DOING BUSINESS IN

AUSTRALIA

MANN JUDD
ADVISORY AND ACCOUNTING

FOREWORD

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Laws in Australia that regulate businesses and taxes can be complex. Therefore, we would advise you to consult an HLB member firm in Australia before taking any specific action.

Issue date: May 2024

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ABOUT HLB

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SYDNEY, NEW SOUTH WALES

GENERAL INFORMATION

GEOGRAPHY

Australia has a land mass of 7,682,300 square kilometres with wide variations in climate and topography. There are rain forests and vast plains in the north (almost 40% of the country lies in the tropics), snowfields in the south-east, desert in the centre and fertile croplands in the east, south and south-west. It is the world's sixth largest country in area and the only nation that occupies an entire continent.

Although geographically isolated from its major trading partners, Australia has a diversified economy characterised by large scale resource development, highly productive agriculture and a range of manufacturing industries.

Daylight savings is observed in the states of Victoria, New South Wales, Tasmania, South Australia, the Australian Capital Territory, and Norfolk Island. Daylight savings operates from the first Sunday of October, when clocks are forwarded one hour, to the first Sunday of April, when clocks rewind one hour.

AUSTRALIAN LAW

Australia's legal system is based on the English System. Depending upon the type of investment proposed, an overseas investor in Australia would need to have regard to the laws and regulations of one or more of the federal, state, territory or local governments.

CURRENCY AND LANGUAGE

Australia has a decimal system of currency, the unit being the dollar (A$), which is divided into 100 cents. Australia does not have exchange controls.

English is the official language but, as a result of considerable immigration in the last fifty years, many foreign languages are spoken by ethnic community groups. Australian English does not differ significantly from other forms of English, although many colloquial expressions are unique to Australia.

POPULATION

Australia is a multicultural country with a population of approximately 25 million. The population is concentrated in capital and other major cities, mainly on the south and east coasts of the continent. This results from a variety of factors including climate, physical characteristics of the continent, changing agricultural practices, exploitation of mineral resources and personal preference.

ECONOMY AND ECONOMIC ARRANGEMENTS

Australia's prosperity is largely dependent on trade. It is geographically remote from most of its major markets and its traditional allies. It is a relatively affluent and resource rich country in a populous, developing and rapidly changing region.

Initially, Britain and the Commonwealth countries were a central element of Australia's foreign policy and economic activity. Close relations now exist with the USA and many Asian countries. While links with Europe remain important factors to Australia in terms of cultural tradition, security, strategic interests and trade, the focus has shifted significantly to the Asia-Pacific region.

Awareness of the importance of neighbouring states in Asia and the South Pacific has led successive Australian governments to promote and maintain friendly and co-operative relations with them to promote the stability and security of the region and to develop trade, investment and technology exchange.

Australia gives special attention to its relations with China, Indonesia, Japan, ASEAN (Association of South East Asian Nations) and its members, New Zealand, Papua New Guinea and the other South Pacific states. APEC (Asia Pacific Economic Co-operation Forum) has also been seen as a way of increasing Australia's trade with its Asian neighbours and has been actively promoted by Australia's Government.

Australia is currently a member of the G20, OCED, WTO, UN, ANZUS, the Pacific Islands Forum and the Commonwealth of Nations.

GOVERNMENT

Australia's political institutions and practices follow the Western democratic tradition, reflecting the British Westminster System.

Australia is a Constitutional Monarchy and has been a federation since 1 January 1901 with a Federal Government (Commonwealth) and separate Governments of each of the six sovereign states of New South Wales (whose capital is Sydney), Victoria (Melbourne), Western Australia (Perth), Queensland (Brisbane), South Australia (Adelaide) and Tasmania (Hobart). There are two mainland territories within federal jurisdiction, the Australian Capital Territory (ACT) where the Federal Parliament is located in Canberra, and the Northern Territory (NT) with Darwin as its capital city. There are also several offshore territories.

There are two houses of the Federal Parliament, the House of Representatives being the Lower House and the Senate being the Upper House. The Head of the Government is the Prime Minister. Each State Parliament, with the exception of Queensland, also has two houses, the lower house being the Legislative Assembly and the Upper House being the Legislative Council. The head of each state government is the Premier. Both the ACT and the Northern Territory have one house only, and the head of each territory government is the Chief Minister.

Australia has a Federal Constitution and similarly, each of the states has its own Constitution. The Federal Constitution vests certain exclusive legislative powers in the federal government and confers numerous other non-exclusive powers which may be exercised by the states until federal legislation overrides them. Other legislative powers not vested in the federal government may be exercised exclusively by the state governments. Where federal law conflicts with state law the former takes precedence.

Foreign investment, exchange control, immigration, banking, taxation, life assurance, customs and excise, the media and communications, trade practices, patents, trademarks, copyright, shipping and overseas trade are examples of areas regulated by the federal government. Mining, land tenure, law enforcement, motor vehicle registrations, partnerships and certain special types of taxation, such as property transfer taxes, are examples of areas regulated by state governments.

In addition, there is a third layer of government, local government, which operates under state laws in defined areas through elected local councils which are responsible for regulating such things as building construction, road construction and maintenance and other local infrastructure services.

Australia imposes taxes on all three levels of government.

INVESTMENT FACTORS

FOREIGN INVESTMENT REVIEW BOARD (FIRB)

The Foreign Investment Review Board (the Board) is an advisory body which assists the Treasurer (the senior federal government finance minister) in the administration of foreign investment policy. The Chairman and Members of the Board have a wide range of business and other experience and provide the Government with a business-oriented and independent source of advice on foreign investment matters.

The main functions of the Board are:

- to advise the Government on foreign investment matters generally;
- to examine proposals by foreign interests for investment in Australia and to make recommendations to the Government on those proposals;
- to foster an awareness and understanding of the Government's policy in the community at large and in the business sector, both in Australia and abroad;
- to provide guidance, where necessary, to foreign investors on those aspects of their proposals that may not be in conformity with Government policy and suggest ways by which the proposals might be amended; and
- to maintain an awareness of the activities of foreign-controlled businesses operating in Australia.

Detailed information on the FIRB requirements can be found on its website at www.firb.gov.au.

Certain types of proposals by foreign interests to invest in Australia are subject to examination under foreign investment policy the *Foreign Acquisitions and Takeovers Act 1975*, the *Foreign Acquisitions and Takeovers Fees Imposition Act 2015*, and their associated regulations. There are also industry-specific legislation governing foreign ownership in airports, airlines and financial businesses.

For the purposes of foreign investment policy, a foreign interest is:

- a natural person not ordinarily resident in Australia;
- a foreign-controlled corporation or business;
- any corporation or business in which there is a substantial foreign interest regardless of whether the corporation or business is foreign-controlled;
- a substantial foreign interest is an interest of 20% or more in the ownership or voting power of a corporation or business by a single foreign interest either alone or together with associates; or, an interest of 40% or more in aggregate in the ownership or voting power of a corporation or business by foreign interests and their associates, if any.

