Doing Business in Australia
Contents

Doing Business
Contents ......................................................... 3

Why Australia ................................................. 4
Overview ....................................................... 4
Government .................................................... 5
Legal system .................................................... 5

Foreign investment and trade ....................... 6
Overview ....................................................... 6
Foreign investment approvals .......................... 7
Foreign exchange issues ................................. 7
Australia's foreign investment rules for fund managers .. 8
Trading with Australia .................................... 9
UN and OECD business conventions .............. 10

Establishing a business presence .................... 11
Overview ....................................................... 11
Companies ..................................................... 12
Partnerships ................................................... 13
Joint ventures ............................................... 13
Trusts .......................................................... 13

Acquiring a company or business .................... 14
Overview ....................................................... 14
Acquisition methods ...................................... 15

Taxation ....................................................... 16
Overview ....................................................... 16
Income tax overview ...................................... 17
Australian tax rates ....................................... 18
Employment taxes .......................................... 19
Taxation of non-residents ............................... 19
International taxation ..................................... 21
Goods and services tax .................................. 22
State taxes .................................................... 23
Tax reform .................................................... 24

Competition and consumer protection ............. 25
Overview ....................................................... 25
Anti competitive behaviour ............................. 26
Unfair business conduct aimed at small businesses . 26
Industry codes ............................................... 26
Consumer protection ...................................... 26

Intellectual property ...................................... 27
Overview ....................................................... 27
Copyright ...................................................... 28
Patents ........................................................ 28
Trade names and trade marks ......................... 28
Registered designs ........................................ 29
Domain names ............................................... 29
Trade secrets and confidential information ......... 29

Employment, industrial relations and immigration 30
Overview ....................................................... 30
National Employment Standards (NES) .......... 31
Awards ........................................................ 31
Enterprise agreements .................................... 31
Employment contracts .................................... 31
Superannuation ............................................. 31
Workplace health and safety ......................... 32
Discrimination and equal opportunity .......... 32
Redundancy procedures and payment ............ 32
Migration ...................................................... 33

Privacy and freedom of information ............... 34
Overview ....................................................... 34
Privacy ......................................................... 35
Freedom of information ................................. 35

Environment ................................................ 36
Overview ....................................................... 36
About this guide ............................................ 37
About Minter Ellison ...................................... 37

Minter Ellison Contacts ................................. 38
Overview

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

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

The 2013 World Bank *Doing Business* report judged Australia to be amongst the top 10 most straightforward and affordable countries in which to start up a business and in terms of overall ease of doing business.

The Australian labour force is highly educated with a strong multicultural background. Approximately 42% of Australia’s working age population has a university degree, diploma or trade qualification. Of the approximately 23 million people in Australia, more than 1.4 million are fluent in a major Asian language and more than 1.2 million are fluent in a major European language.
Government

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

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

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

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

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

Legal system

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

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

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

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

The Australian Government’s foreign investment policy, generally speaking, encourages foreign investment in Australia.

The policy and the Foreign Acquisitions and Takeovers Act (FATA) (which provides the legislative support for the policy) are administered by the Foreign Investment Review Board (FIRB), a division of the Australian Treasury.

As Australia seeks to enhance trade with many countries, free trade and other bilateral agreements will be reached with the intention of promoting two-way investment and setting the parameters for trade between Australia and its trading partners.

For example, the Australia United States Free Trade Agreement and US Free Trade Agreement Implementation Act increase the notification threshold for acquisitions of substantial interests in Australian businesses by US investors from A$248 million to A$1,078 million. The thresholds applying to US investors are subject to annual indexation and should be checked accordingly.
Foreign investment approvals

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

- all acquisitions of vacant non-residential land, residential land or shares in urban land corporations or trust estates
- all direct investments by foreign governments or their agencies
- acquisitions of substantial interests in existing Australian corporations or businesses with total assets over A$248 million (or A$1078 million for US and New Zealand investors)
- takeovers of offshore companies whose Australian subsidiaries or assets are valued at A$248 million (or A$1078 million for US investors) or more, where those Australian assets account for less than 50% of the target company’s global assets, and
- investments in ‘sensitive’ sectors.

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

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

FIRB approval is usually given within 30 days of lodging an application. The Treasurer has the power to block an investment or to require divestment if the Foreign Acquisitions and Takeovers Act (FATA) is breached or the investment is considered to be contrary to the national interest.

Set out on Page 8 is a high-level overview of when you may be required to make an application to seek clearance to proceed with a transaction from FIRB.

Foreign exchange issues

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

Inward investment is not subject to exchange controls, although this does not preclude the need to obtain approval from the FIRB in certain situations (see earlier). Outward exchange flows are not restricted. However, both outward bound and inward bound exchange flows are subject to cash transaction reporting guidelines imposed on ‘cash dealers’ and other persons who send or receive international fund transfer instructions.

Cash dealers, which include banks, financial institutions, insurance companies, currency and bullion dealers and others, must report to the Australian Transaction Reports and Analysis Centre details of certain transactions, including:

- significant cash transactions involving the transfer of currency (coin and paper money of Australia or a foreign country) of A$10,000 or more, including foreign currency equivalents, unless the transaction has been specifically exempted
- international telegraphic or electronic funds transfers to and from Australia, unless the transaction has been specifically exempted, and
- transactions that the cash dealer has reasonable grounds to suspect are relevant to criminal activity.
**Australia’s foreign investment rules for fund managers**

Investment funds and fund managers acquiring interests in Australian companies or companies that have substantial Australian interests need to be mindful of Australia’s foreign investment rules. Set out below is a high-level overview of when you may be required to make an application to seek clearance to proceed with a transaction from Australia’s FIRB.

