

Guide To Doing Business in Australia

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We have prepared this informative Guide for clients and potential clients who already do business in Australia or who are contemplating doing business in Australia

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GUIDE TO DOING BUSINESS IN AUSTRALIA

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1. INTRODUCTION

This **Guide to Doing Business in Australia** was developed to assist our clients and non Australian business enterprises that are considering setting up business in Australia.

This Guide describes some of the major aspects of Australian law that you will need to consider when establishing, acquiring or operating a business in our country

About Our Firm

Koffels Solicitors and Barristers is a prominent boutique commercial firm located in the CBD of Sydney. KOFFELS has a reputation for being hard and diligent negotiators and litigators. The firm's rapid growth has been based almost solely upon its reputation and the resulting referrals. We practice in all areas of law however our foundation is in commercial law and litigation and one of our senior solicitors is a Law Society Accredited Specialist in the field. We can advise on all areas of interest to commercial clients including business start-ups, joint ventures and partnerships, distributions and agency, merchandising and franchising, advertising and marketing, terms and conditions of business, and commercial contract law. We can also assist clients in company and business mergers, acquisitions and sales, restructures and amalgamations, banking and debt financing.

If you would like any further information about Koffels or how we might be able to be of service to you, please do not hesitate to contact us, admin@koffels.com.au or visit our website at www.koffels.com.au

2. AUSTRALIA'S POLITICAL, LEGAL AND ECONOMIC ENVIRONMENT

This brief overview of Australia's political, economic and legal history and ethos provides a basic framework for understanding the major aspects of Australian law that you will need to consider when establishing or acquiring a business in Australia.

Our Country

Australia is an independent Western democracy with a population of more than 19.7 million. It is one of the world's most urbanised countries, with about 70 per cent of the population living in the 10 largest cities. Most of the population is concentrated along the eastern seaboard and the south-eastern corner of the continent.

Australia's lifestyle reflects its mainly Western origins, but Australia is also a multicultural society which has been enriched by nearly five million settlers from almost 200 nations. Four out of 10 Australians are migrants or the first-generation children of migrants, half of them from non-English speaking backgrounds. In 1991-92, East Asia contributed 41 per cent of settler arrivals.

Australia is the only nation to occupy an entire continent. Its land mass of nearly 7.7 million km² is the flattest and (after Antarctica) driest of continents, yet it has extremes of climate and topography. There are rainforests and vast plains in the north, snowfields in the south east, desert in the centre and fertile crop lands in the east, south and south west. About one third of the country lies in the tropics. Australia has a coastline of 36 735km.

Our Government

The Commonwealth of Australia consists of 6 States, New South Wales, Victoria, Queensland, South Australia, Western Australia and Tasmania and 2 internal Territories being the Northern Territory and the Australian Capital Territory plus a number of external Territories. A written Constitution sets out the powers of the Federal Parliament, which has control over income tax and thus over the principal source of revenue. The separate States have written constitutions. Their power to make laws extends to make all laws accept to those that extend to the Commonwealth. Where a law of a state is inconsistent with the law of the commonwealth, the latter prevails and the former is, to the extent of the inconsistency, invalid.

The State governments are responsible for education, police, health facilities, energy and mining, as well as industrial development. The Federal Government is responsible for the collection of income tax, defence, foreign affairs, immigration, social security, communications, trade practices, commerce and insurance law. The third and last tier of government is the Local Government. Totalling approximately 730 throughout Australia their responsibilities relate to the passing of ordinances or regulations for the upkeep and

maintenance of roads, bridges, water, sewerage and drainage systems ,health and sanitary services as well as the supervision of building construction

As a result, when setting up business or investing in Australia, a variety of Federal, State and Territory and Local Government laws and regulations may have to be considered.



Our Legal System

Federal laws are first introduced as Bills into the Federal Parliament but, when passed by that Parliament, it requires Royal Assent by the Governor General on Behalf of the Queen before those laws come into operation. Both the lower and upper house of Parliament must pass Commonwealth Acts before being presented to the Governor-General for assent. Acts can also provide for the making of subordinate legislation, such as regulations, which are made upon approval from the Governor-General without, the need for introduction into the Parliament.

A similar process for making statutory law and subordinate legislation exists in the Australian States. Each State legislature has a general power to make laws for the peace, order and good government of the State, although the wording of that general power can vary from state to state.

The independence of the judiciary and its separation from the legislative and executive arms of government is regarded as of great importance in Australia and it is taken for granted that judges will interpret and apply the law independently of the Government. In the case of federal judges, their security of tenure is guaranteed by the Constitution. In the case of States and Territories the tenure of judges is provided by legislation.

Our Economy

Australia has had one of the strongest economies in the world over the past decade, more competitive, open and vibrant than ever before. Australia's high economic performance resting on strong growth, low inflation and low interest rates has been the result of effective economic management and ongoing structural reform, along with a competitive and dynamic private sector and a skilled, flexible workforce. In the midst of a global economic slowdown, the Australian economy has shown impressive resilience.

The Australian economy has grown by about 4 per cent annually (compound average annual growth) from 1997 to 2003. In contrast with weaker global conditions, Australia's economy was one of the strongest in the developed world over the past year, with the Australian economy forecast to grow by 3¾ per cent in 2003-04.

The opening up of the Australian economy in recent years has created a climate for thriving enterprise and innovation, which supports the spread of knowledge and new technology. Information and communication technologies (ICT) is one of Australia's fastest-growing sectors and is currently the key driver of economic growth. Australia's ICT spending as a proportion of GDP is the fourth highest in the world.

The City of Sydney

Sydney metropolitan area has a population of 3.27 million and is located two thirds of the way down the east coast of Australia.

Sydney was voted "Best City" for three consecutive years (1998-2000) by two leading international travel publications with Sydney also playing host to the "best ever" Olympic Games in 2000.

During the 1990s, Australia moved from 12th to 2nd place on the Human Development Indicator, a measure of quality of life compiled by the United Nations. This placed Australia ahead of the Netherlands, France, Finland, Denmark and Austria. In 2001, international human resources company, William M. Mercer Companies, rated Sydney 4th out of 200 cities based upon quality of life criteria.

The City of Sydney's climate is moderate, with an average summer temperature of 22 deg. C (72 deg. F). According to the City of Sydney's Global Cities Database, Sydney's climate rated 3rd out of 66 world cities.

Sydney is also the epicentre for Australia's economic and business activity. Between 1994 and 2001, the City of Sydney's economic growth rate was more than 5% - that's 1% above the Australian average, while accounting for more than one-quarter (25%) of Australia's total economic activity. Sydney is headquarters to Australia's main financial institutions, the Reserve Bank of Australia, the Australian Stock Exchange and the Sydney Futures Exchange. Additionally, of the nation's top 100 companies, 60% are headquartered in greater Sydney, most within the CBD itself. Two thirds of Australia's

banking and finance industry business, almost three-quarters of financial services and nearly half of Australia and New Zealand's top 500 companies are located in Sydney.

Sydney is also host to a variety of significant regional headquarters. Sydney is regional headquarters to around 500 global corporations operating in the Asia Pacific region. This represents more than 60% of the national total. Just under 60% of these global corporations are based in the United States, 15% in the United Kingdom and a further 5% each in Germany and Canada. Multinationals have made Sydney their base for their Asia Pacific headquarters include American Express, British Aerospace, Coca-Cola Amatil, SITA, Krone, State Street Bank, Unilever and H.J. Heinz. IT&T companies with regional headquarters in Sydney include IBM, Microsoft, Oracle, Sun Microsystems, Compaq, Philips, SAP, Novell, AT&T, AAPT, Vodafone and Optus Cable & Wireless.

Sydney also boasts a respected financial sector. In 2002, the ASX ranked 12th internationally in terms of size and 19th in terms of turnover. In 2001, the SFE was the second largest financial futures and options exchange in the Asia Pacific and the 11th largest in the world. Nationally, Sydney accounts for almost four-fifths of all international and domestic banking and 34 of the 37 foreign banking groups in Australia;

Sydney's strategic geographical location enables corporations to maximise their potential by operating 24-hours a day. Due to its particular geographical longitude, Sydney is able to integrate its "working" time zone with that of Europe and North America. Four hundred and seventy-four international flights depart from Sydney each week and the city is serviced by over 40 international airlines.

Sydney's business costs are also highly competitive. Executive and professional salaries are lower than those in OECD countries as well those in Singapore, Hong Kong and Japan. Rent for a prime office space in Sydney is one-quarter that of Tokyo, less than half that of London and significantly less than a host of cities including Hong Kong, Paris, Frankfurt, Dublin, Taipei and San Francisco.

