to shareholders within this four month period. However, relief from preparing and lodging financial statements is available if a small proprietary company is not part of a large group and the directors have resolved to apply the relief.

Relief is also available from the requirement to have the financial statements audited if shareholders and directors of the small proprietary company agree that an audit of the company's financial report is not required and ASIC is satisfied that the company is well managed and in a sound financial condition. A notice that the small proprietary company is relying on the reporting and audit relief must be lodged with ASIC within the specified timeframe.

# Grants and Incentives

The Australian Government offers a wide range of grant schemes and incentives to promote and develop foreign investment in Australia. The incentives offered take a wide variety of forms including taxable grants, tax relief or the provision of infrastructure services at discounted rates.

The online Grant and Assistance tool allows a business to search for government grants and assistance that they may be eligible for. The tool is available at:  
<https://www.business.gov.au/assistance>

Some of the significant government incentives include:

## Research and Development (R&D) Tax Incentive

The R&D Tax Incentive is one of the Australian Government's initiatives designed to increase the amount of research and development undertaken in Australia. Qualifying companies are entitled to a 43.5% refundable tax offset if they have group turnover of less than AUD\$20 million or a 38.5% non-refundable tax offset for all other companies. The offset reduces to the corporate tax rate once R&D expenditure reaches a cap of AUD\$100 million. Companies would normally need to spend at least AUD\$20,000 on qualifying R&D activities in an income year to claim a tax offset.

The tax offset is available to companies incorporated in Australia, companies incorporated outside Australia that are treated as an Australian resident for tax purposes and companies that are residents of a country that has a double tax agreement with Australia and carry on business through a permanent establishment in Australia.

While the incentive is generally intended to apply to R&D activities

carried out in Australia, overseas R&D activities may qualify if certain conditions are satisfied.

## Small business capital gains tax (CGT) concessions

Generous CGT concessions are available to an entity on the sale of a CGT asset used in carrying on a business if the entity is a small business entity or passes the AUD\$6 million net asset value test and also passes the active asset test. An entity is a small business entity if it carries on a business and has an aggregated turnover of less than AUD\$2 million in the income year.

A sale of shares in an Australian company or units in an Australian trust may also qualify if certain conditions are met.

There are four CGT concessions available, subject to meeting the relevant conditions:

- 15-year asset exemption
- 50% active asset reduction
- Retirement exemption
- Small business roll-over

If the entity is eligible for the concessions, the capital gain can be reduced or eliminated completely.

## Early Stage Innovation Company (ESIC)

From 1 July 2016, eligible investors who purchase new shares in an ESIC may receive the following tax incentives:

- Non-refundable carry forward tax offset equal to 20% of the amount paid for their qualifying investments. This is capped at a maximum tax offset amount of AUD\$200,000 for the investor and their affiliates combined in each income year.

- Modified capital gains tax (CGT) treatment under which capital gains on qualifying shares that are continuously held for at least 12 months and less than ten years may be disregarded. Capital losses on shares held less than ten years must be disregarded.

To qualify for the tax incentives, investors must have purchased new shares in a company that meets the requirements of an ESIC immediately after the shares are issued and the shares must be issued on or after 1 July 2016.

### **Venture Capital Limited Partnerships (VCLP)**

The VCLP program aims to stimulate Australia's venture capital sector by attracting foreign investors with a flow-through tax incentive (exemption from capital gains tax for gains made on eligible investments).

The tax incentives for VCLPs are:

- Flow-through taxation treatment for registered venture capital partnerships.
- Exemption for investors (limited partners) from income tax on capital gains and revenue profits from the disposal of eligible venture capital investments by the VCLP.
- The fund manager can claim their carried interests in the partnership on capital account, rather than as income.

Similar tax incentives are also available to Earlier Stage Venture Capital Limited Partnerships (ESVCLP). From 1 July 2016, partners investing in an ESVCLP may be eligible for a non-refundable carried forward tax offset of up to 10% of their contributions made to the ESVCLP during an income year.