<table>
<thead>
<tr>
<th>Private foreign persons</th>
<th>Foreign government investors</th>
</tr>
</thead>
<tbody>
<tr>
<td>involved in any of the following:</td>
<td>involved in any of the following:</td>
</tr>
<tr>
<td>• acquisition of a &gt;15% direct or indirect interest in a</td>
<td>• acquiring an interest in urban or rural land;</td>
</tr>
<tr>
<td>target with Australian assets valued at &gt;A$248m (a higher</td>
<td>• establishing a new business in Australia; or</td>
</tr>
<tr>
<td>threshold of &gt;A$1,078m applies to US and NZ investors</td>
<td>• making a ‘direct investment’ in an Australian business or company (generally includes</td>
</tr>
<tr>
<td>outside of ‘sensitive’ sectors such as media, military</td>
<td>acquisitions of &gt;10% interest that gives the acquirer ‘influence’ or ‘control’ over the</td>
</tr>
<tr>
<td>goods, uranium, mining, etc);</td>
<td>target); regardless of the value of the transaction.</td>
</tr>
<tr>
<td>• acquisition of a direct or indirect interest in a target</td>
<td>• acquisition of an interest in developed commercial real estate valued at &gt;A$54m (unless</td>
</tr>
<tr>
<td>in which ≥50% of its assets consist of interests in</td>
<td>heritage listed, in which case aA$5m threshold applies); or</td>
</tr>
<tr>
<td>Australian urban land (ie, land that is not used for</td>
<td>• acquisition of an interest in vacant land or residential land.</td>
</tr>
<tr>
<td>primary production purposes);</td>
<td></td>
</tr>
<tr>
<td>• acquisition of an interest in developed commercial real</td>
<td></td>
</tr>
<tr>
<td>estate valued at &gt;A$54m (unless heritage listed, in which</td>
<td></td>
</tr>
<tr>
<td>case aA$5m threshold applies);</td>
<td></td>
</tr>
<tr>
<td>• acquisition of an interest in vacant land or residential</td>
<td></td>
</tr>
<tr>
<td>land.</td>
<td></td>
</tr>
</tbody>
</table>

**FIRB clearance will likely be required**

Private foreign persons are:

- entities that are ultimately ≥15% controlled by non-government related foreign entities or persons from 1 country; and
- entities that are ultimately ≥40% controlled by non-government related foreign entities or persons from more than 1 country.

US and NZ investors are entities established in, and ultimately controlled by persons from, the United States of America or New Zealand.

Foreign government investors are:

- entities that are ≥15% controlled by foreign governments entities / associates from 1 country; and
- entities that are ≥40% controlled by foreign governments entities / associates from more than 1 country.
Trading with Australia

It is possible to do business in Australia without setting up formal structures, although having some form of legal identity or other formal arrangement is often advisable.

The Australian Government’s trade policy combines multilateral, regional and bilateral approaches. Australia pursues every opportunity to open up global markets for exporters and to encourage investment flows across all sectors. As part of this commitment, the Australian Government has negotiated special access for Australian suppliers of goods and services to key export markets through free trade agreements (FTAs).

Australia has made significant advances in its pursuit to enhance international trade by signing a FTA with South Korea, agreeing to the terms of a FTA with China and actively pursuing a FTA with India. Meanwhile, Australia also continues to negotiate regional FTAs, including the Trans Pacific Partnership (TPP), the Regional Comprehensive Economic Partnership (RCEP) and PACER Plus. These, coupled with existing FTAs with ASEAN, New Zealand, the USA, Thailand, Singapore and Malaysia, facilitate a complex but greatly liberalised framework for international trade for Australian business as well as foreign businesses who trade with Australia.

The following issues should be considered:

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

Other legal issues that may arise include:

- protection of intellectual property rights
- the law of the contract, the relevant forum for enforcing the contract and the possible impact of the United Nations Convention on Contracts for the International Sale of Goods
- security for payment, including title retention
- dispute resolution and the relevant forum for settling disputes
- currency of payment and protection against exchange rate fluctuations
- potential product liability claims, and
- taxation, although Australia has an extensive system of agreements to avoid double taxation with its main trading partners.

Sanctions

There are two types of sanctions enforced under Australian law:

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

UNSC-based sanctions generally mirror those imposed by other UN members in terms of the scope of measures imposed and the countries, individuals and entities to which they apply. However, to address situations of concern to Australia where there is no UNSC Resolution (or to further supplement UNSC-based sanctions that are in place), Australia may impose ‘autonomous’ sanctions.

As at August 2013, Australian autonomous sanctions apply to Burma, North Korea, Fiji, the Former Federal Republic of Yugoslavia, Iran, Libya, Syria, and Zimbabwe. In terms of their impact on business, the scope of autonomous sanctions is often similar to those imposed in line with UNSC sanctions.

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

Permits may be sought for trade that is affected by sanctions, but permits are frequently denied.

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

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

Certain defence and dual-use goods may not be exported from Australia without a permit. Dual-use goods to which these rules apply include a fairly wide range of products, including certain computing and telecommunications equipment.

This means the scope of Australian export controls goes well beyond the defence sector. Particularly strict controls apply to goods and services that may assist in the development of weapons of mass destruction and weapons delivery systems.

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

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

The key offence provisions under the new laws do not come into effect until May 2015 (two years after the entry into force of the Australia-US Defence Trade Cooperation Treaty, which occurred in May 2013). This is designed to allow a ‘transition period’ during which affected corporations will need to familiarise themselves with the new requirements, and develop appropriate compliance programs.