Sydney's multicultural workforce is also ideally suited to the global economy. More than one-quarter of the Sydney metropolitan residential population was born overseas and a further 20% are the children of migrants. In addition to English, more than 200 languages are spoken in Australia. 16% of the population five years and over spoke a language other than English. Notably, some 14.8% of Sydneysiders with a higher educational qualification also speak a second Asian language.

Visit Australia via the Internet

To find out more about our country's history, political system, geography, economy and other attributes visit our Government of Australia website www.australia.gov.au For another useful site that is specifically designed for business persons in other countries visit www.austrade.gov.au.

Visit Sydney via the Internet

To learn more about the city of Sydney and its advantages for businesses and lifestyle visit Sydney's official website at <http://www.cityofsydney.nsw.gov.au/>

3. FOREIGN INVESTMENT CONSIDERATIONS

Our country encourages foreign investment. In August and September 1999, the Government announced a number of changes to its foreign investment policy (and the Foreign Acquisitions and Takeovers Regulations), designed to reduce notification obligations on business and to streamline the administration of foreign investment policy.

The foreign investment policy, however, does provide for Government scrutiny of many proposed foreign purchases of Australian businesses and properties. The Government has the power under the *Foreign Acquisitions and Takeovers Act 1975* to block proposals that are determined to be contrary to the national interest. The Act also provides legislative backing for ensuring compliance with the policy.

Approval Period

Approval under the Government's foreign investment policy is normally only given for a specific transaction which is expected to be completed in a timely manner. If an approved transaction does not proceed at that time and/or the parties enter into new agreements at a later date, or if a transaction is not completed within 12 months, further approval must be sought for the transaction. Approvals for share acquisitions involving a full or partial bid under Corporations Law only apply to the shares acquired during the bid period. For example, if approval is given for a full bid and the bidder only acquires 60 per cent of the shares, but then subsequently wishes to proceed to acquire further shares on market using the creep provisions of Corporations Law or to acquire the balance of the shares through a subsequent bid, further prior approval must be sought.

Where a proposal involves option agreements for the purchase of shares, assets or property, prior approval is required to acquire the options. Normally, approvals for options will also extend to the exercise of those options, provided the option is exercised within 12 months of approval. Subsequent approval for the exercise of the options may be sought on an annual basis. The time period for an approval may be varied where it can be shown that an extended period is fundamental to the success of a proposal and that extending the timing of the proposal does not involve an activity (eg real estate speculation) that would be contrary to the national interest. In this situation the extended period will be stated in the approval.

Applications

The information normally required to enable foreign investment proposals to be processed is set out below. Copies of relevant annual reports for the most recent financial year should accompany the application. There is no statutory charge for processing applications. All applications should be addressed in writing to:

The Executive Member
Foreign Investment Review Board
C/- The Treasury
CANBERRA ACT 2600

Commercial in Confidence Sensitivity

The Government recognises the commercial-in-confidence sensitivity of much of the information provided to the Board. The Government respects this confidential status and ensures that appropriate security is given to it. Where third parties outside of Government seek to obtain access to confidential information held by the Government, it will not be made available without the permission of the applicant, except upon the order of a court of competent jurisdiction. In this respect, the Government will pursue the defence of this policy through the judicial system. In addition, the Government is obligated to respect the privacy of personal information that is provided by applicants to the Foreign Investment Review Board in accordance with the requirements of the *Privacy Act 1988*. In accordance with that Act, the Government advises that in situations where the applicant has breached, or is strongly suspected of having breached the Foreign Acquisitions and Takeovers Act 1975 (FATA), the Board may seek the assistance of other Government agencies in its efforts to ensure applicants comply with the FATA. In seeking such assistance, the Board may pass relevant personal information to those government agencies. Most commonly these agencies will be the Department of Immigration and Multicultural Affairs, the Australian Tax Office or the Australian Federal Police.

The Federal Government's foreign investment policy encompasses both the *Foreign Acquisitions and Takeovers Act 1975* and other requirements specified by Ministerial statements. The Treasurer is responsible for the administration of the policy and is assisted in this task by the Foreign Investment Review Board (FIRB). FIRB is responsible for the examination of proposals for investment in Australia, making recommendations to the Government on those proposals and the provision of guidance to foreign investors so that their proposals conform with the Government's policy. Generally speaking, administration of the policy by FIRB is based on guidelines rather than inflexible rules. Under these guidelines and in accordance with the *Foreign Acquisitions and Takeovers Act*, FIRB must be notified of certain types of proposals by "foreign interests" who intend to invest in Australia.

Examination Under FIRB

Certain foreign interest proposals will be subject to examination by the FIRB. This will include any Acquisitions of a substantial interest in an existing Australian business that has total assets of more than \$5 million (more than \$3 million for rural properties) as well as Proposals for the establishment of a new business involving total investment of \$10 million or more.

Examination under FIRB will also occur for:

1. Non portfolio proposals for investment in the media, irrespective of size.
2. Direct investments by foreign governments or their agencies, irrespective of size.
3. Takeovers of offshore companies whose Australian subsidiaries or assets are valued at \$20 million or more, or amount for more than 50% of the target company's global assets.
4. Proposals to acquire non-residential commercial real estate valued at \$5 million or more. Proposals to acquire residential real estate irrespective of size.
5. Proposals where any doubt exists as to whether they are notifiable.
6. Funding arrangements that include debt instruments having quasi-equity characteristics will be treated as direct foreign investments.

Generally, such proposals will be approved within three weeks, unless they are considered to be contrary to the national interest.

Commercial Real Estate

Acquisitions of commercial real estate by foreign interests should be submitted to the Government through the Foreign Investment Review Board for approval prior to purchase unless the acquisition is exempt (see below). Foreign interests are natural persons, other than Australian citizens and permanent residents who have been resident in Australia for at least 200 days out of the last year, and corporations, businesses or trusts in which there is a substantial foreign interest. A substantial foreign interest is a holding of 15 per cent or more by a single non-resident person or corporation (either alone or with associates) or an aggregate holding of 40 per cent or more by a number of non-residents taken together.

Exempt Commercial Real Estate Acquisitions

Acquisitions of commercial real estate by Australian citizens resident abroad, or companies or trusts owned by Australian citizens resident abroad, do not require approval. Acquisitions of commercial real estate where the total value of the property being acquired is less than \$5 million do not require notification or approval unless (i) the ownership of the property is vested in a holding company which is being acquired or (ii) the property is being acquired by the agent of a foreign government. Acquisitions of commercial real estate which are to be used immediately for industrial or commercial purposes which are incidental to an existing or proposed business, (other than a business or dealing in land or operating hotels motels or tourist facilities), do not require notification or approval. (Further details of exempt acquisitions are available from the booklet "Australia's Foreign Investment Policy: A Guide for Investors".)

Developed Commercial Real Estate

Acquisitions of developed commercial real estate valued over \$5 million are normally approved (unless considered contrary to the national interest) subject to the acquisition being made with 50 per cent Australian equity. However, approval may be given for acquisitions with up to 100 per cent foreign equity where the parties can show that the property was actively marketed for a period of three months prior to their purchase or was sold by public auction or open tender.

Applications

The Board is unable to give "in principle" approval to persons wishing to acquire property, so an application for foreign investment approval must specify the particular property to be acquired.

4. AUSTRALIAN TRADE POLICY

Australia is actively committed to the principals and objectives of the World Trade Organisation (WTO). Australia is pursuing all avenues to build support for effective liberalisation in the new WTO round, particularly in agriculture, industrial products and services – including actively engaging in the Cairns group of Fair Trading Nations (founded by Australia).

Australia is committed to achieving the Asia Pacific Economic Cooperation (APEC) forum's goals of free and open trade and investment. Implementation of these goals will greatly improve Australia's access to markets in APEC member economies – which already account for more than two-thirds of Australia's goods and services exports and imports.

Australia's economic presence is enhanced by the Australia New Zealand Closer Economic Relations Trade Agreement (CER) and the ASEAN Free Trade Area (AFTA) Closer Economic Partnership. Australia also seeks bilateral and other Free Trade Agreements (FTA's) that deliver meaningful gains in market access across all sectors that cannot be achieved in a similar timeframe elsewhere. Australia has recently concluded a FTA with Singapore, Thailand and the United States that is comprehensive in scope and can complement Australia's multilateral trade objectives.

5. FORMS OF BUSINESS ORGANIZATIONS

When establishing business operations in Australia, companies can consider several different types of organisations, each with its own advantages, business processes and tax considerations.