Proposals which require registration or approval of the Foreign Investment Review Board include:

NON-LAND INVESTMENTS

INVESTOR	ACTION	THRESHOLD – MORE THAN: *
All investors	National security businesses	$0
	Australian media businesses	$0
Private investors from certain FTA partners[5]	Non-sensitive business	$1,427m
	Sensitive businesses[6]	$330m
	Agribusiness	For Chile, New Zealand, and the United States, $1,427m
		Others, $67m (cumulative)
Private investors not from a certain FTA partner	Businesses (sensitive & non-sensitive)	$330m
	Agribusiness	$71m
	Service businesses (non-sensitive)	For India, $533m[7]
Foreign government investors	All investments	$0[8]

*Figures all in Australian Dollars ($AU)

[5] The certain FTA partners are: Chile, China, Hong Kong, Japan, New Zealand, Peru, Singapore, the Republic of Korea, the United States of America, and any other countries not otherwise listed (other than Australia) for which the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), done at Santiago on 8 March 2018, is in force (i.e. Canada, Mexico, Malaysia and Vietnam). To be eligible for these thresholds, the immediate acquirer must be an entity formed in one of these countries. An investor acquiring through a subsidiary incorporated in another jurisdiction will be subject to the relevant thresholds of the subsidiary's jurisdiction.
[6] Sensitive businesses (see section 22 of the *Foreign Acquisitions and Takeovers Regulation 2015*) include: media; telecommunications; transport; defence and military related industries and activities; encryption and securities technologies and communications systems; and the extraction of uranium or plutonium; or the operation of nuclear facilities.
[7] See subsections 51(2) and 51(3) of the *Foreign Acquisitions and Takeovers Regulation 2015* [commences 29 December 2022]
[8] Some limited exceptions to this rule apply (see section 56 of the *Foreign Acquisitions and Takeovers Regulation 2015*).

LAND INVESTMENTS

INVESTOR	ACTION	THRESHOLD – MORE THAN:
All investors	National security land	$0
	Residential land	$0
	Vacant commercial land	$0
Private investors from certain FTA partners[1]	Agricultural land	For Chile, New Zealand, and the United States, $1,427m
		Others, $15m (cumulative)
	Developed commercial land	$1,427m[2]
	Mining and production tenements	For Chile, New Zealand, and the United States, $1,427m
		Others, $0
Private investors not from a certain FTA partner	Agricultural land	For Thailand, $50m
		Others, $15m (cumulative)
	Developed commercial land	$330m
		Where the land is sensitive, $71m
		For India, non-sensitive[3] land for the supply of services, $533m[4]
	Mining and production tenements	$0
Foreign government investors	All investments	$0

*Figures all in Australian Dollars ($AU)

[1] The certain FTA partners are: Chile, China, Hong Kong, Japan, New Zealand, Peru, Singapore, the Republic of Korea, the United States of America, and any other countries not otherwise listed (other than Australia) for which the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), done at Santiago on 8 March 2018, is in force (i.e. Canada, Mexico, Malaysia and Vietnam). To be eligible for these thresholds, the immediate acquirer must be an entity formed in one of these countries. An investor acquiring through a subsidiary incorporated in another jurisdiction will be subject to the relevant thresholds of the subsidiary's jurisdiction.
[2] For Hong Kong and Peruvian investors however, where developed commercial land is also sensitive land (see subsections 52(5) and 52(6) of the *Foreign Acquisitions and Takeovers Regulation 2015*), a threshold of $67 million will apply.
[3] Sensitive developed commercial land (see subsection 52(6) of the *Foreign Acquisitions and Takeovers Regulation 2015*) includes: mines and critical infrastructure (for example, an airport or port).
[4] This applies to developed commercial land acquired predominantly for the supply of a service through a commercial presence in Australia (see subsection 52(5), table item 3A of the *Foreign Acquisitions and Takeovers Regulation 2015* [commences 29 December 2022]).

Sensitive businesses include:

- Media;
- Telecommunications;
- Transport;
- Defence and military related industries and activities;
- Encryption and securities technologies and communications systems;
- The extraction of uranium or plutonium; and
- The operation of nuclear facilities.

Low threshold land includes mines and public infrastructure.

IMPORT AND EXPORT CONTROLS

Import Controls

The importation of goods into Australia is controlled primarily by regulations made under the *Federal Customs Act 1901* and tariffs applicable under the *Customs Tariff Act 1995* which are administered by the Australian Customs Service (ACS). The purposes of these regulations are, in essence, to protect Australian industry and consumers and to raise revenue.

Australia has free trade agreements in place and concession schemes which may reduce the amount of duty paid on goods imported into Australia. Typically, concessions are granted only where substitutable goods are not made in Australia.

Goods may be prohibited from importation either absolutely or by reference to their place of origin or, unless certain specified conditions or restrictions are complied with. The regulations also prohibit the importation of certain goods without a licence or governmental approval.

All goods imported into Australia must be cleared by Customs whether arriving by air, sea or post.

Customs duty and/or Goods and Services Tax (GST) are levied on many items entering Australia.

Import Documentation

Customs does not require importers to hold an import licence. However, depending on the nature of the commodity and regardless of value, owners may need to obtain permits to clear the goods.

For example, permits are required prior to the importation of firearms and weapons which are prohibited or restricted under the *Customs (Prohibited Imports) Regulations 1956*.

Clearance of Commercial Consignments

Fees apply to cargo reporting and import entry processing for goods. Commercial Customs clearances may be arranged by the owner or a customs broker who will usually charge a fee for the service. Brokers specialise in clearing imported goods and are licensed by Customs.

Customs Valuation System

Customs determines the value of goods imported into Australia based on the World Trade Organization (WTO) Valuation Agreement.

The most common method used is the Transaction Value method, which is based on the price actually paid (or payable) for the imported goods. However, in applying the Transaction Value method the transaction must be at arm's length.

If the price paid (or payable) cannot be accepted as the basis for determining the Customs value, then Customs would consider the alternate methods provided by the WTO Valuation Agreement.

The "price", if not in Australian dollars will be converted to Australian dollars at the ruling rate of exchange on the day the goods were imported.

Indirect Taxes

The appropriate tariff classification for any goods imported must be supplied. Imported goods may be subject to one or more indirect taxes. These indirect taxes include the goods and services tax (GST), the wine equalisation tax and the luxury car tax.

Tariff Advice

Where importers are considering the importation of specific goods, they should obtain a Tariff Advice (TA).

Import Prohibitions and Restrictions

A range of legislation provides for the importation of certain goods into Australia to be prohibited absolutely or conditionally.

Goods that may be subject to import prohibitions and restrictions include:

- certain animal, marine and plant life and their products;
- goods bearing certain official emblems and designs;
- goods that may be hazardous to health (including chemicals, radioactive material and therapeutic substances);
- goods bearing incorrect or misleading markings and packaging;
- goods that infringe trademarks or copyright;
- certain goods relating to cultural heritage;
- goods subject to quarantine controls;
- ozone depleting substances;
- weapons;
- narcotic and psychotropic substances; and
- goods subject to censorship controls.

Commerce Trade Descriptions

Importers are required to ensure that goods entering the commerce of Australia are correctly marked.

Trade descriptions markings must be:

- in English;
- in prominent and legible characters;
- on a principal label or brand attached to the goods in a prominent position in a manner as permanent as is practicable;
- and in certain circumstances include the country of origin.

Temporary Import/Export of Commercial Goods

Goods may be brought into Australia on a temporary basis without the payment of Customs duty or taxes for a period of up to 12 months. These goods are referred to as Temporary Imports.