UN and OECD business conventions

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

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

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

Unlike some legislation overseas, such as the UK Bribery Act 2010, Australia’s foreign bribery laws allow for the payment of ‘facilitation payments’ to secure minor government actions (although the Australian Government has consulted on and continues to consider the abolition of the defence). It is also a defence if it can be proved that the conduct in question was permitted under a written law of the country where it takes place.

In order to address corruption risks, it is appropriate for businesses in Australia to promote a corporate culture that discourages bribery and other corrupt practices. As other Western countries also become ‘active enforcers’ of their own foreign bribery laws, multinationals operating in Australia are frequently integrating aspects of Australian law compliance into their global anti-bribery and corruption programs. This typically involves an actively enforced anti-bribery and corruption policy, and organisation-wide training and compliance programs.

For more information about foreign investment and trade, contact Minter Ellison’s experts
Overview

A foreign company establishing a business presence in Australia usually establishes or acquires an Australian subsidiary company, or establishes a branch office registering itself as doing business in Australia.

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

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

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

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

Types of companies

Four types of companies may be incorporated in Australia:

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

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

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

Proprietary companies are the most common because they have simple and cost-effective administration requirements.

A proprietary company, which may be further classified as small or large, is a private company designed for a relatively small group of persons (maximum of 50 non-employee members). A proprietary company can place restrictions on the transfer of its shares.

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

Registration

To register a company, an application is made to the Australian Securities and Investment Commission (ASIC).

On registration, each company is allocated an Australian Company Number (ACN), a unique identifying number.

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

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

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

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

Regulation

Company law in Australia is regulated by a national scheme. The Corporations Act and the Australian Securities and Investments Commission Act govern companies, securities and futures law in Australia.

This legislation was enacted by the federal parliament following a referral of power from each of the Australian states.

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

Fundraising

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

Subject to certain excepted circumstances (for example, an offer to ‘wholesale’ investors), an offer of securities must be accompanied by a disclosure document.

Depending on the size and nature of the offering, the disclosure document may be a prospectus, profile statement or offer information statement.
Partnerships

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

- each partner is the agent of the other partners and may make contracts, undertake obligations and dispose of partnership property on behalf of the partnership in the ordinary course of the partnership business
- arrangements between partners will protect them in their relationship with each other
- third parties without knowledge to the contrary, however, are protected from actions committed by partners beyond their authority
- each partner is personally liable, jointly and severally, for the liabilities of the partnership. The liability of each partner is unlimited except in the case of limited partnerships when the property of the partnership is owned by the partners personally, and
- the partnership must submit an annual tax return disclosing its income, outgoings and the distribution of profits to partners, although it is the partners individually who must pay tax on their share of partnership profits and not the partnership as a whole. Such profits will become part of each partner’s other income (or losses).

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

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

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

Joint ventures

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

Joint venturers often appoint a company to manage the business of the joint venture. Although not strictly correct, the term ‘joint venture’ is often used by business people to refer to:

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

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

Trusts

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

The usual unit trust structure provides for beneficiaries to hold units to which entitlements attach and which may be transferred in a similar way to shares in a company. Income arising from a trust is taxed in the hands of the beneficiary rather than the trustee.
Acquiring a company or business

Overview

Acquisitions of shares and businesses in Australia are regulated by:

- the Corporations Act
- the Foreign Acquisitions and Takeovers Act (FATA)
- the Competition and Consumer Act
- the Listing Rules of Australian Stock Exchange Limited (ASX), and
- legislation affecting the relevant industry of the corporation or business being acquired.

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

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

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

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

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

Other matters for consideration
Other restrictions that may apply to a particular transaction include:

- under the Corporations Act, the requirement for substantial shareholding notices to be lodged with both the company and with ASX when a 5% threshold is reached and then for updated notices to be lodged whenever the holding increases or decreases by 1% or more. The threshold relates to the number of votes attached to shares in which a person and their associates have a relevant interest. It may be reached before shares are actually acquired or transferred
- under the Listing Rules, provisions regulating various activities, including the sale of a company’s main undertaking or the issue of shares over a prescribed level. These activities require shareholder approval and must comply with certain ASX requirements.

Transactions between parties that are considered to be related usually also require shareholder approval. The *Corporations Act* also regulates the circumstances in which a company may financially assist a person to acquire shares in itself.

A company can only do this if:

- the financial assistance does not materially prejudice the company, the shareholders or company’s ability to pay its creditors,
- or if the shareholders give their advance approval to the financial assistance.

Trading in securities while in possession of information that is not generally available to the public and that, if it were available, would have a material effect on the price of the securities is prohibited by the *Corporations Act* under insider trading provisions.

For more information about acquiring a company or business, contact Minter Ellison’s experts.
Overview

Australia has a relatively complex federal tax system that includes an income tax, a capital gains tax, a consumption tax (the GST) and a number of employment-based taxes (for example, fringe benefits tax).

Australia also has a number of state/territory-based taxes, such as stamp duty, land tax and payroll tax, and one of the keys to doing business in Australia is understanding how these taxes interact and how they affect business structures and transactions. Australia has a comprehensive international tax system, and a wide network of Double Taxation Agreements that will impact on anyone doing cross-border business involving Australia. As with most OECD countries, reforms to Australia’s tax system are regularly proposed, and Australia’s taxation authorities regularly issue rulings and other determinations on how they will interpret and administer the tax laws.

For more information about taxation, contact Minter Ellison’s experts.
Income tax overview

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

Residence

A company is a resident of Australia for tax purposes if:
• it is incorporated in Australia, or
• where the company is not incorporated in Australia, it carries on business in Australia and either:
  – has its central management and control in Australia, or
  – its voting power is controlled by shareholders who are residents of Australia.