Registering a Foreign Company Background

A foreign company conducting business in Australia, other than through an Australian subsidiary, must register as a foreign company with the Australian Securities and Investment Commission (ASIC) under Part 5B.2 of the *Corporations Act 2001*. A business enterprise in Australia may be operated by an individual, a trust, a company, a joint venture, a partnership or a branch of a foreign company. Each has different legal and taxation implications. A foreign investor may conduct business in Australia through any of these structures. The most common choices include establishing or acquiring an Australian subsidiary, or by registering as a “foreign company”. In both cases, registration is governed by the Commonwealth *Corporations Act 2001*. A foreign company wishing to apply for registration must: ensure that the company’s name is available (a name would be unavailable if it is currently registered by another company or business or contains a restricted word or expression) – if a name is available it may be reserved for a period of two months whilst the company organises preparation of the necessary registration documents; In choosing a business structure, you should carefully examine what structure will best serve your proposed operations in Australia. Following this, the relevant application forms and documents should be lodged, including a certified copy of the company’s certificate of incorporation, (or a document of similar effect).

Registering a (New) Company

All companies operating in Australia must be registered following the Corporations Act (Commonwealth) 2001. This act contains the substantive law in Australia concerning companies and their incorporation.

Once a company is registered in accordance with the Corporations Act, that company is automatically registered for business throughout Australia. Individual registration in each of the States and Territories is not required.

The current fee in registering a company is \$36.00. The next step is to set up a company with a single director, which costs \$72.00. The alternative is to purchase a shelf company for between \$950 to \$1300 from an accountant or a lawyer.

The Australia Securities and Investment Commission (ASIC) administers the Corporations Act.

The *Corporations Act 2001* allows for the registration of four types of companies:

1. a company limited by shares;
2. a company limited by guarantee, requiring a registered office in Australia;
3. a company with unlimited liability, in which a local agent would be appointed to represent the company in making sure it complies with its legislative requirements in Australia.
4. a no liability company (for mining purposes).

If ASIC is satisfied with the application and supporting documentation and the statutory registration fee is paid, registration usually occurs within approximately 5 business days of receipt of the application. ASIC will allocate an Australian Registered Body Number (ARBN) to the foreign company and issue to it a ‘Certificate of Registration’ The most common type of company is the company limited by shares, which may be either a proprietary (private) company or a public company. The proprietary company is most common because it has the advantage of being simpler to manage and less expensive to administer.

In terms of post registration obligations, a registered foreign company is required to lodge with ASIC, at least once every calendar year, a copy of its balance sheet, profit and loss and cash flow statements. Registered foreign companies must also notify ASIC of certain changes as they occur (within prescribed time limits) – such as changes to the structure of the company itself (i.e. its name or constitution) or changes concerning its directors, local agent or office addresses.

Establishing a new Australian Subsidiary

A foreign company can establish a new Australian subsidiary by registering the company, or more commonly, acquiring an existing “shelf” company. The administrative procedure in establishing an Australian subsidiary is similar to the process required in registering a foreign company. It involves lodging company documents with ASIC and applying for an Australian Business Number (ABN), a Tax File Number (TFN) and also being registered for the Goods and Services Tax (GST).

The Australian subsidiary is a separate legal entity. An Australian subsidiary of a foreign company must have a registered office within Australia. There are also requirements to have Australian resident directors (two for public companies, one for proprietary companies) and an Australian resident company secretary (optional for proprietary companies). There are, however, no minimum capital requirements for an Australian subsidiary of a foreign company.

Acquiring an Australian Company

An alternative to establishing a branch or subsidiary company may be to acquire the shares in, or the assets of, an existing Australian company. Australia's foreign investment rules generally encourage investment in Australia. When acquiring an Australian company however, the foreign investor should be aware of the takeover legislation relating to share acquisitions as well as Australia's foreign investment policy.

Takeover regulation is not limited to purchases of shares in listed companies. It applies to acquisitions of securities in any unlisted company with more than 50 shareholders.

The Foreign Acquisitions and Takeovers Act 1975, administered through the Foreign Investment Review Board (FIRB), regulates (among other things) acquisitions by foreign investors of shareholdings of 15% or more in Australian companies (and trusts) that have total assets valued at more than A\$50 million. It also regulates foreign interest where several foreigners have a 40% or more interest in aggregate.

Foreign companies may apply for listing on the Australian Stock Exchange (ASX). To obtain and maintain ASX listing, companies need to meet the prescribed requirements set out in the ASX listing rules. This includes firm disclosure and reporting requirements. Foreign listed organisations may qualify as a *Foreign Exempt Listing*. Details on whether a company can qualify are found on the ASX website (www.asx.com.au).

In terms of company structure, proprietary companies are unable to raise equity or debt capital through the issues of securities to the public as they are not permitted to engage in any activity which would require a disclosure document to be lodged with ASIC.

Joint Ventures

Foreign investors may enter into joint venture agreements with Australian entities to carry out commercial activities, thus avoiding the need to incorporate an Australian subsidiary or register as a foreign company.

A joint venture is often used when the parties intend to simply undertake one venture rather than carry on a continuous business. Joint ventures are a popular structure for mining and manufacturing enterprises.

The joint venture will be governed by the terms of the joint venture agreement between the parties as well as by common law and contract law.

Liability

The mutual rights and liabilities of participants in joint ventures are substantially similar to those of partners in a partnership, and the principals of law applicable to partnerships are generally applicable, eg. Each joint venturer is liable for the debts and obligations of the joint venture. Each venturer has the power to bind the other and to subject them to liability to third persons in matters within the scope of the joint venture.

Tax Consequences

Joint ventures are treated as partnerships for tax purposes. Like a partnership, a joint venture is not a taxable entity and the tax liabilities pass through to the joint ventures.

Partnerships

Partnerships are commonly referred to as “firms”. They are a formally recognised legal relationships and are governed by State laws consisting of mixtures of trust law, agency law and contract law. This type of business structure is very easy and cheap to establish and can be created by either a formal agreement (partnership deed/agreement) or even by the parties’ conduct. Partnerships have a great deal of flexibility and secrecy, as they are not required to make public disclosures. Each partner will be taxed separately on the income he/she receives.

Partnerships have many drawbacks relating to liability. The partners are all jointly and severally liable for the debts of the firm and have unlimited liability. There is limited growth in this type of business structure as the maximum number of partners in a partnership is limited to 20, except in the case of certain professional partnerships. There are two basic types of trading trusts available in Australia: discretionary trusts and unit trusts.

There are two forms of Partnership

1. General
2. Limited

1. General Partnership

Liability

The partners in general partnership have unlimited liability for the obligations of the partnership, ie. Their liability is not limited to their contributed capital of the assets of the partnership. Every partner is an agent of the partnership and can act on behalf of the business and bind the other partners. Each partner is jointly and severally liable for the debts and obligations of the business, including those arising out of the wrongful actions of another partner.

Tax Consequences

For income tax purposes, the tax consequences of the partnership “pass through” to the individual partners. The partnership itself is, thus, not subject to taxation on its income. The partners are taxed on their proportionate share of the partnership’s income (whether or not the income is distributed to them) and they can use their share of partnership losses to offset other income.

2. The Limited Partnership

A limited partnership is a partnership formed under the laws of a State by two or more persons, one or more of whom are general partners and one or more of whom are limited partners. This form is unavailable if no one is willing to assume the risk of a general partner. The primary purpose of the limited partnership is to enable one or more persons to invest in a partnership without incurring the unlimited liability of a general partner. Partners form a limited partnership by complying with the applicable state Limited Partnership Acts. A limited partnership provides most of the advantages of a general partnership

Liability

In a limited partnership, the liability of limited partners for the obligations of the partnership is limited to their investment. General partners, however, still have unlimited personal liability. In some states if a limited partnership exercises control over the business of the limited partnership, the limited partner will incur liability of a general partner. In these states, only a general partner may participate in the control of the business. As a rule, when the statutory requirements for a limited partnership have not been complied with but a partnership has nevertheless been formed, the result is a general partnership with unlimited personal liability for all partners.

Tax Consequences

Like a general partnership, a limited partnership is not itself taxed on its income. Tax consequences flow through to the partners, although there are restrictions on the ability of limited partners to use their share or partnership losses to offset other income.

Co-operatives

Co-operatives are an alternative incorporated form and offer limited liability for their members.

A Co-operative Society may be registered only if the registrar is satisfied that the Society is designed and intended to function in accordance with Co-operative principals. This includes that there are reasonable grounds for believing that the Society, if registered, will be able to carry out its objectives successfully and there is no reasonable cause why the Society and its rules should not be registered.