Another way goods can be brought into Australia on a temporary basis is under the cover of a "carnet" which is an international "passport for goods". All temporary imports must be re-exported within the approved period.

Rules of Origin

Rules of Origin (ROO) are applied to determine which country goods originate from for international trade purposes as goods imported from certain countries attract a lower (preferential) rate of duty.

Trade between Australia and New Zealand, Fiji and the Pacific Forum Islands and other APEC members may be eligible for preferential rates of duty on imports.

Exporting Goods

Goods intended for export must be notified on an export entry. The exceptions are:

- personal or household effects of a passenger or crew of a ship or aircraft other than goods which are regarded as commercial consignments or are in commercial quantities;
- a postal consignment that has a Free On Board (FOB) value not exceeding $2000 except for:
  - dutiable goods on which duty is unpaid
  - excisable goods on which excise duty is unpaid
  - goods on which a person intends to claim a drawback of customs duty or excise duty
  - goods on which GST is payable but unpaid
- those in a consignment to which a single Australian Harmonised Export Commodity Classification (AHECC) applies, and the consignment is one exported by ship or aircraft that has an FOB value not exceeding $500 export for:
  - dutiable goods on which duty is unpaid
  - excisable goods on which excise duty is unpaid
  - goods on which a person intends to claim a drawback of customs duty or excise duty
  - goods on which GST is payable but unpaid
- containers, whether empty or loaded, that belong to a business in Australia and are exported on a temporary basis to be re-imported; and
- certain ships' stores.

GOODS SUBJECT TO EXPORT CONTROL

Exportation of goods is regulated under *Export Control Act 2020 (Cth)*. An exporter must apply to the appropriate government department or agency for a permit or licence to export where goods are subject to export controls under Customs or any other Commonwealth legislation.

The following is a non-exhaustive list of categories of goods that are subject to export control:

- certain animal, marine and plant life and their products;
- certain drugs and goods containing those drugs;
- certain goods bound for certain countries subject to United Nations embargoes, chemical warfare precursors, biological agents and toxins;
- certain human products;
- fresh fruit and vegetables;
- hazardous waste and ozone-depleting substances;
- military goods, civilian arms and explosives and goods containing dual-use (military/civilian) technology;
- nuclear-related equipment and materials;
- movable cultural heritage items like works of art, Aboriginal artefacts, precious stones and minerals, fossils and items of national significance; and
- wine, brandy and grape spirit.

Commerce Trade Descriptions

It is an offence for exporters to knowingly apply any false trade descriptions to goods destined for export or to export such goods.

Export Concessions

The Drawback scheme provides for a refund of import duty on goods that are subsequently exported. Excise duty may also be refunded on exported goods. Imported goods must be exported either unused since importation or exported in manufactured goods after further processing.

Indirect Taxes

Overseas customers will not bear the cost of the GST as the supply of goods for export is generally GST free.

AUSTRALIAN COMPETITION & CONSUMER COMMISSION (ACCC)

This regulatory body was formed in 1995 by merging the Trade Practices Commission and the Prices Surveillance Authority. The ACCC is responsible for administration of the *Trade Practices Act 1974* and covers consumer rights, anti-competition and unfair market practices, industry regulation and price monitoring.

FREE TRADE AGREEMENTS (FTA)

Australia has entered into international treaties with individual and groups of countries to facilitate greater trade and investment and promote economic integration, bloc

treaties include the Association of South East Asian Nations (ASEAN), and the Regional Comprehensive Economic Partnership Agreement (RCEP), Asia Pacific Economic Cooperation (APEC). Australia has strongly pursued FTAs and a number of FTAs are under negotiation. Australia is also a member of the World Trade Organization (WTO). Under WTO rules, FTAs must eliminate tariffs and restrictions on substantially all trade in goods between the member countries and all discrimination against service suppliers from member countries.

GOVERNMENT INCENTIVES

Federal Government

Investment in Australia should be made on a sound commercial basis as no tax holidays or special tax-free zones exist.

The Tax Act does however provide for certain capital allowances and increased deductions for Research & Development expenditure.

GrantConnect is the centralised location for Australian Government grants. To search for new opportunities, visit its website at https://help.grants.gov.au.

State Government

In recent years state governments have provided significant incentives to investors who can develop industries resulting in significant employment opportunities. These incentives usually take the form of reduced state taxes such as payroll tax or interest free loans or grants.

Export Market Development Grants

Austrade administers the Export Development Grant Scheme which provides grants to subsidise the cost of developing export markets.

SOURCES OF FINANCE

Banks

The Australian banking system was deregulated in the 1980s and is now comprised of one central bank (Reserve Bank of Australia) and a number of private banks. Since deregulation many foreign banks have commenced operation in Australia.

Sophisticated financial services are available from both traditional banking sectors and from the many merchant banks and finance companies now operating in Australia.

A major review into Australia's financial system was completed in 1997. The objective of the Review was to make Australia's capital markets and financial sector more efficient and competitive, both domestically and internationally.

The recommendations of the Wallis Committee of Inquiry resulted in the establishment of APRA (Australian Prudential Regulation Authority) to prudentially supervise deposit, taking institutions, life and general insurance companies and superannuation (pension) funds.

The review also resulted in the strengthening of the Reserve Bank's powers with its role focused on the objectives of Australia's monetary policy, overall financial system stability and regulation of the payments systems (clearing systems).

Australian banks generally require significant levels of collateral, predominantly real estate, to secure advances. Security may also be taken over inventories and receivables.

Other

Funding in the form of equity may be raised from the public via listing on the Australian Stock Exchange (ASX). A number of venture capital funds provide both debt and equity financing for start-up companies and management buy outs.

FOREIGN EXCHANGE CONTROL

Australia has no foreign exchange controls. The *Financial Transaction Reports Act 1988* requires that any cash transaction of A$10,000 or more involving the flow of funds to or from Australia be reported by cash dealers to AUSTRAC (the Australian Transaction Reports and Analysis Centre). Similarly, any cash transaction of A$10,000 or more within Australia must also be reported. There are exemptions available for certain transactions and certain businesses.

EMPLOYMENT REGULATIONS

Characterisation

In general, in Australia, if a relationship between a purchaser of labour and provider of labour is classified as one between an employer and an employee it is subject to statutory regulation. On the other hand, if the provider of labour is classified as a non-employee independent contractor then, subject to certain exceptions where statutes require particular groups of independent contractors to be treated as employees for particular purposes, contracting parties have a considerable degree of freedom in regulating their relationship.

In determining whether a person is an employee rather than an independent contractor, the courts examine the relationship as a whole, looking toward factors such as the degree of control which is exercised over that person's work, and the extent to which he or she is integrated into the business structure of the person to whom he or she provides labour.

It is not possible to contractually deem a person who is clearly an employee to be an independent contractor, but nevertheless in borderline situations appropriate contractual drafting may determine how a particular person is classified.

Industrial Awards/Enterprise Bargaining

The majority of employees in Australia are subject to the provisions of state, federal industrial awards or agreements negotiated by the parties. There are some groups of managerial and professional employees who lie outside award coverage.

Australian industrial awards are mainly concerned with wages and fringe benefits, hours of work and leave provisions. They are negotiated between employers and labour unions.