An individual is a resident of Australia for tax purposes if, generally, he or she:
• resides or is domiciled in Australia, unless the Commissioner is satisfied that the person’s permanent place of abode is outside of Australia
• is in Australia for at least 183 days in a tax year, unless he or she does not intend to take up Australian residence and has a usual place of abode overseas, or
• is a member or eligible employee under certain superannuation legislation or is the spouse or a child under 16 of a person covered by such superannuation legislation.

Registration

Australian resident companies and individuals are required to be registered with the Australian Taxation Office to have a tax file number (TFN).

Trading companies registered with the Australian Taxation Office will have various tax compliance obligations, including filing of an annual company tax return and the periodic reporting of activity statements.

Source of income

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

Taxable income

‘Taxable income’ (that is, broadly, accounting profits that are subject to tax) is computed in the same manner for both individuals and companies. Tax is charged on taxable income, which is calculated as the assessable income, less allowable deductions.

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

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

Consolidated groups

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

Capital gains

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

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

Non-residents will only be subject to tax on capital gains made on the disposal of ‘Taxable Australian Property’.

For more information about income tax, contact Minter Ellison’s experts
Taxable Australian Property is defined broadly to include direct real property interests (including mining, quarrying or prospecting rights), indirect real property interests and assets used in carrying on business in Australia through a permanent establishment.

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

Rollover relief may be available in respect of capital gains made in relation to a takeover bid where shares or units in one entity are exchanged for shares or units respectively in another entity. The Australian rules also provide demerger relief in some instances.

Where rollover relief is available, any capital gain made on the disposal of the original shares or units will be deferred until the disposal of the exchanged asset.

**Losses**

Generally, a company or a trust can carry forward its tax losses on revenue account indefinitely, and can set off those losses against both income and capital gains. Capital losses can also be carried forward indefinitely, however they can only be set off against capital gains.

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

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

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

The Australian Government has introduced rules to allow companies to ‘carry back’ revenue losses to offset prior year profits, and obtain a refund of tax previously paid on those profits. The proposal is for a one year ‘carry back’ period to apply for the 2012/2013 income year, with a two year ‘carry back’ period applying for the 2013/2014 and following income years.

A A$1 million ‘cap’ applies in each claim year to the amount of losses that a company can carry back against taxes paid in previous income years.

**Australian tax rates**

Tables 1 and 2 summarise the principal rates of taxation that apply in Australia from 1 July 2013. The rates may be changed by the Australian Government at any time.

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

The rates in Table 2 do not include the Medicare levy of 1.5%. In the 2013/14 Federal Budget, the Australian Government confirmed that the Medicare levy will increase from 1.5% to 2% from 1 July 2014.

**Companies**

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

**Table 1: Resident individuals**

<table>
<thead>
<tr>
<th>Taxable income (A$)</th>
<th>Tax on this income (A$)</th>
</tr>
</thead>
<tbody>
<tr>
<td>$0 – $18,200</td>
<td>Nil</td>
</tr>
<tr>
<td>$18,201 – $37,000</td>
<td>19c for each $1 over $18,200</td>
</tr>
<tr>
<td>$37,001 – $80,000</td>
<td>$3,572 plus 32.5c for each $1 over $37,000</td>
</tr>
<tr>
<td>$80,001 – $180,000</td>
<td>$17,547 plus 37c for each $1 over $80,000</td>
</tr>
<tr>
<td>$180,001</td>
<td>and over $54,547 plus 45c for each $1 over $180,000</td>
</tr>
</tbody>
</table>

**Table 2: Non-resident individuals**

<table>
<thead>
<tr>
<th>Taxable income (A$)</th>
<th>Tax on this income (A$)</th>
</tr>
</thead>
<tbody>
<tr>
<td>$0 – $80,000</td>
<td>32.5c for each $1</td>
</tr>
<tr>
<td>$80,001 – $180,000</td>
<td>$26,000 plus 37c for each $1 over $80,000</td>
</tr>
</tbody>
</table>
Employment taxes

Fringe benefits tax
Fringe benefits tax (FBT) is payable on certain cash and non-cash benefits provided to an employee in connection with their employment. FBT is imposed on and payable by the employer.

Superannuation
Employers have superannuation guarantee obligations under which they are required to contribute to their employees’ nominated superannuation (pension) fund in order to avoid incurring a ‘superannuation guarantee charge’.

The contribution amount is 9.5% of ‘ordinary time earnings’.

See also Employment, Industrial relations and Immigration.

Employee share schemes
Australia has specific rules dealing with the taxation of benefits provided to employees under employee share schemes.

Broadly, any ‘discount’ is taxable to the employees as ordinary income (not as a capital gain) in the tax year in which the benefits are granted. However, there are two concessions:

- a A$1,000 tax-free concession – under this concession, the first A$1,000 of the ‘discount’ is tax free, or
- tax deferral – under this concession, the tax liability is deferred generally until the earlier of when there is no longer a real risk that the employee will forfeit the benefit (for example, vesting), termination of group employment or seven years from the date that the benefit is granted.

There are different ‘gateway’ tests that must be met depending on which concession applies.

Employers/providers must also give each employee and the Australian Taxation Office certain information about employee share scheme benefits that have been granted to the employee (such as the number of benefits granted and the amount of the ‘discount’).

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

Taxation of non-residents

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

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

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

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

Interest derived by non-residents carrying on business in Australia through a permanent establishment is subject to the corporate tax rate.

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

Interest incurred is generally deductible when incurred. However, Australia’s thin capitalisation rules may apply to limit interest deductions subject to a number of safe harbours. In the 2013/14 Federal Budget the then Australian Government announced it would reduce the safe harbour limits and the current government is expected to implement this.