Once registration is effected the registrar and the Advisory Council have a continuing role in the administrative powers. For example, submissions must be made to the Advisory Council for approval of additional shares, handling of varying disputes between the members and the inspection of records.

The main difference between a Co-operative and companies in Australia is that under a company structure there is a profit motive, returning dividends to the members of a

company, whereas a Co-operative operate on a service motive, providing adequate services to its members and any return of capital is limited.

Unlike a company, all members of a Co-operative have only one vote, irrespective of their shareholding. It is run in a similar fashion to a company. A board of directors is elected which controls the management of the business of the Co-operative.

A person joining a Co-operative takes advantage of the facilities provided by the Co-operative. These services may include advertising and marketing.

Incorporated Associations

Incorporated Associations are governed by the Associations Incorporations Act throughout the different states of Australia, although with very similarly shared legislation.

Under the Associated Incorporated Act (NSW) for example;

1. It allows five or more persons formed for a lawful object to incorporate if the association is not one carried on for the object of trading or securing pecuniary gain for its members.
2. There must be appointed a public officer who acts as a point of liaison between the association and the Department of Business and Consumer Affairs
3. Must notify the Department of Business and consumer Affairs of changes to its governing committee, object, rules and identity of its public officer
4. An annual general meeting must be held annually to prepare a statement outlining the income and expenditure of the last financial year and assets and accounting statement to the Department of Business and Consumer Affairs
5. The association must maintain public liability insurance with an approved insurer for the amount of \$2 million
6. Fees for incorporation and lodgement of an annual statement are significantly lower than that of companies

The Sole Proprietorship

The sole proprietorship is the least complicated form of doing business for the one man business in which the same individual owns all of the assets of the business and is solely liable for all of the debts and obligations of the business. The sole proprietor may, however, lawfully employ as many employees as needed.

The advantage of the sole proprietorship is the lack of formality, both in its organisation and in subsequent operations. Management is left to the sole discretion of the sole proprietor and only the sole proprietor or an appointed agent can act on behalf of the business. As to matters of title to property and the conduct of litigation, the laws applicable to individuals apply to the sole proprietorship. This does not mean that the business must be done in the sole proprietor's name; rather it may be conducted under an assumed or trade name, subject to compliance with state statutory requirements. Upon the death of the sole proprietor, the business ends, unless whoever acquires the assets upon the sole proprietor's death continues to operate the business.

Liability

A sole proprietor is subject to unlimited personal liability for all obligations of the sole proprietorship and he cannot limit his risk to the portion of his assets used in the business.

Tax Consequences

A sole proprietorship is not treated as a taxable entity. Instead, the sole proprietor includes the profits and losses of the sole proprietorship on his personal federal and state income tax returns. The federal individual income tax rates currently range from 10 to 38.6%

Limited Company

A limited company is a public company consisting of five people who fill the roles of directors and secretaries. Limited Companies also have shareholders and can raise capital by offering shares to the public by issuing a prospectus.

The Australia Securities and Investment Commission registers all Australian companies, both public and private. Any company that is registered with ASIC will have an ACN number. (Australian Company Number)

Can you set up a company if you live overseas?

Yes but at least one of the Directors of the company or the Company Secretary needs to live in Australia. If it is a public company, then at least two of the Directors need to live in Australia

Registration of Business Name

To run a Business in Australia you must register the Business Name if it is being produced under a name other than that of the owner. Business names can be registered at the Department of Fair Trading in every State or Territory. Generally, a name that is already registered cannot be adopted by another organisation. In addition, names that are misleading cannot be registered.

6. TAX CONSIDERATIONS

This chapter provides a general overview of the tax implications relating to both personal income of individuals and those of businesses, considering doing business in Australia.

Income Tax

In Australia, the obligation to pay tax is based on:

1. residence of the taxpayer
2. source of income; and
3. the presence or absence of a permanent establishment (PE)

Residence

Subject to any applicable Double Tax Agreement (DTA) (see below), entities defined as an individual, company, corporate limited partnership and certain trustees which are held to be Australian residents for income tax purposes (Resident Entity or RE), are required to pay income tax on their worldwide income irrespective of the source of the income.

For example: An RE who owns real property located in France is assessed in Australia on any rental income derived from the property (subject to certain qualification) and liable to pay tax in Australia on any capital gains derived on the sale of the property (subject to certain qualifications)

An entity that is not an Australia resident for income tax purposes (Non resident Entity or NRE) is only liable to pay tax in Australia on any capital gain derived on the sale of the property (subject to certain qualifications)

An entity that is not an Australian resident for income tax purposes (Non-resident Entity or NRE) is only liable to pay tax in Australia on income that has its source in Australia.

For example: a Chinese resident who owns an investment property in Australia is subject to tax in Australia (subject to certain qualification), on any rental and any income gain accruing on disposal.

A resident Entity company is one:

1. Whose place of incorporation is in Australia; and
2. Has either its rental management and control in Australia; or
3. Whose voting power is controlled by Australia resident shareholders

Double Tax Agreements

Double tax agreements (DTAs) negotiated between Australia and other countries alter the domestic taxing rights of those countries.

The character of the income (business profits, royalties, dividends, interests) and the residency of the taxpayer determine Australia's taxing rights under a DTA. Under most modern DTA's negotiated by Australia, an NRE is only taxed in Australia on business profits derived from business carried out on a permanently established business (PE) in Australia.

Source of Income

The assessable income of an NRE includes income from all Australian sources. Australian sourced income is generally subject to tax in Australia. Factors a court will consider in determining the source of income include the jurisdiction where

1. the activities giving rise to income are performed;
2. contracts are negotiated and entered into
3. payment is made; and
4. the contract is performed.

The above common law source rules only apply to countries that have not entered into DTAs with Australia.

Permanent Establishment

A PE is a fixed place of business through which the business of an enterprise is wholly or partly carried on.

The following tests determine whether an enterprise has sufficient presence in a country to constitute a PE:

1. Assets test – are the assets maintained by an enterprise in the other treaty country sufficient to constitute a PE?
2. Activity test – are the activities carried on by an enterprise in the other treaty country sufficient to establish a PE?
3. Agency test – are the acts of the agent of an enterprise (attributed to the enterprise) sufficient to deem the enterprise as having a PE, even though the enterprise does not have a physical presence in the treaty country?

Withholding tax and income characterisation

The character of income (whether arising from the supply of goods, provisions of services, use of intangible property or disposal of an asset) determines whether or not withholding tax will apply to particular payments leaving a tax jurisdiction.

Goods and Services Tax (GST)

GST is charged at the rate of 10 percent on the supply of goods and services in Australia and on goods imported into Australia under the New Tax System (Goods and Services Tax) Act 1999 Cth. A supply of anything other than goods or real property will be subject to GST if the supply is done in Australia or the supplier makes the supply through an enterprise that the supplier carries on in Australia (including a PE and an enterprise falling short of a PE)

A person makes a taxable supply if a supply is made for consideration, in the course or furtherance of an enterprise where the supply is connected with Australia and the person is (or required to be) registered for GST purposes. However a supply is not taxable to the extent that it is GST free or input taxed. To prevent double taxation, a supply does not include a supply of money unless the money is provided as consideration for a supply that is a supply of money. For example, Andre pays Beth A\$100 for the supply of 100francs.

A supplier who has a liability to charge and remit GST is required to register for GST. A business in Australia is required to register for GST if it carries on an enterprise and has an annual turnover of \$50 000 or more. Annual turnover includes the sum of all supplies made or likely to be made in a 12 month period other than supplies which are not subject to GST

Taxation of Companies

Company tax in Australia is a Federal income tax. It is levied at a flat rate, regardless of the size or structure of the company. Effective from 1 July 2001 the corporate tax rate is 30%. The timing of payment of income tax is dependent on the quantum of tax payable.

The principles determining the income upon which tax is levied are contained in the Income Tax Assessment Acts of 1936 and 1997. The rates are contained in the Income Tax Rates Act. The income tax law is administered by the Commissioner of Taxation which is based in Canberra, the Federal Capital.

A company which is resident in Australia is liable to Australian income tax on all its assessable income which is not specifically exempt, less allowable deductions with a credit for qualifying foreign taxes paid.

A non-resident company is liable to income tax only on assessable income derived from sources in Australia.

Assessable income includes the income calculated by normal accounting concepts, with specified adjustments, and certain capital gains. Normally tax losses can be carried forward indefinitely or transferred amongst group companies, for offset against future profits.