### **Export Market Development Grants (EMDG) Scheme**

The EMDG scheme is a key Australian Government financial assistance program for exporters with business turnover not exceeding AUD\$50 million. The Scheme is administered by Austrade and provides cash grants as an incentive to Australian residents who export eligible goods and services, industrial property rights and know-how. The applicant must have incurred at least AUD\$15,000 of eligible expenditure in the claim year. Where the application is successful, the scheme reimburses up to 50% of eligible export promotion expenses above AUD\$5,000.

# Agencies Providing Assistance

The Australian government and its agencies provide various guidance and support to foreign investors and foreign businesses.

## The role of investment promotional agency

The Australian Trade and Investment Commission, Austrade, is a government agency that promotes trade, investment and education, and develops tourism policy, programs and research. Through its global network, Austrade helps Australian companies attract productive foreign direct investment and assist investors to expand into Australia. (<https://www.austrade.gov.au>)

## Industry organisations and trade associations

### Australian Chamber of Commerce

The Australian Chamber of Commerce and Industry is Australia's largest and most representative business association, comprising state and territory chambers of commerce and national industry associations. (<https://www.acci.asn.au>)

## Other key government organisations

There are a number of different Australian government departments and organisations which foreign entities wishing to do business in Australia need to be aware of including:

- **Australian Taxation Office (ATO):** ATO is the Australian tax authority. (<https://www.ato.gov.au/>)
- **Foreign Investment Review Board (FIRB):** The FIRB's function includes assessing investment proposals submitted by foreign interests. (<http://firb.gov.au/>)

- **The Australian Competition and Consumer Commission (ACCC):** The ACCC's primary role is to administer the Competition and Consumer Act to promote competition, fair trading, and provide for consumer protection. (<https://www.accc.gov.au/>)
- **Australian Securities and Investments commission (ASIC):** ASIC is the independent Australian Statutory regulator of Australian registered companies and one of three Federal Government bodies that regulate financial services. (<http://asic.gov.au/>)
- **IP Australia:** IP Australia is the Federal Government agency that administers registration of intellectual property rights and legislation in relation to patents, trademarks and designs in Australia. (<https://www.ipaustralia.gov.au/>)
- **Australian Government Department of Immigration and Border Protection:** This Department is responsible for immigration and customs border policy. (<https://www.border.gov.au/>)
- **Department of foreign affairs and trade:** This department provides foreign, trade and development policy advice to the Government. (<http://dfat.gov.au>)



## The Next Step

To discuss your needs, please contact:

**Greenwich & Co**  
[www.greenwichco.com.au](http://www.greenwichco.com.au)

**Mr Scott Fleay**  
[scott.fleay@greenwichco.com](mailto:scott.fleay@greenwichco.com)  
+61 8 6555 9500

Level 2, 35 Outram Street,  
West Perth, West Australia, 6005,  
Australia

**Hayes Knight**  
[www.hayesknight.com.au](http://www.hayesknight.com.au)

**Ms Linda Jing**  
[linda.jing@hayesknight.com.au](mailto:linda.jing@hayesknight.com.au)  
+61 2 9221 6666

Level 2, 115 Pitt Street, Sydney,  
New South Wales, 2000, Australia

**Hill Rogers**  
[www.hillrogers.com.au](http://www.hillrogers.com.au)

**Mr Andrew Lam**  
[andrew.lam@hillrogers.com.au](mailto:andrew.lam@hillrogers.com.au)  
+61 2 9232 5111

Level 5, 1 Chifley Square, Sydney,  
New South Wales, 2000, Australia

**Leebridge Group**  
[www.leebridgegroup.com.au](http://www.leebridgegroup.com.au)

**Mr Adrian Rosa**  
[adrian.rosa@leebridgegroup.com.au](mailto:adrian.rosa@leebridgegroup.com.au)  
+61 3 9854 3100

Level 2, 35 Cotham Road, Kew,  
Victoria, 3101, Australia