In the absence of agreement between unions and employers, awards are set by state and federal industrial commissions and tribunals. The Fair Work Commission (FWC) seeks to resolve industrial disputes by compromise and, in essence, takes a pragmatic rather than a legalistic view of matters before it, seeing as its principal task the achievement of industrial harmony rather than implementation of any particular rules or policies.

A general trend exists towards enterprise bargaining and employment contracts as a way to achieve labour market reform and increase labour efficiency and productivity.

Over June to December 2023, there will be new workplace law and changes to industrial awards. These represent the most significant change since the commencement of the current industrial relations system. Key changes include the removal of secrecy over pay, limiting the use of fixed term contracts, expanding the grounds for flexible working arrangements, expansion of multi-enterprise bargaining provisions, job advertisements, protection from discrimination and sexual harassment, and substantial wage equality.

Detailed information can be found at the Fair Work Ombudsman website at http://www.fairwork.gov.au.

Hiring and Firing

Apart from equal opportunity legislation aimed at preventing discrimination, an employer's right to hire labour as they see fit is essentially unrestricted. However, an employer does not have a totally free hand with regard to dismissal of workers. There are strong provisions preventing the dismissal of workers for union activities and legislative provisions to the effect that if a worker can show that their dismissal was harsh and unreasonable (even though it may not have been in breach of contract) they can seek damages or reinstatement.

The availability and extent of these remedies vary from state-to-state. Generally, if an employer can show that there were bona fide commercial reasons for the dismissal and that it was carried out in a fair manner, (e.g. a worker whose performance was regarded as inadequate is given a warning to either improve or be dismissed), such an application for damages or reinstatement is likely to be dismissed. Problems in this area can usually be avoided if appropriate standardised dismissal procedures are set up and adhered to by management.

Controls On Foreigners Working in Australia

A number of working, skilled and investor visas are available to people wishing to come to Australia to start a new business, manage a new or existing business, or invest in Australia. Visas range from 3 months at a time but can be for up to 6 months. Australian companies can also sponsor individuals to come to Australia to work in specified positions.

Australia has established a Migration Program which offers resident status to applicants who will use their skills and capital to actively engage in business of benefit to Australia.

Persons who have successful business records as either an owner or part-owner of a successful business (or in some cases senior executives employed in a major business) may apply.

To qualify under the Skills stream a number of criteria are applied such as business attributes (recent history and skills), age, English language skills and net assets legally available for transfer to Australia.

MODERN SLAVERY

The *Modern Slavery Act 2018* requires large businesses (with group revenue of at least A$100 million) to annually report on the actions taken to address the risk of modern slavery practices within their operations and supply chains, and the actions undertaken to assess and address those risks.

Modern slavery means conduct which would constitute slavery, servitude, forced labour, forced marriage, child labour or trafficking in persons.

TYPES OF BUSINESS ORGANISATIONS

GENERAL

In Australia, a business can be carried on as a sole trader, in partnership, through a joint venture, as a company, as an Australian branch of a foreign company, or through a trust.

The choice of business organisation is an important decision as each type has advantages and disadvantages regarding risks, liabilities, tax treatment, reporting, documentation and legal requirements.

SOLE PROPRIETORSHIP

A sole trader is an individual who carries on a business on his or her own behalf.

The individual may carry on a business under his or her own name or adopt a business name must be registered in the states and territories where the individual carries on the business. A register of business names is integrated with a register of company names to avoid name similarity.

The principal advantages of sole proprietorship are that it is comparatively easy to wind up or sell such a business; the costs of establishing and operating the business are generally less than those of other structures; and, apart from an individual tax return, there are generally no other reporting or disclosure requirements. On the death of the sole proprietor, the business will cease although it may be sold by the deceased's personal representatives.

The major disadvantage is that the sole proprietor has unlimited personal liability for his or her business obligations and debts. There may also be income tax disadvantages in operating this way. For example, there is at present a significant difference between the highest rate applicable to an individual's taxable income (47% including Medicare Levy) and that applicable to a company (between 25% and 30%).

PARTNERSHIP

A partnership is an arrangement where two or more individuals or corporations agree to carry on a business together or in common with a view to derive profit jointly.

A partnership is not a separate legal entity. Each partner is jointly and separately severally liable for the debts and obligations of the partnership and can have unlimited personal liability. In some states, a limited liability partnership can be established under which one or more general partners have unlimited liability and one or more limited partners have liability limited to the extent of their capital contribution but must not take part in the management of the partnership.

The rights and interests of the partners as between themselves, such as the ownership of partnership assets and share of profits, are largely determined by the terms of the partnership agreement. What is not covered in that agreement is regulated by legislation in each state and territory and at common law.

Partnerships (other than certain professional partnerships) are generally limited to twenty partners, with partners able to be corporations and non-Australian residents. The interest of a partner is not freely transferable in that the consent of the other partners is necessary before a partnership interest can be transferred.

The principal advantages of partnerships are that the arrangements need not be committed to writing, though, for taxation reasons and to avoid future disputes it is prudent to have the full terms of the partnership clearly set out; the degree of control among the partners can be agreed upon and management may be vested in a particular partner or a committee of partners; partnership losses can be offset against other income of individual partners for income tax purposes; and, subject to certain conditions, the partnership agreement is a flexible document which may be tailored to meet specific needs. For example, there may be differential profit sharing, unequal contribution of assets and labour and individual ownership of assets used for producing partnership income.

For taxation purposes, a partnership itself does not pay tax. However, partnership accounts and income tax returns must be prepared on the basis that the partnership is a single independent entity and taxpayer in its own right. The partners' share of net income is taxed as part of their personal income and the partners' share of net losses is, subject to certain conditions, deductible against other income of those partners. Thus the partners must adopt and be bound by a uniform treatment of partnership expenses and revenue for tax purposes. Certain deductions normally available to individuals and companies may not be available to the partners.

JOINT VENTURE

A joint venture involves two or more individuals or companies that come together to undertake a project. The joint venture can be incorporated or unincorporated.

An incorporated joint venture involves establishing a special purpose company, with each party as the shareholder. A joint venture company cannot offset profits and losses against profits and losses outside the company. Tax losses are carried forward to future years when assessable income is derived by the company.

An unincorporated joint venture is a contractual relationship between the parties. It is often used for property development or in the mining, oil and gas or other natural resources sectors, where pre-production costs are likely to be high. The joint venture agreement sets out the respective rights and obligations of the parties (such as the percentage ownership of each asset and share of revenue and expenses) and avoids the relationship being characterised as a partnership. If it were held to be a partnership, each party would be liable for the debts incurred by the other in the joint venture and certain elections under income tax law could not be exercised by each party separately.

An unincorporated joint venture is not required to lodge a separate income tax return. Rather, each party is treated separately for tax purposes and incorporates its share of the income and expenses of the venture into its own accounts and income tax return.

CORPORATION

General

The *Corporations Act 2001* (Corporations Act) provides for the following types of companies:

- Companies limited by shares (the personal liability of each shareholder is limited to their capital contribution)
- Companies limited by Guarantee (no shares are issued but shareholders are liable up to a nominated amount). As the amount of the guarantee cannot be varied, these are unsuitable for trading ventures where it is likely that capital needs will increase, and are generally used by clubs, charities and other not-for-profit organisations.
- Unlimited Companies (shareholders have joint and several unlimited liability for the company's obligations)
- No Liability Companies (shareholders may forfeit their shares instead of paying further capital calls and are not liable for the debts of the company). This is only available to the mining industry.