For income tax purposes a company is either a public or private company. Generally a public company is defined as one in which the shares are listed on a stock exchange anywhere in the world or is a subsidiary of such a company. The significance of the distinction between public and private companies has been greatly diminished with further restrictions on inter-company dividend rebates.

Australia has adopted a dividend imputation system, which operates to impute Australian tax paid at the company level to resident individual shareholders. Effectively the tax paid at the company level is passed on to shareholders in the form of franked dividends.

Taxation of Individuals

As with company taxation, income tax is imposed on individuals by the Federal Government.

Resident individuals are liable to Australian income tax on all their assessable income. Non-resident individuals are liable to income tax only on assessable income derived from sources in Australia. As for companies, this is calculated by normal accounting concepts with specified adjustments and includes certain capital gains.

Tax rates for individuals increase with the level of taxable income. For resident individuals, tax is imposed on taxable income in excess of the tax-free threshold.

The tax-free threshold (currently \$6,000) is available on a pro-rata basis to a taxpayer first joining the Australian workforce on a full-time basis or taking up or ceasing Australian residence during a tax year.

Tax is deducted at source under the PAYG (Pay As You Go) system for employees. Other tax instalment systems also apply to individual taxpayers under the PAYG system. These replaced earlier instalment systems, such as Prescribed Payments, Reportable Payments and Provisional Tax Systems.

There is also a compulsory health insurance levy (Medicare). Higher income individuals (>\$50,000) and families (>\$100,000) who do not have private patient hospital cover will pay an extra 1% of their taxable income for the Medicare levy surcharge. This is in addition to the normal 1.5% Medicare levy.

Capital Gains Tax

Capital gains tax (CGT) applies to profits on the sale of non-trading assets acquired or deemed to have been acquired after 19 September 1985. Concessions apply within the legislation to lessen the impact of CGT, including 50% discount of the assessable gain for individuals and trusts disposing of assets which they have held for more than twelve months. Companies do not qualify for this concession.

Non residents are only subject to CGT on the disposal of assets which have the necessary connection to Australia. This term includes shares in private companies (not listed companies) and real property.

Withholding Taxes

Withholding tax must normally be deducted from interest or dividends paid otherwise than out of taxed company income paid to non-residents. Similarly income tax must normally be deducted from royalty payments.

Foreign Source Income

Australia has adopted a very complex system for the taxation of foreign source income. Depending on the particular circumstances tax is either imposed when the foreign income is derived or as it accumulates in a controlled foreign company or trust.

Thin Capitalisation

From 1 July 2001, a new thin capitalisation regime applies. It applies to disallow a proportion of finance expenses (e.g. interest) when the amount of debt allocated to the Australian operations of both Australian and foreign multi-national investors exceeds specified limits. The limits are different for banks and non-banks.

A de minimus rule applies where debt deductions do not exceed \$A250,000.

Other Taxes / Charges

Federal

Fringe benefits tax is a Federal tax payable by all employers on benefits, other than exempt benefits, provided to employees. The tax is payable by quarterly instalments under a self-assessment system. The tax payable is generally 48.5% of the grossed up value. This rate is subject to change in certain circumstances.

Goods and Services Tax (“GST”) is imposed at the rate of 10% on the making of a taxable supply. “Taxable Supply” includes importations – in this case GST is payable by the importer and not the overseas supplier. For taxpayers registered for GST, credits are available in respect of GST paid on inputs. GST is payable on a quarterly or monthly basis.

Superannuation Guarantee Scheme requires all employers to provide a minimum level of superannuation support for all full-time, part time and casual employees. The required percentages for 2001/02 is 8%.

State

Payroll tax is based on the gross salaries and wages paid by an employer. Certain bodies and employers with small payrolls are exempt. The rates and wages thresholds vary between the States and Territories.

Land tax is a tax levied on the value of freehold property. Rates and conditions vary between the States and Territories.

Stamp duty is chargeable on certain documents, legal and other. The rates of duty vary between the States and Territories. No stamp duty is payable on transfer of shares in listed companies.

Tax Rates

In Australia, a taxpayer's income is taxed progressively. Broadly, this means that as you earn more income your average tax rate rises. Progressive taxation means that higher income earners pay more tax than lower income earners. This is achieved by taxing a range of income brackets as a set percentage or cents in the dollar. These income brackets are called **tax brackets**. The following tables detail the tax brackets of our progressive tax system for the financial years ending 30 June 2003 and 30 June 2004. The rate of tax within these brackets is called the **marginal rate of tax**. For Australian residents, the first tax bracket, from \$0 to \$6,000, has a zero marginal rate of tax. Tax is applied to every dollar after this figure. This tax-free amount is called the **tax-free threshold**.

These rates apply to individuals who:
are residents of Australia for tax purposes for the whole financial year and
did not leave full-time education for the first time during the financial year.

Tax rates 20017-18

<i>Taxable income</i>	<i>Tax on this income</i>
\$0 – \$18,000	Nil
\$18,201 – \$37,000	19c for each \$1 over \$18,200
\$37,001 - \$87,000	\$3,572 plus 32.5c for each \$1 over \$37,000
\$87,001 – \$180,000	\$19,822 plus 37c for each \$1 over \$87,000
Over \$180,001	\$54,097 plus 45c for each \$1 over \$180,000

Tax rates 2018-19

<i>Taxable income</i>	<i>Tax on this income</i>
\$0 – \$18,000	Nil
\$18,201 – \$37,000	19c for each \$1 over \$18,200
\$37,001 - \$90,000	\$3,572 plus 32.5c for each \$1 over \$37,000
\$90,001 – \$180,000	\$20,797 plus 37c for each \$1 over \$90,000
Over \$180,001	\$54,097 plus 45c for each \$1 over \$180,000

Tax offsets reduce the tax payable. Tax offsets based on taxable income levels apply to:

- individuals on low incomes:
 - below \$24,450 in 2002-03
 - below \$27,475 in 2003-04

Non-residents

If you are a non-resident for the full year, the following rates apply:

Tax rates 20017-18

<i>Taxable income</i>	<i>Tax on this income</i>
\$0 – \$90,000	32.5% of amounts over \$0
\$90,001 - \$180,000	\$29,250 + 37% of amounts over \$90,000
\$50,001 – \$60,000	\$62,550 + 45% of amounts over \$180,000

Tax rates 20018-19

<i>Taxable income</i>	<i>Tax on this income</i>
\$0 – \$90,000	32.5% of amounts over \$0
\$90,001 - \$180,000	\$29,250 + 37% of amounts over \$90,000
\$50,001 – \$60,000	\$62,550 + 45% of amounts over \$180,000

7. BUSINESS IMMIGRATION

A new two-stage Business Migration scheme was introduced on 1 March 2003 for Australia.

Under this new arrangement, business migrants are granted a Provisional Visa for four years and after establishing the required level of business or maintaining their eligible investment, they can apply for a Business Skills Residence Visa.

A positive aspect behind these changes is that it gives prospective business migrants the opportunity to trial their intentions in Australia rather than making a permanent decision. They can gain a first hand perspective on business opportunities available in Australia, liaise with Australian State / Territory Government agencies and local business on the type of business which may be favourably viewed, conduct market research, meet local citizens and examine the settlement and education prospects of their families as well as experience the Australia lifestyle.

There are four main visa types under Business Migration

1. Senior Executive Migration to Australia for successful senior executives of a major business with a genuine commitment to participate, as a substantial owner, or as a manager in a new or existing business in Australia.
2. Business Owner Migration for successful owners or part-owners of a business with a legitimate interest in establishing and managing a business in Australia.
3. Investment Linked Migration for successful business investors with a genuine commitment to maintain business or investment activity in Australia after the designated investment matures.
4. Established Business to Australia for successful owners or part owners of one or more businesses already established in Australia, seeking to change their residency status from temporary to permanent

Australian Immigration Program - Business Skills Visas

Under the new two-stage arrangements introduced on 1 March 2003:- successful business migrants are first granted a Business Skills (Provisional) visa for four years, then after establishing the requisite level of business, or maintaining their eligible investment they are eligible to make an application for a Business Skills Residence Visa (permanent residence) - applied for in Australia. 'A Direct Permanent Residence Category' will still be available for certain business migrants sponsored by State/Territory governments. This is known as the Business Talent Visa.

Who can apply for a Business Skills Visa ?

- a. Business owner: for owners or part-owners of a business;
- b. Senior executive: for senior executive employees of major businesses;
- c. Investment: for investors/business people willing to invest in Australia;
- d. Business Talent: for high-calibre business people who have sponsorship from a State/Territory government.