For more information about employment taxes, contact Minter Ellison’s experts
Royalties

Royalties are payments made for the use of rights. The payments may be periodic, irregular or one off. Royalties are deemed to have a source in Australia if they are paid to a non-resident by a resident of Australia, unless the resident pays the royalty in the course of carrying on a business outside of Australia or through a permanent establishment in another country.

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

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

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

Managed investment trusts

Where a non-resident has an interest in an Australian fixed trust that qualifies as a managed investment trust (MIT), MIT withholding tax may apply on the distributions made by the trust to non-residents.

Where the non-resident is located in an information exchange country, then a reduced rate of withholding of 15% may apply. This was previously 7.5% for the 2010/2011 and 2011/2012 income years. Where the non-resident is located in a jurisdiction with which Australia does not have an information exchange agreement, the rate of withholding is a 30% final tax.

For the purposes of computing the distribution subject to MIT withholding tax, dividends, interest and royalties are excluded (they will be subject to the dividends/interest/royalty withholding taxes), as well as non-Australian sourced amounts.

Further, where the MIT distributions include capital gains in relation to assets that are not Taxable Australian Property, such gains will continue to be disregarded and will also not be subject to MIT withholding.

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

Tax concessions for inbound investment

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

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

Investors proposing to use Australia as an intermediary in their investment strategy should seek professional advice regarding the availability of taxation concessions (including those mentioned above) in respect of ‘foreign income dividends’ and offshore banking units.
International taxation

Transfer pricing

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

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

The Australian Government is currently undertaking a wide-ranging review of Australia’s domestic transfer pricing and treaty practice and has recently introduced new transfer pricing rules.

Residency, double taxation and foreign tax offsets

Australia’s capacity to tax non-residents may be limited where the non-resident is resident in a country with which Australia has concluded a double taxation agreement (DTA) (see Table 1).

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

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

A foreign tax offset is a non-refundable credit allowed for foreign tax that is paid by an Australian resident on foreign sourced income which is also assessable in Australia.

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

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

Table 1: Countries with which Australia has a double tax agreement

<table>
<thead>
<tr>
<th>Argentina</th>
<th>Finland</th>
<th>Kiribati</th>
<th>Philippines</th>
<th>Sri Lanka</th>
</tr>
</thead>
<tbody>
<tr>
<td>Austria</td>
<td>France</td>
<td>Korea</td>
<td>Poland</td>
<td>Sweden</td>
</tr>
<tr>
<td>Belgium</td>
<td>Germany</td>
<td>Malaysia</td>
<td>Romania</td>
<td>Switzerland</td>
</tr>
<tr>
<td>Canada</td>
<td>Hungary</td>
<td>Malta</td>
<td>Russia</td>
<td>Taipei</td>
</tr>
<tr>
<td>Chile</td>
<td>India</td>
<td>Mexico</td>
<td>Singapore</td>
<td>Thailand</td>
</tr>
<tr>
<td>China</td>
<td>Indonesia</td>
<td>Netherlands</td>
<td>Slovakia</td>
<td>Turkey</td>
</tr>
<tr>
<td>Czech Republic</td>
<td>Ireland</td>
<td>New Zealand</td>
<td>South Africa</td>
<td>United Kingdom</td>
</tr>
<tr>
<td>Denmark</td>
<td>Italy</td>
<td>Norway</td>
<td>South Korea</td>
<td>United States</td>
</tr>
<tr>
<td>Fiji</td>
<td>Japan</td>
<td>Papua New Guinea</td>
<td>Spain</td>
<td>Vietnam</td>
</tr>
</tbody>
</table>

For more information about international tax, contact Minter Ellison’s experts.
Goods and services tax

A goods and services tax (GST) has applied in Australia since 1 July 2000 to the supply of goods, real property and other supplies (such as intangible rights and services).

Broadly, the GST is similar in operation to the value added tax systems operating in Europe.

GST is payable at a flat rate of 10% of the value of a taxable supply. A taxable supply arises where:

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

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

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

The supply will be ‘connected with Australia’ if:

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

Whether a supply is ‘done’ in Australia will depend on its nature – for example, the Australian Taxation Office regards a supply of rights to be ‘done’ in the place where the agreement to supply those rights is made. A GST registered supplier’s entitlement to claim an input tax credit (effectively a GST refund) for the GST component of the cost of things acquired in the course of carrying on their enterprise will depend on the type of supply the acquisition is used to make.

For GST purposes there are:

Taxable supplies: for which GST is payable by the supplier when it makes the supply, but the supplier is entitled to an input tax credit (that is, a GST refund) for GST incurred on things acquired to make the supply. Examples of taxable supplies include commercial rent and most types of services consumed in Australia.

GST free supplies: for which no GST is payable by the supplier when it makes the supply, but the supplier is entitled to an input tax credit (that is, a GST refund) for GST incurred on things acquired to make the supply. Examples of GST free supplies include certain types of food, education courses and the export of goods or outbound supply of intangibles such as rights or services for use or consumption outside of Australia.

Input taxed supplies: for which no GST is payable by the supplier when it makes the supply, but the supplier will not be entitled to an input tax credit for GST incurred on things acquired to make the input taxed supply. Examples of these supplies include financial supplies and residential rent.

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

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

Entities with an annual turnover of less than A$20 million may submit returns quarterly or may elect to submit returns monthly.

For more information about GST, contact Minter Ellison’s experts
State taxes

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

- stamp duty (which includes transfer duty, ‘land rich’ or ‘land holder’ duty, motor vehicle registration duty, insurance duty, and mortgage duty)
- land tax, and
- payroll tax (See Employment taxation for detail).