Companies can be established as a proprietary (private) or public company.

Proprietary company

Proprietary companies have a limit of 50 non-employee shareholders and restricted rights on the transfer of its shares and fundraising. Only companies limited by shares or unlimited liability companies can be proprietary companies. Proprietary Companies must add the suffix "Pty Limited" to their names if it is a limited liability company (or "Pty" only if it is an unlimited liability company). "Limited" may be shortened to "Ltd". Proprietary companies are often used as subsidiaries of domestic public companies or foreign companies.

Proprietary Companies are further classified as Large or Small with a company being "large" if it meets two of the following three tests:

- Consolidated revenue greater than A$50 million;
- Consolidated gross assets greater than A$25 million (book amount, not current value); and
- More than 100 employees.

Large proprietary companies are subject to more regulatory requirements, such as lodging audited financial statements with ASIC.

Public company

A public company can have an unlimited number of shareholders and may raise funds from the public. Public Companies must add "Limited" to their names, unless it is a company limited by guarantee or an unlimited liability company.

Only shares in Public Companies and No Liability Companies may be listed on the Australian Stock Exchange (ASX).

Legal Requirements

Constitution

All companies are required to have a Constitution setting out the rules under which the Company should operate.

Approval of at least 75% of members is generally required to amend the Constitution.

Management

Proprietary Companies must have at least one director who ordinarily resides in Australia. A proprietary company is not required to have a secretary. Public Companies must have at least three directors, at least two of whom must reside in Australia, and at least one secretary who resides in Australia. An officeholder can be both a director and a secretary. Directors and secretaries of companies must be natural persons. From 2022, all company directors must apply for a Director Identification Number with the Australian Business Registry Services (ABRS) before being appointed.

Alternate directors may be appointed and directors' meetings may be held anywhere in the world. The constitution of most companies allows for directors' meetings by teleconference and for a circulated resolution signed by all directors to be used as a substitute for a directors' meeting.

Where a company carries on a business, it must appoint a Public Officer who is responsible for compliance with tax legislation. The Public Officer must be an Australian resident.

Current and former directors carry risk and may be made personally liable for unpaid taxes (including PAYG withholding, superannuation guarantee and GST liabilities) and commitments entered into when the company is trading while insolvent. The director penalty regime was introduced to eliminate "phoenix activity", which is when a company is wound up to avoid paying its debts and a new company is established to continue the same business activities without the debt. Thus, it is important to obtain appropriate directors and officers liability insurance.

Registration

A company can be established by registering with ASIC or acquiring an existing proprietary company "off the shelf" (for about A$1,200). Fees payable to ASIC may be as low as A$310 a year.

All businesses carrying on an enterprise must register a company (legal) name, business (trading) name if different, and an Australian Business Number (ABN) and apply for any licenses and permits. Upon registration, the company is issued with an Australian Company Number (ACN). The ABN is used as the identifier for dealings with the Australian Government.

All companies will receive an annual statement from ASIC. Upon receipt, the company must pay the annual review fee, check and update company details and pass a solvency resolution.

Companies must maintain a register of shareholders, option holders, directors, and property. ASIC generally require notification of changes within a short period after they occur, including changes to shareholders, issued capital, holding company, location of registry, identity of officeholders, principal place of business, and any charges or mortgages against the company.

Registered office

A company must maintain a registered office in Australia. It is where official documents are served on the company.

For a public company, the registered office must be open to the public for at least three hours each day and display the company name and the words "Registered Office".

Accounting and Audit Requirements

All companies must maintain financial records of their activities. Permanent establishments must keep separate accounting records if their Australian turnover exceeds A$2 million.

Public Companies must also prepare an annual report, comprising of financial statements, directors' report and an independent audit report. This must be sent to all shareholders and filed with ASIC, making them available for public scrutiny. Some companies must also prepare half-yearly reports.

Similar requirements apply to Large Proprietary Companies unless they are part of a group that files audited group financial statements and has cross guarantees between all group companies for payment of liabilities.

Small Proprietary Companies are generally not required to appoint auditors and prepare annual financial statements unless they are controlled by a foreign corporation. Provided that they are not part of a "large" (same definition as above) group within Australia, foreign owned Small Proprietary Companies may apply to ASIC for relief from these requirements. Once audit relief has been granted, by ASIC, the relief will remain in place for subsequent years as long as the requirements for relief continue to be satisfied.

Corporate Governance and Directors' Duties

Through legal reform as a result of corporate collapses in the 1980s, the law now imposes more stringent requirements on directors' duties in relation to companies. The duty to act bona fide in the best interests of the company, the duty to exercise reasonable care and diligence in the performance of their duties and the duty to prevent insolvent trading are all codified in the Corporations Act and also in that body of law handed down by the Courts through judgements made in the 1990s and 2000s. Additionally ASX imposes its own corporate governance rules for listed Public Companies.

BRANCH

Foreign companies that wish to carry on a business in Australia typically either incorporate a wholly or partly owned subsidiary company or establish a branch office in Australia. A branch is not a separate legal entity; rather, a branch arises when a company carries out its activities at another location. Establishing a branch office involves registering as a foreign company with ASIC. It must have a registered office in Australia (which can be an accountant's office) and appoint a local agent who is responsible for ensuring that all obligations of the company are met.

Upon registration, an Australian Registered Business Number (ARBN) will be issued. The company can register a separate business (trading) name with ASIC if desired.

A registered foreign company must lodge a copy of its financial statements for its last financial year and annual thereafter. If the company is not required to prepare these in its home country, they must be prepared, audited and lodged in a form as those required for public companies. An exemption is available if the foreign company is not "large" or part of a "large group" (in terms of revenue, assets and number of employees) or is covered by consolidated financial statements which are lodged with ASIC. In such cases, the foreign company instead file an annual return with information including share capital, paid up capital, details of directors and local agents.

TRUST

Where a trust is established to carry on a business, the trustee owns and holds the assets of the business and runs the business for the benefit of the trust's beneficiaries. The beneficiaries have no right to directly control the use or disposal of any asset.

Generally, trustees are liable for their actions as trustee with a right of indemnity against the trust assets, provided they act within the scope of their authority. The trustee is liable for any debts that it incurs in connection with the business but, if the trustee is a company, liability will be limited to the assets of the company (if any) and the trust. A corporate trustee also enables perpetual succession.

The operation of the trust is regulated by a deed, and the flexibility of available trust structures means that the deed can be drawn up to suit most applications and requirements. The beneficiaries' entitlements may be in a fixed proportion (in a unit trust) or variable at the discretion of the trustee (in a discretionary trust).

Discretionary trusts have become a popular structure for small business or family investment. A typical family trust gives the person establishing the trust, and the trustee, wide discretionary powers in relation to the distribution of income and capital among the beneficiaries. The trust deed typically includes a provision giving the person establishing the trust the power to remove and replace the trustee, acquire or dispose of property, carry on business, borrow money and offer security for such borrowing.

A unit trust structure may be adopted where a beneficiary's entitlement to the income of the trust is dependent upon the number of units that the beneficiary holds. In many respects, units are similar to shares in a company, although there are fundamental legal differences between the two. A unit trust may list its units on a stock exchange.