Persons who are in Australia on temporary visas, may still apply for Permanent Residence under the following two categories: (or under the new Business Owner (Residence) visa

- 1. **Established Business in Australia (EBA):** for people temporarily in Australia who are owners or part owners of a business; and
- 2. **Regional Established Business in Australia (REBA):** for people temporarily in Australia who are owners or part owners of a business in a designated area of Australia.

Permanent Residence Business Owner Visas

Business Owner (PR)

You have to meet the criteria for either the Residence or State Sponsored Visa

Residence	State / Territory sponsored
You have notified the appropriate State regional authority	Must be sponsored by an appropriate regional authority of a State or Territory Government
You are the holder of a Business Owner (provisional) or State sponsored Business Owner visa, or, a Senior executive (provisional) or State sponsored Senior executive (provisional) visa, or, an Investor (provisional) or state sponsored investor (provisional) visa	You are the holder of a Business Owner (provisional) or State sponsored Business Owner visa, or, a Senior executive (provisional) or State sponsored Senior executive (provisional) visa, or, an Investor (provisional) or state sponsored investor (provisional) visa, or the holder of a subclass 457ie visa.
You must fulfil all of these requirements:- 1. Throughout the 12 months immediately before the application is made, your (or your and your spouse's) main business /ess employed at least 2	Unless the appropriate regional authority has determined that there are exceptional circumstances, you meet at least 2 of the following 3 requirements:- 1. Throughout the 12 months

<p>full time employees (Aus citizen, or PR)</p> <p>2. Throughout the 12 months immediately before the application is made, the net value of your (or your and your spouse's) personal and business assets in Australia has been at least A\$ 250 000</p> <p>3. Throughout the 12 months immediately before the application is made, the net value of your (or your and your spouse's) assets in the main business/ess is at least A\$ 100 000</p>	<p>immediately before the application is made, your (or your and your spouse's) main business /ess employed at least 1 full time employee (Aus citizen, or PR)</p> <p>2. Throughout the 12 months immediately before the application is made, the net value of your (or your and your spouse's) personal and business assets in Australia has been at least A\$ 250 000</p> <p>3. Throughout the 12 months immediately before the application is made, the net value of your (or your and your spouse's) assets in the main business/ess is at least A\$ 75 000</p>
In the 12 months immediately before the application is made, your main business/ess had a turnover of at least A\$ 300 000	In the 12 months immediately before the application is made, your main business/ess had a turnover of at least A\$ 200 000
You had, and continue to have, an ownership interest in one or more actively operating main businesses in Australia for at least 2 years immediately before application is made.	
For each business, an Australian Business Number (ABN) has been obtained and all Business Activity Statements (BAS) required by the ATO for that period have been submitted to the ATO, and are included in the application	

- You have not been engaged in a business where the provision of professional or technical or trade services took up more than 50% of your time
- Neither you or your spouse have a history of involvement in a business or investment activities of a nature not generally acceptable in Australia
- You have been in Australia as the holder of one of the qualifying visas for a total of at least one year in the two years immediately before application is made.

Australian Business Talent (Migrant) category

Business Talent

To be eligible you must show that:-
<ul style="list-style-type: none"> • You have been sponsored by a State or Territory Government
<ul style="list-style-type: none"> • Had an overall successful business career
<ul style="list-style-type: none"> • For at least 2 of the last 4 fiscal years immediately before application is made, you had an ownership interest in a main business, or main businesses (2), with an annual turnover of at least A\$3 000 000 (each year)
<ul style="list-style-type: none"> • For at least 2 of the last 4 fiscal years immediately before the application is made, you (or you and your spouse together) have net assets in a qualifying business (in which you

held an ownership interest) of at least A\$ 400 000
<ul style="list-style-type: none"> • Your business and personal assets (including your spouse) have a net value of at least A\$ 1 500 000 which are available for the conduct or establishment of a business in Australia and are lawfully acquired and available for transfer to Australia within 2 years of the grant of your visa.
<ul style="list-style-type: none"> • You are aged less than 55 at time of application, or you are proposing to establish or participate in a business that your sponsoring state or territory has determined is of exceptional economic benefit to the state or territory
<ul style="list-style-type: none"> • Neither you or your spouse have a history of involvement in a business or investment activities of a nature not generally acceptable in Australia
<ul style="list-style-type: none"> • You have a genuine and realistic commitment to establish or participate actively in a qualifying business in Australia and to maintain and hold a substantial ownership level.

Permanent Residence Business Owner Visas

Business Owner (PR)

You have to meet the criteria for either the Residence or State Sponsored Visa

Residence	State / Territory sponsored
You have notified the appropriate State regional authority	Must be sponsored by an appropriate regional authority of a State or Territory Government
You are the holder of a Business Owner (provisional) or State sponsored Business Owner visa, or, a Senior executive (provisional) or State sponsored Senior executive (provisional) visa, or, an Investor (provisional) or state sponsored investor (provisional) visa	You are the holder of a Business Owner (provisional) or State sponsored Business Owner visa, or, a Senior executive (provisional) or State sponsored Senior executive (provisional) visa, or, an Investor (provisional) or state sponsored investor (provisional) visa, or the holder of a subclass 457ie visa.
You must meet all of these requirements:- 1. Throughout the 12 months immediately before the application is made, your (or your and your spouse's) main business /ess employed at least 2 full time employees (Aus citizen, or PR) 2. Throughout the 12 months immediately before the application is made, the net value of your (or your and your spouse's) personal and business assets in Australia has been at least A\$ 250 000 3. Throughout the 12 months immediately	Unless the appropriate regional authority has determined that there are exceptional circumstances, you meet at least 2 of the following 3 requirements:- 1. Throughout the 12 months immediately before the application is made, your (or your and your spouse's) main business /ess employed at least 1 full time employee (Aus citizen, or PR) 2. Throughout the 12 months immediately before the application is made, the net value of your (or your and your spouse's)

before the application is made, the net value of your (or your and your spouse's) assets in the main business/ess is at least A\$ 100 000	personal and business assets in Australia has been at least A\$ 250 000 3. Throughout the 12 months immediately before the application is made, the net value of your (or your and your spouse's) assets in the main business/ess is at least A\$ 75 000
In the 12 months immediately before the application is made, your main business/ess had a turnover of at least A\$ 300 000	In the 12 months immediately before the application is made, your main business/ess had a turnover of at least A\$ 200 000
You had, and continue to have, an ownership interest in one or more actively operating main businesses in Australia for at least 2 years immediately before application is made.	
For each business, an Australian Business Number (ABN) has been obtained and all Business Activity Statements (BAS) required by the ATO for that period have been submitted to the ATO, and are included in the application	

- You have not been engaged in a business where the provision of professional or technical or trade services took up more than 50% of your time
- Neither you or your spouse have a history of involvement in a business or investment activities of a nature not generally acceptable in Australia
- You have been in Australia as the holder of one of the qualifying visas for a total of at least one year in the two years immediately before application is made.

8. EMPLOYEE – RELATED MATTERS

Employment standards are regulated by State and Federal awards as well as Australian Workplace Agreements (AWA). Awards and agreements are legal documents setting out minimum standards for workers who are paid under them.

They usually contain information on the following topics:

- Pay rates
- Job classifications
- Sick Leave
- Hours of Work
- Annual Leave
- Public Holidays
- Superannuation
- Overtime
- Rates of pay for weekends
- Maternity Leave
- Meal times and tea breaks
- Redundancy
- Time records

What is an Award?

Awards set out minimum wages and conditions of employment for specified employees. Awards may be Federal or State. Federal awards are made by the Australian Industrial Relations Commission (AIRC).

Federal awards normally cover key terms and conditions of employment. This includes:

- minimum rates of pay and allowances;
- overtime, shift penalty and other penalty rates;
- hours of work; and
- leave provisions; eg sick/personal leave, recreation leave.

Awards may include provisions about specific issues such as superannuation or long service leave. More than one award may apply to an employee but provide for different parts of the overall employment package. eg. the Clerks (ACT.) Award 1998 provides for pay and conditions, and the Clerks (Long Service Leave ACT.) Award 2000 provides for long service leave.

The Workplace Relations Act 1996 requires that federal awards are to be simplified so that they only include a safety net of minimum wages and conditions and do not regulate matters that are better dealt with at the workplace.