Stamp duty

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

Generally, stamp duty will not be payable on the establishment of a business. However, as stated above, a stamp duty liability will arise in some states where an existing business is purchased and the assets of the business include dutiable property. While stamp duty on the transfer of business assets has now been abolished in some states, it still remains in the majority of states and is expected to remain in Australia’s business rules indefinitely. Stamp duty remains payable on the transfer of land and interests in land in all states.

If financing is required to establish the business, stamp duty will be payable where that transaction is secured by property located for stamp duty purposes in New South Wales. This is known generally as ‘mortgage duty’ and is expected to remain indefinitely. In South Australia, stamp duty is a tax on instruments, such as contracts and transfer forms (as opposed to transactions).

The rate of transfer duty imposed by stamp duties legislation is imposed on a sliding scale that varies between jurisdictions, ranging from a top rate of 4.5% in Tasmania to a top rate of 7.25% in the Australian Capital Territory based on the dutiable value of the dutiable transaction.

Land tax

Each of the states (with the exception of the Northern Territory) imposes an annual land tax on the ‘owner’ of land in the relevant jurisdiction. ‘Land’ generally includes vacant land, land that is built on, and lots in building unit plans.

Land tax is assessed on the taxable value of an owner’s total land holdings. The taxable value is the aggregate of the relevant unimproved value of all land owned less any exemptions or deductions.

Land tax is then generally imposed on the taxable value of the relevant land above a certain threshold amount (for example A$412,000 in New South Wales) at marginal rates of approximately 1–3% on the value exceeding the threshold.
Tax reform

Tax policy in Australia is continually evolving to meet changing conditions. New reforms are regularly proposed. For the latest news in tax reform, visit Minter Ellison’s website.
Overview

The Australian Competition and Consumer Act (CCA) (formerly known as the Trade Practices Act) regulates competition and consumer protection law in Australia.

The competition provisions of the CCA are based on anti-trust legislation in the USA and are not dissimilar to the anti-trust provisions of the European Community’s Treaty of Rome.

The CCA prohibits:
- anti-competitive behaviour
- misuse of market power
- anti-competitive mergers, and
- unfair business practices when dealing with small businesses.

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

The Australian Competition and Consumer Commission (ACCC) is responsible for administering and enforcing the CCA. It has the power to authorise, on public benefit grounds, conduct that may otherwise breach the CCA.
Anti competitive behaviour

The Competition and Consumer Act (CCA) prohibits anti-competitive behaviour such as:

- agreements between competitors to fix, maintain or control prices
- agreements between competitors to split up a market or customers agreements between competitors not to deal with particular suppliers, customers or other competitors
- the supply of goods or services on condition that the customer purchase goods or services from a third party, and
- inducing resellers to not sell products below a specified price.

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

Misuse of market power

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

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

Mergers and acquisitions

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

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

Unfair business conduct aimed at small businesses

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

- misleading conduct in business transactions – this is extremely broad and includes not only the making of untrue statements about present matters, but also the making of unfounded or unreasonable predictions or statements as to future matters, and
- unconscionable conduct in business transactions – the CCA makes it illegal for businesses to engage in unconscionable conduct in business transactions with businesses that are not listed companies.

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

Industry codes

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

Consumer protection

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

- prohibiting misleading conduct – this is extremely broad, and includes not only the making of untrue claims or statements but also omitting to give all relevant details and failing to correct mistaken impressions
- prohibiting unconscionable conduct – for example, taking advantage of a party’s weaker bargaining position or lack of knowledge or expertise in the subject matter of a negotiation
- voiding unfair contract terms in consumer contracts where the term would produce a significant imbalance in the parties’ rights and obligations arising under the contract, is not reasonably necessary to protect the legitimate interests of the party who would be advantaged by the term, and would cause detriment to a party if it were to be applied or relied on establishing a statutory consumer guarantees regime that applies to sales transactions with consumers. The guarantees relate to the quality and standard of goods and services supplied and cannot be excluded, limited or modified even with the agreement of the consumer, and
- making manufacturers and importers liable for defective goods – the CCA essentially defines defective goods as those that are unsafe. Liability for defective goods can rest with a manufacturer, an importer, or someone who allows their name or logo to appear on a good sold in Australia.

For more information about competition and consumer protection, contact Minter Ellison’s experts
Overview

Australia’s laws provide comprehensive protection for intellectual property, including copyright, patents for inventions, trade names and trade marks, domain names, trade secrets and confidential information, and registered designs.

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

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

Copyright is the exclusive right to reproduce, publish, perform, communicate and adapt original literary (including computer programs), artistic, dramatic and musical works, together with other protected subject matter such as films and sound recordings. Australia’s copyright laws also provide for the protection of moral rights, which give authors both the right of attribution and the right to have copyrighted works treated with integrity.

Copyright arises automatically on creation of a work and generally continues for 70 years after the death of the author. Australia is a member of the various international conventions on copyright and so affords reciprocal protection for copyright recognised in other member countries.

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

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

The Copyright Act continues to evolve to address technological developments and the internet. At present, the Australian Law Reform Commission (ALRC) is in the process of conducting a review of the exceptions and statutory licences in the Copyright Act to determine whether these are adequate and appropriate in the digital economy.

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

Patents

A standard patent confers on the patentee the exclusive right to exploit commercially the patented invention for a term of 20 years. Recent legislative changes have aligned Australia’s criteria of patentability for standard patents more closely with international standards. A number of patent law reviews are also currently underway, including whether the threshold for patentability should be raised for innovation patents to the same level as standard patents.