Unit trusts are commonly used as a vehicle for non-family businesses, for example where there are a number of separate families, individuals or companies involved. The beneficial ownership of the trust property is divided into a number of fixed units which may be further divided into income and capital units.

The operation of unit trusts is governed by the same principles as other trusts. In unit trusts there is normally no discretion to distribute the beneficial interest in capital or income among unitholders.

The principal advantages of a trust structure are that trusts are relatively easy to form and are not subject to government controls on their formation or operation (except where a company acts as trustee, in which case, the requirements of the Corporations Act must be fulfilled). There may be significant taxation benefits in the use of a trust. A discretionary trust has considerable flexibility in the distribution of income and in most cases the key figure can maintain a significant degree of control.

The principal disadvantages of a trust structure are that a number of formalities are required to maintain a trust. There must be strict adherence to the terms of the trust deed and, in relation to a trustee company, there must be adherence to the provisions of its constituent documents and the Corporations Act. Also, there is legislation relating to the powers and duties of trustees to be adhered to and the courts have developed a complex set of rules relating to trusts. A trust structure will not enable beneficiaries to offset their share of trust losses against assessable income from other sources.

For taxation purposes, the trust itself will not be taxed on income that is distributed to beneficiaries. The beneficiaries will be taxed on their share of the trust income they are "presently entitled" to (even if they have not actually received the income). If the trust income is not fully distributed, the trustee will have to pay tax at the top marginal rate on the income retained in the trust. Trust losses cannot be distributed to beneficiaries but are carried forward to offset against future trust income.

BAROSSA VALLEY, SOUTH AUSTRALIA

TAXATION

GENERAL STRUCTURE

Framework

Income tax system is administered by the Australian Taxation Office (ATO) under the *Income Tax Assessment Act 1936* and *Income Tax Assessment Act 1997* (the Tax Act), together with associated legislations, regulations and multilateral agreements. The 1936 Act has been partially redrafted into the 1997 Act. The aim of the rewrite was to improve the expression of tax law, without changing it. The law that was not rewritten remains in the 1997 Act. Therefore, the two Acts and related sections must be read together for a full understanding of the income tax system.

Calculation

The provisions of the Tax Act apply to income and capital gains derived by individuals, partnerships, corporations and trusts.

Tax is levied on taxable income, which is the amount remaining after deducting allowable deductions from assessable income. The tax rate depends on the type of taxpayer (whether an individual, company, or superannuation fund).

Assessable income consists of not only income as is ordinarily understood (for example, salary and wages, business profits, rent, interest and dividends) but also items that are specified by the Tax Act to constitute assessable income (for example, net capital gains), and excludes exempt income and non-assessable non-exempt (NANE) income.

Deductions consists of general deductions (for example, losses and outgoings) and specific deductions under the Tax Act.

A tax loss arises where deductions exceed assessable income. Tax losses may be carried forward indefinitely to reduce future taxable income. A net capital gain loss is not a deduction but is carried forward indefinitely to reduce future capital gains.

Tax offsets are applied to reduce the tax liability. Some tax offsets are refundable if they exceed the tax liability (for example, franking credits) while others the excess is foregone (for example, foreign income tax offset).

Territorial operation

Apart from the withholding tax and capital gains provisions of the Tax Act, which both contain special rules relating to foreign residents, the two key elements which give rise to a liability to Australian tax are residence and source. Australian tax residents are generally taxed on income from all sources worldwide, while non-residents are taxed on only Australian-sourced income.

The source of income is largely a matter of fact to be determined by reference to principles developed by the courts. However, the Tax Act deem certain income to have a source in Australia (for example, certain royalties paid by an Australian business to a non-resident and certain interest paid upon money secured by mortgage of any property in Australia). Further, withholding tax operate in such a way as to give, in effect, an Australian source to dividends and interest paid to non-residents (see section on Non-Resident Withholding Tax).

The operation of the Tax Act in respect of both residents and non-residents is subject to the provisions of the double taxation agreements which Australia has entered into with other countries and which provide relief from double taxation (see section on Double Taxation Agreements). Such agreements often contain their own rules for determining the source of different types of income.

Tax year

Income tax is imposed on an annual basis, with the tax year generally being 1 July to the 30 June following. However, taxpayers can request a different year end (a Substituted Accounting Period), such as to align with the fiscal year of a foreign-owned parent.

Residents need to lodge a return with the ATO and determine the amount of tax payable or refundable under a self-assessment system. Credit is given for tax paid in advance under withholding tax or tax instalments.

INDIVIDUALS

Residency

Residency is a question of fact to be determined on a year-by-year basis. The tests to determine residency for tax purposes is not the same as the tests for migration purposes.

A person who resides in Australia within the ordinary meaning of that expression is a resident of Australia for tax purposes. In addition, the Tax Act extends the definition of resident to include a person:

- whose domicile is in Australia, unless the ATO is satisfied that his permanent place of abode is outside Australia (the tests of domicile are complex and depend on the individual circumstances of each case);
- who has physically been in Australia, continuously or intermittently, for more than half the income year, unless the ATO is satisfied that his usual place of abode is outside Australia and that he does not intend to take up residence in Australia; or
- who is a member of certain Commonwealth Government Superannuation Schemes or is the spouse or a child under 16 years of age of such a member.

All persons, whether resident or non-resident, whose total assessable income (other than interest or dividend income to which the withholding tax provisions apply) exceeds the

limit specified by the ATO, are required to lodge an income tax return.

Tax rate

Individuals are taxed on a progressive basis, with higher rates applying to higher levels of taxable income (referred to as marginal rates). Resident individual taxpayers are taxed at more favourable rates than non-residents, with further concessions accruing to resident families.

For resident individuals, the marginal tax rates start from 19% for amounts above the tax-free threshold and progressively increase to 45%, with compulsory public medical insurance levy adding a further 2% plus a surcharge of up to 1.5% by high income earners who do not hold private health insurance.

For non-resident individuals, the marginal tax rates start from 32.5% and progressively increase to 45% with no tax-free threshold. Rates applicable to persons under the age of 18 years vary depending upon the nature of their income. Tax offsets are usually not available. A tax return is not required to the extent that the income is subject to a final withholding tax.

Employers are required to make tax instalment deductions from all payments of salary and wages paid to individual employees, which are then forwarded to the ATO. The total amount of the deductions is credited against an individual employee's tax liability as determined at the end of the year of income.

Temporary residents

Favourable tax treatments can apply to expatriate individuals who come to Australia on a temporary work visa, including certain fringe benefits tax exemptions.

A temporary resident is a person who is in Australia on a temporary visa and does not have a spouse who is an Australian resident. Temporary residents are taxed on income derived in Australia and income earned from employment or services performed overseas while they are a temporary resident. They are not taxed on other foreign income and capital gains other than on taxable Australian property.

It is important to be aware, however, that as soon as expatriates decide to take up permanent residency in Australia, they can no longer utilise the expatriate tax concessions.

PARTNERSHIPS

At common law, a partnership is defined to mean the relationship that exists between persons carrying on a business in common with a view to profit. For the purpose of the Tax Act, the definition of partnership is extended to mean not only a partnership at common law but also any association of persons jointly in receipt of income.

A partnership for tax purposes, therefore, includes any association of persons who jointly share in income or profits of an undertaking.