The matters that may be included in an award have been limited to twenty ‘allowable’ matters:

- classifications of employees and skill-based career paths

- ordinary time hours of work and the times within which they are performed, rest breaks, notice periods and variations to working hours (but awards will not be able to set maximum or minimum hours of work for regular part-time employees)
- rates of pay (such as hourly rates and annual salaries), rates of pay for juniors, trainees or apprentices, and rates of pay for employees under the supported wage system
- incentive based payments (other than tallies in the meat industry), piece rates and bonuses
- annual leave and leave loadings
- long service leave
- personal/carer's leave, including sick leave, family leave, bereavement leave, compassionate leave, cultural leave and other like forms of leave
- parental leave, including maternity and adoption leave
- public holidays
- allowances
- loadings for overtime, casual and shift work
- penalty rates
- redundancy pay
- notice of termination
- stand-down provisions
- dispute settling procedures
- jury service
- type of employment, such as full-time, casual, regular part-time employment and shift work (but awards will not be able to restrict the number or proportion of these types of employees). Awards can include provisions setting a minimum number of consecutive or a regular pattern in the hours that a regular part-time employee works.
- superannuation (The Government has introduced legislation to remove superannuation from allowable award matters, but this legislation has not been passed at the time of writing)
- pay and conditions for outworkers but only to the extent necessary to ensure that their overall pay and conditions are fair and reasonable in comparison with employees who perform the same kind of work at an employer's business or commercial premises.
- anti-discrimination clauses may also be found in an award.

Awards can also include provisions that are incidental to these allowable matters and necessary for the effective operation of the award; for example, the date and period of operation of the award.

From 1 July 1998 any non-allowable matters still in awards are not enforceable. The AIRC is currently reviewing each award to remove provisions that have ceased to have effect, and to ensure that the award is easy to understand and will operate flexibly.

The difference between a State and Federal award

The Federal and State workplace relations systems are administered separately. Federal awards are the responsibility of the AIRC. State awards are the responsibility of State industrial tribunals.

Federal awards are generally made by the AIRC as a settlement of an inter-State dispute (a dispute involving employees and employers in more than one State). Victoria, the Northern Territory and the Australian Capital Territory are only covered by Federal awards, rely on other reasons as the basis for their Federal award coverage.

State awards are made by State industrial tribunals. State awards are similar in content to federal awards, and also set out minimum pay and conditions of employment for groups of employees.

A significant difference between Federal and State awards is the way they apply to employers:

Federal awards or agreements can apply to an employer (and therefore relevant employees working for that employer) when:

- the employer is specifically named in the parties bound clause; or
- the employer is a member of a federally registered employer organisation named in the parties bound clause; eg. the Australian Hotels Association; or
- an employer buys a business that is already named in a Federal award - the award then applies to the new owner; or
- (only in the ACT or NT) where the AIRC under s141 of the Workplace Relations Act 1996, declares an award to be a common rule award for a particular industry. In the ACT and NT 'Common Rule' awards can apply to all employees in a particular industry whether or not their employers are named in the award as being respondents to the award.

A State award generally applies to every employer who employs a person in an industry or occupation covered by the award.

Over award payments

Awards specify minimum wage rates and employment conditions that place an obligation on employers covered by the award.

Employers may pay employees more than the minimum wage rate. Also, some employers may offer additional or more generous conditions than those in the relevant award. This may be to attract and retain staff.

Over award payments: are higher rates of pay than the minimum award wage rate, where these higher wage rates are not included in a certified agreement or Australian Workplace Agreement (AWA).

Informal agreement: if employees receive higher wage rates (over award payments) or more generous conditions, that are not included in a certified agreement or AWA.

FEDERAL AGREEMENTS

Under the Federal Workplace Relations Act 1996 (the WR Act), certified agreements (CAs) can be made between: an employer (a constitutional corporation, or an employer in Victoria or a Territory, or an employer in a prescribed area of interstate or overseas trade and commerce, or the Commonwealth), and a federally registered union(s), to cover a single business or part of a single business (s. 170LJ of the WR Act).

A federal CA must meet a range of criteria before it can be certified by the Australian Industrial Relations Commission (the Commission). This includes:

- the agreement passes the no-disadvantage test, that is, its certification would not result, on balance, in a reduction in the overall terms and conditions of employment of employees covered by the agreement when compared with the relevant award, or designated award, and laws the Commission considers relevant;
- the agreement has the genuine approval of a majority of employees who would be covered by it;
- the employer explained the terms of the agreement to employees in a manner appropriate to the employees' particular circumstances and needs — for example, if the employees included women, people from a non-English speaking background or young people;
- the agreement contains a dispute settlement procedure, which may, if the Commission approves, empower the Commission to settle disputes over the application of the agreement, or appoint a board of reference for the purpose of settling such disputes;
- if the agreement was made directly with employees, the employer did not coerce, or attempt to coerce, any employee not to request a union to represent him/her, or to withdraw a request for union representation;
- the agreement specifies a nominal expiry date, which cannot be more than three years after the agreement comes into operation;
- the agreement is consistent with the termination of employment provisions of the WR Act;
- in negotiating the agreement, the employer (or someone acting on the employer's behalf) did not discriminate between unionists and non-unionists, or between members of different unions, or contravene the freedom of association provisions of the WR Act;
- the agreement does not discriminate against an employee for reasons including race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin; and
- if the agreement applies only to part of a single business that is neither a geographically distinct part of the business nor a distinct operational or organisational unit of the business, the Commission considers that the part is not

defined in such a way as to unfairly exclude employees whom it would be reasonable for the agreement to cover.

CAs prevail over State awards or State agreements to the extent of any inconsistency. CAs prevail over inconsistent terms and conditions of employment specified in a State law, but operate subject to any provisions of State law dealing with occupational health and safety, workers' compensation, apprenticeship, or other prescribed law.

Key features of Australian workplace agreements

An Australian workplace agreement (AWA) is an individual agreement between an employer and an employee about the employee's wages and conditions of employment. AWAs may be negotiated collectively, but are required to be signed individually. Employees and employers are able to appoint a bargaining agent to act on their behalf in relation to the making, approval, variation or termination of an AWA. The appointment must be in writing. Bargaining agents, including unions, are neither party to, nor bound by an AWA.

The WR Act prohibits the disclosure of information by staff of the Office of the Employment Advocate and the registry of the Commission that would identify the parties to an AWA unless authorised to do so.

An AWA must meet a range of criteria before it can be approved by the Employment Advocate, including that:

- it passes the no-disadvantage test, that is, its approval would not result, on balance, in a reduction in the overall terms and conditions of employment of the employee covered by the agreement when compared with the relevant award or designated laws;
- it does not restrict disclosure of AWA details by the parties;
- the employee received a copy of the AWA at least the required number of days before signing the AWA. This is 14 days for existing employees, and five days for new employees;
- the employer explained the effect of the AWA to the employee prior to the employee signing the AWA;
- the employee genuinely consented to making the AWA; and
- in a case where the employer failed to offer an AWA in the same terms to all comparable employees, the employer did not act unfairly or unreasonably in failing to do so

AWAs are also required to contain anti-discrimination provisions and dispute resolution procedures. If they do not contain such provisions, they are taken to include model provisions.

If the Employment Advocate has concerns about whether the AWA passes the no-disadvantage test, the Employment Advocate must approve the AWA if those concerns are resolved by either a written undertaking given by the employer or other action by the parties. Such an undertaking would, if accepted, then form part of the agreement.

If the Employment Advocate's concerns in relation to the no-disadvantage test are not resolved by any form of undertaking or other action, the Employment Advocate must refer the AWA to the Commission.

Provided that certain criteria are satisfied, the WR Act provides limited immunity from actions under statute or common law for industrial action and lockouts undertaken during bargaining for an AWA.

During the term of an AWA, the AWA operates to the exclusion of any State award or State Agreement that would otherwise apply to the employee's employment.

9. PRIVACY LEGISLATION

Australian privacy legislation seeks to protect individuals from the unfair or unauthorised use of their personal information.

The amendments to the *Privacy Act 1988* extend a set of National Privacy Principles (NPPs) to the private sector. The NPPs were originally developed by the Privacy Commissioner in 1997 through a process of consultation with industry and consumer groups. The NPPs differ from the Information Privacy Principles (IPPs) which apply to Commonwealth Government agencies.