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

The invention must be novel and amount to a manner of manufacture as that phrase is understood. The invention must also involve either an inventive step (for a standard patent) or an innovative step (for an innovation patent). The specification must be clear and not ambiguous and the claims fully supported by the information disclosed in the specification.

Trade names and trade marks

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

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

Australia follows the international system of classification of goods and services. Early trade mark registration is desirable for those seeking to enter the Australian market. Australia also has a federal system for registering business names for persons carrying on business under a name other than their own name or company name.
Registered designs

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

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

A person infringes a registered design if they deal in certain ways with a product that embodies the design or a substantially similar design. A defence applies for spare parts, allowing third parties to manufacture legitimate spare parts for complex products without infringing the registered design in the complex product.

Domain names

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

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

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

Trade secrets and confidential information

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

For more information about intellectual property, contact Minter Ellison’s experts

For the latest updates and further commentary on intellectual property, visit our Intellect Blog
Employment, industrial relations and immigration

Overview

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

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

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

The NES set out 10 minimum standards or entitlements in relation to:
- hours – a 38 hour working week plus reasonable additional hours
- annual leave – 4 weeks’ paid leave per year, untaken leave is carried forward and is paid out on termination
- personal/carer’s leave, which includes sick leave – 10 days’ paid leave per year, untaken leave is carried forward but not paid out on termination
- parental leave – 12 months’ unpaid leave with a right to request an extension of up to 12 months. (The federal government also recently introduced a government-funded parental leave pay scheme)
- notice of termination and redundancy – up to 5 weeks’ notice and 16 weeks’ redundancy pay based on length of service;
- long service leave – usually based on state legislation and provides for extended paid leave for long service (for example, 2 months’ leave after 10 years’ service)
- public holidays – 8 core public holidays plus some additional state specific holidays
- community service leave – generally unpaid
- rights to request flexible work arrangements, and

Awards

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

From 1 January 2010, more than 120 new Modern Awards came into operation that replaced in excess of 1600 old awards (although other historical awards continue to apply in some cases). Modern Awards tend to be industry or occupation-specific and quite complex rules apply to their interaction. This can make it difficult to determine which applies.

All Modern Awards contain terms dealing with broadly similar matters, including:
- minimum wages – including job classification structures
- arrangements relating to hours of work – including span of hours, rest breaks
- type of work performed – such as full time, part time or casual employment
- overtime, penalty rates and other monetary entitlements, and
- consultation and dispute settling procedures.

Enterprise agreements

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

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

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

Employment contracts

Subject to legislation and to applicable industrial instruments, employers are able to (and typically do) make contracts of employment with employees, covering a range of matters. Policies and practices covering employment and industrial relations issues may also be implemented. It is important for anyone planning to establish or purchase a business in Australia to ascertain the terms of any awards, agreements and employment legislation that may apply to existing or prospective employees. The terms of contracts of employment and relevant policies and practices should also be reviewed or be carefully considered when being drafted.

Superannuation

Broadly speaking, under the federal superannuation guarantee legislation, an employer must make superannuation contributions of at least the prescribed minimum rate of each employee’s earnings in order to avoid in order to avoid incurring a charge called the ‘superannuation guarantee charge’ or ‘SGC’. These contributions must be made quarterly.
The minimum prescribed rate is currently 9.5% (from 1 July 2014). The government has announced the rate will remain at 9.5% until 30 June 2018 and then increase by 0.5 percentage points each year until it reaches 12%.

This rate is applied to the employee’s ordinary time earnings (which excludes overtime but which generally includes bonus, allowances and commission) up to maximum earnings prescribed by the legislation (called the employee’s ‘maximum earnings base’).

However, certain exceptions apply in respect of some employees, including:
- non-resident employees paid for work done outside Australia, and
- resident employees employed by non-resident employers for work done outside Australia.

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

The federal superannuation guarantee legislation operates alongside and may overlap with any other superannuation entitlements an employee may have under an industrial instrument or their contract.

More information is available in Taxation.

Workers’ compensation

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

Discrimination and equal opportunity

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

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

The Workplace Gender Equality Act 2012 requires all private sector employers with more than 100 employees to institute workplace programs providing women with equal opportunity in the workplace.

The program requires that employers prepare a profile of the company, outlining the occupational and gender characteristics of the workplace, which is made publicly available.

Redundancy procedures and payment

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

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

Unfair dismissals

Under the Fair Work Act, an employee may commence proceedings if they consider that the termination of their employment was ‘harsh, unjust or unreasonable’. The remedies are reinstatement or compensation if reinstatement is not appropriate. Compensation is capped at approximately A$64,500, which increases from July each year.
To be eligible to make an unfair dismissal claim, an employee must have been employed for at least six months and earn less than approximately A$129,300 per year (which increases from July each year) unless they are covered by an industrial instrument, in which case, the level of their remuneration is irrelevant.

An employee dismissed because of a ‘genuine redundancy’ (which is a statutory test) is not eligible to make an unfair dismissal claim.

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

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

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

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

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

The Subclass 457 visa enables overseas residents to,
for a period of three months to four years:
- work in Australia (but only for the sponsor employer)
- bring any family members with them, and
- have no limit placed on travel in and out of Australia.

Visa application process
Step 1: The employer applies for approval as business sponsor.
Step 2: The employer nominates the position to be filled.
Step 3: The prospective employee applies for the Subclass 457 visa.

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

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

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

For more information about employment, industrial relations and immigration, contact Minter Ellison’s experts

For the latest news and further commentary in employment, industrial relations and immigration, visit our website
Privacy and freedom of information

Overview

In the digital age, privacy and freedom of information for businesses are more important than ever.