In conformity with the position at common law, a partnership is not regarded as a separate legal entity for tax purposes and no tax is payable by or on behalf of the partnership itself. However, a partnership return is required to be lodged with the ATO on an annual basis, showing either the net income of the partnership (equivalent to taxable income) or the partnership loss of the partnership, as the case may be.

The Tax Act includes in the assessable income of each resident partner his or her individual share of the net income of the partnership and allows as a deduction to each resident partner his or her individual share of any partnership loss. In relation to non-resident partners, the Tax Act includes in the assessable income of each non-resident partner his or her individual share of the net income of the partnership which is attributable to Australian sources and allows as a deduction his or her share of any partnership loss which is attributable to Australian

CORPORATIONS

The Tax Act defines a company to include all bodies or associations, whether incorporated or unincorporated, and specifically excludes partnerships.

Residency

It is necessary to determine whether or not a company is a resident of Australia for tax purposes. The Tax Act defines a resident of Australia to include any company which is

- incorporated in Australia; or
- carries on business in Australia, and has either
- its central management and control in Australia or its voting power controlled by Australia residents.

In relation to a company which is not incorporated in Australia, it should be noted that the Courts have held that a company which has its central management and control in Australia necessarily carries on business in Australia, thus constituting it a resident of Australia.

Central management and control is a concept which originates in English law and is one which has been developed by the courts in both England and Australia. The company's central management and control will usually be the place where the directors meet to do the business of the company, although regard must always be had as to where real control of the company's operations is located.

A company that qualifies as a resident solely under this concept and is also a resident in another country will, from 1 July 1997, be deemed to be a non-resident and denied a number of tax concessions.

Tax rate

A non-resident company which derives Australian source income is required to lodge an annual return of income unless it derives only interest and dividend income to which the withholding tax provisions apply.

Companies pay a flat rate of tax on each dollar of taxable income. The current rate is 30% for most companies. However, a lower tax rate of 25% has been introduced for "base rate entities". A company will be a base rate entity if it is earning predominantly business income (less than 80% of income is from passive activities) and its group turnover is below A$50 million for the year ended 30 June 2022 or later years.

Companies may be entitled to a tax credit for tax payable in respect of franked dividends included in their assessable income (see section on Dividend Imputation).

Companies generally pay periodic instalments towards their tax liability. This is calculated by applying an instalment rate (based on the previous year income) to the turnover for the period.

Tax loss

The ability to use carryforward tax losses is subject to continuity of ownership and business continuity tests that are designed to counter trafficking in tax losses.

Group taxation

From 1 July 2002, wholly owned Australian groups companies, partnerships and trusts may make an irrevocable election to lodge a consolidated income tax return for the group. Groups that consolidate must include all wholly owned entities.

The main advantages of such election are the ability to transfer tax losses between companies, resetting the cost base of certain assets, and the pooling of dividend imputation credits.

TRUSTS

A trust is not a separate legal entity. Rather, it is a relationship which exists between a person who holds property or in whose name property is vested, being the trustee, and the person or persons on whose behalf the property is held, being the beneficiaries.

Residency

The residency of a trust depends on the residence of the trustee or where central management and control is located.

Taxation

If the trust property produces income, the trustee will, in accordance with the terms of the trust and the principles of equity, hold that income not on its own behalf but on behalf of one or more of the beneficiaries. Income of a trust estate is taxed only once, either in the hands of the trustee if not distributed to the beneficiaries or in the hands of the beneficiaries upon distribution.

Unlike the losses of a partnership, trust losses are not allocated to beneficiaries and not allowed as deductions. Instead the losses are accumulated to be offset against future income of the trust. A number of tests have been introduced to counter trafficking in trust losses. Special rules usually deny the loss if control or ownership of the trust changes.

An Australian resident who is a beneficiary of a non-resident trust is liable to Australian income tax in respect of any income or other property distributed to or applied for the benefit of the beneficiary by the non-resident trust.

TAXATION OF CAPITAL GAINS

Prior to 20 September 1985, the imposition of Australian income tax on capital receipts was limited to profits arising from the sale of property purchased within 12 months of the date of sale, profits arising from the sale of property acquired for the purpose of profit-making by sale and profits arising from the carrying on or carrying out of any profit-making undertaking or scheme to the extent if any, that they were considered not to be income.

Australia taxes, either in whole or in part, most capital gains arising on the disposal of assets acquired by resident taxpayers on or after 20 September 1985. For individual taxpayers, capital gains or losses made on the sale of the principal place of residence is generally exempt from capital gains tax.

In relation to non-resident taxpayers, Australia taxes, either in whole or in part, capital gains arising on the disposal of certain assets (defined by the Tax Act to be Taxable Australian Property) acquired on or after 20 September 1985. Taxable Australian Property includes:

- land or buildings situated in Australia (including mining rights);
- an asset that has at any time been used in carrying on a trade or business wholly or partly at or through a permanent establishment in Australia;
- shares, or an interest in shares, of a company whose assets comprise principally of Australian real property;
- non-portfolio interests in entities (10% or more) whose assets principally comprise taxable Australian real property;
- an option to acquire any of the above assets; and
- a CGT asset elected by an individual to continue to be subject to Australian CGT after they cease to be an Australian tax resident.

A non-final 12.5% withholding tax of the proceeds of sale upon the sale of interest in Australian property of more than A$750,000 by non-resident sellers. The tax is used to reduce any tax payable when the seller completes their Australian tax return.

Capital losses may be applied to reduce capital gains in the same year of income. If there are insufficient capital gains to absorb the capital loss, the capital losses cannot be used to offset other assessable income but can be carried forward indefinitely to offset future capital gains.

Individuals and Superannuation Funds

For assets acquired before 21 September 1999, capital gains realised by individuals, trusts and superannuation funds may be determined by one of two methods:

Method 1 – Indexation Method

Consideration received less the cost of the asset disposed of after allowing for inflation. The result is included in assessable income.

Method 2 – Discount Method

Consideration received less cost of asset disposed of. If the asset is held for more than 12 months, only half of the net capital gains (two thirds for superannuation funds) is included in assessable income.

For assets acquired after 21 September 1999 only Method 2 can be used.

From 8 May 2012 non-resident individuals are no longer able to apply Method 2 to calculate their taxable capital gain by claiming a full discount. However, they may be eligible for a partial discount in certain circumstances.

Individuals migrating to Australia become subject to Australian CGT on their worldwide assets. This may require obtaining valuation of certain assets.

Corporations

For corporations, assessable net capital gains are determined by deducting the cost of the asset disposed of from the consideration for sale.

There is a range of CGT concessions available to small businesses in relation to the sale of business assets.

GENERAL INFORMATION REGARDING INCOME TAX

Debt and Equity Tests

Legislation effective 1 July 2001 was enacted to codify the distinction between debt and equity interests. The distinction is important in determining whether returns on these interests are considered to be either deductible interest in the case of debt interests or frankable dividends in the case of equity interests.

The test for debt interests revolves around whether the issuer has an effective obligation to return to the investor an amount at least equal to the amount invested.

The determination of whether an interest is one of debt is important in relation to Thin Capitalisation (see below).

Equity interests are defined as interests providing returns that depend on the issuers' economic performance, the discretion of the issuer or an interest that will convert into a share. The distinction between debt and equity interest of non-residents also has ramifications with respect to the level of withholding tax that may apply.