The National Privacy Principles set out minimum standards for the handling of personal information. To a large extent these principles reflect the OECD's *Guidelines Governing the Protection of Privacy and Transborder Flow of Personal Data* from 1980. In the shortest form, they may be summarised in this way:

- **Collection of personal information:** Collection must be necessary for an organisation's activities, information must be collected lawfully and fairly, and as a general principle must be collected with the individual's consent.
- **Use and disclosure of personal information:** As a general principle, information can only be used or disclosed for its original purpose unless the person has consented to its use or disclosure for another purpose. Exemptions apply to initial contact for direct marketing (if consent wasn't practicable originally) and other situations such as when there are issues of law enforcement, public safety or protecting the company from fraud.
- **Accuracy of personal information:** Organisations must take reasonable steps to ensure that they keep personal information accurate, complete and up to date.
- **Security of personal information:** Organisations must take reasonable steps to protect the personal information which they hold from misuse, loss unauthorised access, modification or disclosure.
- **Openness in relation to the organisations practices:** Organisations which collect personal information must be able to document their practices and must make this information available on request.
- **Access and correction rights:** As a general principle, organisations must give individuals access to their personal information and must allow them to correct it or explain something with which they disagree, unless disclosing this would have an unreasonable impact on someone else's privacy. This principle is subject to exemptions such as if this disclosure would compromise a fraud investigation.
- **Use of government identifiers:** Organisations cannot use a government agency's identifier as it's identifier. This would cover items such as Medicare numbers, a Tax File Number (which in any case is covered by other legislation) or any future identity numbers assigned by a government agency.
- **Anonymity:** Organisations must give people the option of entering into transactions anonymously where it is lawful and practicable. For example, this would apply to travel on a bus, but not to opening a bank account.

- **Restrictions on transborder data flows:** As a general principle, organisations can only transfer the personal information about an individual to a foreign country if they believe that the information will be protected by a law or a contract which upholds privacy principles similar to the NPPs.
- **Special provision for sensitive personal information:** A higher level of privacy protection applies to sensitive personal information, which includes information about a person's health, political or religious beliefs or affiliation, and sexual preference. This information must only be collected with the individual's consent.

Privacy Codes

By default, the NPPs apply to organisations - that is, unless the organisation is a signatory to a voluntary code which has been approved by the Privacy Commissioner. However, the legislation leaves open the option of industry groups or individual firms developing their own codes of conduct in place of the NPPs. Codes can be developed by any organisation or group, but cannot impose a lower standard or privacy protection than the NPPs. Codes must be approved by the Privacy Commissioner after a process of consultation. The codes are intended to give the legislation maximum flexibility while retaining a consistent standard of privacy protection. The Privacy Commissioner recently released a set of guidelines covering the requirements which must be met for a code to meet the Commissioner's approval.

10. PUBLIC SECURITIES INDUSTRY

The primary aim of securities regulation are to promote commercial certainty, reduce business costs and increase market efficiency.

Securities Industry Law is regulated by the common law as well as statutes. In addition there are also additional forms of regulation applicable to the securities industry through rules made by self-regulatory bodies, such as the Australian Stock Exchange and the Sydney Futures Exchange.

The Corporations Act 1989 (Cth) and the Australian Securities and Investment Commission Act 1989 (Cth) is the primary source of law. The Corporations Act 1989 however, only directly applies to the Australian Capital Territory (ACT). By agreement between the States, the Northern Territory and the Commonwealth, that ACT law applies, by application of laws legislation, in the States and the Northern Territory.

ASIC,

Formerly the Australian Securities Commission, is now responsible for consumer protection in financial products covering superannuation, life insurance, general insurance and deposit taking (but not credit).

ASIC retains all the powers of the ASC, that is, it is the Commonwealth Government body responsible under the Corporations Law for the regulation of companies and the securities and futures industries. In addition, ASIC has acquired the function of monitoring and promoting market integrity and consumer protection in relation to the Australian financial system, the provision of financial services and the payments system.

ASIC was formed in 1998 as part of the government's response to the financial systems inquiry which recommended a reorganisation of the framework for prudential regulation. ASIC now assumes the powers of the Insurance and Superannuation Commission, the Australian Competition and Consumer Commission and the Australian Payments System Council in relation to market integrity and consumer protection for financial products and services.

11. OTHER WEBSITES OF INTEREST

To help you find information about the topics that we have discussed, this section lists some key websites under the headings of each chapter of this guide. Many of these websites also provide links to other useful resources

4. Introduction

KOFFELS Solicitors and Barristers

www.koffels.com.au

5. Australia's Political, Legal and Economic Environment

Federal

General Hyperlink index

<http://www.gksoft.com/govt/en/au.html>

Government Services for Australians

www.australia.gov.au

Australian Trade Commission

www.austrade.gov.au

National Library of Australia: Australian Government Information

<http://www.nla.gov.au/oz/gov/>

Parliament of Australia

<http://www.aph.gov.au/>

Invest Australia

<http://www.investaustralia.gov.au/index.cfm?menuid=BF22E9-A579-684F-A1EADF20C05C9C5C>

State and Territory

New South Wales Government

<http://www.nsw.gov.au/>

Northern Territory Government

<http://www.nt.gov.au/>

City of Sydney

<http://www.cityofsydney.nsw.gov.au/>

Government of Western Australia

<http://www.wa.gov.au/>

Welcome to the Australian National Territory

<http://www.act.gov.au/index.jsp>

Victoria Online

<http://www.vic.gov.au/index.jsp>

Queensland Government

<http://www.qld.gov.au/>

6. Foreign Investment Considerations

Australian Treasury

<http://www.treasury.gov.au/home.asp?ContentID=521>

Foreign Investment Review Board

<http://www.firb.gov.au/content/default.asp>

Australian Trade Commission

<http://www.austrade.gov.au/>

Invest Australia

<http://www.investaustralia.com/locating/advantage.htm>

Australian Stock Exchange

<http://www.asx.com.au/asx/homepage/index.jsp>

7. Australian Trade Policy

Australian Trade Information Services

<http://www.austradeinfo.com/policy.htm>

Australian Department of Foreign Affairs and Trade Publications

<http://203.6.165.64/publications/>

8. Forms of Business Organization

Doing Business in Australia

<http://www.executiveplanet.com/business-etiquette/Australia.html>

Invest Australia; locating in Australia
<http://www.investaustralia.com/locating/bizfaq.htm>

9. Tax Considerations

Australian Taxation Office
<http://www.ato.gov.au/>

ATO Tax Reform Website
www.taxreform.ato.gov.au

New Tax System Advisory Board
www.taxreform.ato.gov.au/advisory_board/advisory.htm

Review of Business Taxation
www.rbt.treasury.gov.au

4. Business Immigration

Department of Immigration and Multicultural and Indigenous Affairs
<http://www.immi.gov.au/>

Australian Consulate General
http://www.australia.org.hk/eng/visa/faq_business.htm

5. Employee-Related Matters

Australian Workplace Cth Australia
<http://www.workplace.gov.au/Workplace/WPDisplay/0,1251,a0%253D0%2526a1%253D517%2526a2%253D624,00.html>

International Occupation Safety and Health Regulations; Australian Legislation
<http://www.ilo.org/public/english/protection/safework/cis/legosh/aus/>

6. Privacy Legislation

Federal Privacy Commissioner Australia
<http://www.privacy.gov.au/>

7. Public Securities Legislation

Australian Securities Investment Commission
<http://www.asc.gov.au/asic/asic.nsf>

12. MOVING FORWARD

About Our Firm

Koffels Solicitors and Barristers is a prominent boutique commercial firm located in the CBD Sydney. KOFFELS has a reputation for being hard and diligent negotiators and litigators. The firm's rapid growth has been based almost solely upon its reputation and the resulting referrals. We practice in all areas of law however our foundation is in commercial law and litigation and one of our senior solicitors is a Law Society Accredited Specialist in the field. We can advise on all areas of interest to commercial clients including business start-ups, joint ventures and partnerships, distributions and agency, merchandising and franchising, advertising and marketing, terms and conditions of business, and commercial contract law. We can also assist clients in company and business mergers, acquisitions and sales, restructures and amalgamations, banking and debt financing.

THE KOFFELS ADVANTAGE

OUR ADVICE

Practical advice with a recommended solution. Innovative approaches and commercially realistic recommendations as to solutions with reasonable costs.

REPORTING

Keeping clients advised of progress with billing that clarifies the work carried out by each staff member each day is provided to all clients.

Keeping track of cost estimate provided to clients with regular assessment of cost incurred to date compared with the estimate provided to the client.

Personalised service with at least, two practitioners with knowledge of each matter. After hours contact always available.

TECHNOLOGY

Koffels maintain an advanced computer system and ever changing software to support the delivery of our services and the management of matters. Accounting and time recording are based on sophisticated software to ensure accurate and detailed information is provided to clients in their bills.

LANGUAGES SPOKEN

We have members of staff who speak Italian, French, German, Mandarin, Macedonian and Hindi.

If you would like any further information about Koffels or how we might be able to be of service to you, please do not hesitate to contact us, admin@koffels.com.au or visit our website at www.koffels.com.au

13. ACKNOWLEDGEMENTS

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