In Australia, substantial amendments to the Commonwealth Privacy Act came into effect in March 2014, which gives consumers rights and businesses corresponding responsibilities in relation to personal information. There are also some state and territory based information (including health) privacy laws. In addition, the Freedom of Information laws ensure businesses and individuals can seek access to government information, promoting transparency and accountability.
Privacy

The Privacy Act is the primary means of privacy protection in Australia. It contains 13 Australian Privacy Principles (APPs) that broadly set out how both private sector organisations and public sector agencies should use, disclose and handle personal information.

These provide individuals with a general right to know what information an entity holds concerning them and a right to correct that information.

There are also some restrictions with respect to entities using personal information for direct marketing purposes and sending such information overseas. Currently, entities are subject to an exemption in respect of information held about employees. Additionally, entities have privacy obligations, including credit reporting requirements and tax file number requirements.

Recent amendments to the Privacy Act have provided the Federal Privacy Commissioner with enhanced functions and powers, including the power to seek enforceable undertakings from an entity or civil penalties of up to A$1.7 million for serious or repeated interferences with privacy.

Freedom of information

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

Government agencies are also required to provide access to documents in their possession unless the document is exempt from disclosure under the legislation.

Exemptions exist where it is necessary for the protection of the public interest and for the protection of the private and business affairs of persons and organisations.

For more information about privacy and freedom of information, contact Minter Ellison’s experts.

For the latest updates and further commentary on privacy, visit our Intellect Blog.
Environment

Overview

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

At the federal level, businesses that conduct environmentally harmful activities are required to obtain approval for those activities as well as comply with mandatory reporting requirements.

Legislation provides an assessment and approval process for actions that may have an impact on matters of national environmental significance or actions that may impact on the conservation of biodiversity and heritage. There is also a mandatory reporting scheme for corporate greenhouse gas emissions and energy production and consumption.

At the state and local level, development approval is required for the vast majority of businesses, however the type of approval will depend on the size and nature of the development.

Each state has its own contaminated land regime, which includes a contaminated land register and, in most cases, a duty of notification to the relevant authority where contamination is found. State legislation also makes pollution a strict liability offence, except as permitted under environmental licences. Owners and occupiers of relevant properties may have similar liability. These offences are prosecuted by state environmental authorities.

For more information about the environment, contact Minter Ellison’s experts.
About this guide

Complying with the laws and regulations for businesses in Australia can be a challenging task. Businesses are required to grapple with a number of complex considerations in a broad range of areas, including taxation, intellectual property, industrial relations and foreign investment rules.

Minter Ellison’s *Doing Business in Australia* is designed to make that passage easier to navigate.

By combining our expertise from across a wide range of industries, we have provided a guide that is fundamental for businesses planning to invest in Australia. We provide clear, accessible guidance on the broad scope of areas that require consideration and comprehension, enabling businesses to make informed decisions about future investments.

This latest version, in its new digital format, enables easy navigation for you to hone in on the information you need.

For more information about doing business in Australia, please contact one of our experts.

About Minter Ellison

Minter Ellison is one of the Asia Pacific’s leading law firms. Established in 1827, the firm today operates in Australia, Hong Kong, mainland China, Mongolia, New Zealand and the United Kingdom through a network of integrated offices and associated offices.

Minter Ellison supports leading industry and government clients, delivering practical, results-focused solutions and helping clients achieve successful business outcomes. Our large and diverse client base includes blue-chip public and private companies, leading multinationals and global financial institutions operating in Australia and the Asia Pacific region, all levels of government and government agencies, and state-owned entities.

For more information about Minter Ellison please visit [www.minterellison.com](http://www.minterellison.com).
## Minter Ellison Contacts

### SYDNEY
Leigh Brown  
+61 2 9921 4941  
leigh.brown@minterellison.com  

Nicole Green  
+61 2 9921 4739  
nicole.green@minterellison.com  

### BRISBANE
William Thompson  
+61 7 3119 6221  
william.thompson@minterellison.com  

### MELBOURNE
Angela Skandarajah  
+61 3 8608 2269  
angela.skandarajah@minterellison.com  

### CANBERRA
Michael Brennan  
+61 2 6225 3043  
michael.brennan@minterellison.com  

### HONG KONG
Fred Kinmonth  
+852 2841 6822  
fred.kinmonth@minterellison.com  

### SHANGHAI
Yi Yi Wu  
+86 21 2223 1017  
yiyi.wu@minterellison.com  

### BEIJING
Jem Li  
+86 10 6535 3455  
jem.li@minterellison.com  

### ULAANBAATAR
Elisabeth Ellis  
+976 7700 7780  
elisabeth.ellis@minterellison.com  

### LONDON
Michael Wallin  
+44 20 7448 4824  
michael.wallin@minterellison.com  

### ADELAIDE
Adam Bannister  
+61 8 8233 5616  
adam.bannister@minterellison.com  

### PERTH
Adam Handley  
+61 8 6189 7864  
adam.handley@minterellison.com  

### DARWIN
Lachlan Drew  
+61 8 8233 5451  
lachlan.drew@minterellison.com  

### GOLD COAST
John Witheriff  
+61 7 5553 9400  
john.witheriff@minterellison.com  

### AUCKLAND/WELLINGTON
Mark Weenink  
+64 9 353 9998  
mark.weenink@minterellison.co.nz  

---  

## Disclaimer
This publication presents the law at October 2013. It is intended as an introductory guide to doing business in Australia and answers preliminary questions frequently asked by those unfamiliar with the Australian business environment. Factors that may be relevant to particular circumstances (including industry specific regulation) are not covered.

For more comprehensive and proper professional advice please contact any Minter Ellison Legal Group office.