Taxation of Financial Arrangements (TOFA)

Special rules apply for the taxation of financial arrangements. The TOFA rules provide six methods for determining gains or losses for tax purposes in respect of financial arrangements, such as loans and derivatives.

The default methods are the accruals method and realization method. The accruals method spreads a gain or loss over the life of the financial instrument where there is sufficient certainty that the expected gain or loss will occur.

The realization method is used if the gain or loss is not sufficiently certain.

Alternatively, the taxpayer can irrevocably choose one of four elective methods (fair value, retranslation, financial reports, and hedging) provided certain criteria are met. Generally, the criteria require that the taxpayer prepare a financial report that can be audited under Australian accounting and auditing standards.

Dividend Imputation

An imputation system for the taxation of company dividends operates in Australia and applies to all dividends paid on or after 1 July 1987.

In broad terms, the imputation system operates to impute or allocate tax paid by a company in respect of the company's profits to shareholders in the company to whom dividends are paid. Dividends with an imputation credit attached are known as franked dividends. Resident shareholders to whom franked dividends are paid are assessed to tax on the sum of the dividend received and the imputation credit, but are allowed a tax credit for an amount equal to the imputation credit. Where the credit exceeds tax payable, the excess is refundable to individuals, charities and superannuation funds.

When a company declares dividends out of profits which have not borne company tax (for example, because of the entitlement to a deduction for carry-forward losses), the dividends are normally unfranked dividends and do not carry an entitlement to an imputation credit. For resident individual shareholders, the amount of the dividend is included in the assessable income of the shareholder, who is taxable on the dividend in the normal manner.

Entitlement to imputation credits is subject to a 45 day holding rule, i.e. shares must be held and the investor must be at risk for at least 45 days.

Where a taxpayer's tax liability is less than the value of imputation credits a refund of the excess is available. Dividends may also be partly franked and partly unfranked. In such circumstances, the two components of the dividend are treated as if they were separate franked and unfranked dividends.

Dividends paid by resident companies to non-residents may also be subject to withholding tax, on the unfranked portion of the dividend.

Medicare Levy

An individual who is a resident of Australia at any time during a year of income is liable to pay, in addition to income tax, Medicare levy based upon the individual's taxable income for the year of income. The Medicare levy is also payable by some trustees. The rate of the Medicare levy is 2%.

An additional surcharge of between 1% and 1.5% will be imposed on high income earners who do not carry the required level of private health insurance.

Uniform Capital Allowances

A Uniform Capital Allowance was introduced from 1 July 2001 which allows for deductions for the decline in value of business assets over their effective life.

CROSS BORDER TAX RULES

Double Taxation Treaties

Australia has entered into a number of double taxation agreements (DTAs) or tax treaties to prevent double taxation. The form is generally based on, but not identical with, the *OECD Model Double Taxation Convention on Income and on Capital (1977)*. Australia has also ratified the Multilateral Instrument (MLI), which allows jurisdictions to modify bilateral tax treaties to address issues identified by the Base Erosion and Profit Shifting (BEPS) regime.

Australia currently has DTAs with Argentina, Austria, Belgium, Canada, Chile, China, the Czech Republic, Denmark, Fiji, Finland, France, Germany, Greece, Hungary, India, Indonesia, Ireland, Israel, Italy, Japan, Kiribati, Republic of Korea, Malaysia, Malta, Mexico, the Netherlands, New Zealand, Norway, Papua New Guinea, the Philippines, Poland, Romania, Russia, Singapore, Slovakia, South Africa, Spain, Sri Lanka, Sweden, Switzerland, Taiwan, Thailand, Turkey, the United Kingdom, the United States of America and Vietnam. New treaties are continually being negotiated.

The provisions of the treaties are given the force of law in Australia by virtue of the *Income Tax (International Agreements) Act 1953*, which incorporates the provisions of both the treaties and the Tax Act. Subject to certain limited exceptions, to the extent to which any inconsistency exists between the Tax Act and a treaty, the treaty prevails.

Double taxation agreements usually contain tie breaker rules that decide in which country a taxpayer will be deemed to be a resident. This is only for the purpose of applying the double taxation agreement and the taxpayer will still be a resident of their home country for domestic tax law purposes.

Double taxation agreements apply to various types of income derived by residents of one country from sources in the other country. Each agreement adopts two alternative methods of avoiding or relieving double taxation, the applicable method depending upon the nature of the income. The first method reserves to the country of residence of the taxpayer (generally) the right to tax the income. The second method permits the country of source to tax the income and, to the extent to which the country of residence also taxes the same income, the agreements require the country of residence to give a credit against its tax for any tax paid in the country of source.

Subject to the Controlled Foreign Companies (CFC) and Transferor Trust Rules, business profits of an enterprise will be generally taxable only in a taxpayer's country of residence, except in circumstances where the business profits are attributable to a permanent establishment in the country of source through which an enterprise carries on business. Conversely, the country of source is permitted to tax business profits which are attributable to a permanent establishment in the country of source, through which the enterprise carries on business. In the latter circumstances, a credit will be available to the enterprise in its country of residence.

Each agreement defines extensively (but not necessarily in identical terms), what constitutes a permanent establishment. A permanent establishment usually includes, but is not limited to, a fixed place of business through which the business of the enterprise concerned is wholly or partly carried on, such as a place of management, a branch, an office, a factory, or a workshop. In addition, agents who habitually exercise an authority to conclude contracts on behalf of the enterprise usually constitute a permanent establishment.

Income which is taxable in the country of source also includes dividend, interest and royalty income. However, in relation to such income, all agreements limit the rate of tax which the country of source can impose on such income, except in circumstances where the income is effectively connected with a permanent establishment of the person beneficially entitled to the income in the country of source. Other provisions of such agreements deal with income from real property, shipping and air transport profits, independent personal services, dependent personal services, income of entertainers, teachers and students, and pension income.

Other Tax Treaties

Australia has also negotiated agreements dealing with exchange of tax-related information with more than 35 countries (including low-tax jurisdictions), assistance in the collection of taxation and the resolution of tax disputes, and has enacted legislation giving effect to the Common Reporting Standard and US Foreign Account Tax Compliance Act.

From 1 January 2024, Australia will be implementing the Global Anti-Base Erosion (GloBE) Rules to address the digitalization of the economy, including a 15% global minimum tax that will apply to Australian operations of multinationals with annual global revenue of at least £750 million.

Non-Resident Withholding Tax

Unfranked dividends

An unfranked dividend paid by a resident company to a non-resident is subject to withholding tax. The applicable rate is 30% of the gross amount of the dividend, except where the person beneficially entitled to the dividend is a resident of a country with which Australia has entered into a double taxation agreement, and the holding in respect of which the dividend is paid is not effectively connected with an Australian permanent establishment. In such case, the applicable rate is generally limited to 15% of the gross amount of the dividend or less (depending on the country). In contrast, to the extent to which a dividend paid to a non-resident is franked, no liability to withholding tax arises.

From 1 July 2005, the more limited Foreign Dividend Account (FDA) rules were replaced with a Conduit Foreign Income (CFI) exemption. This exemption allows foreign income to be passed through an Australian company to foreign shareholders without being taxed in Australia. By declaring an unfranked dividend that it pays to foreign shareholders to be CFI, the relevant foreign income will be treated as non-assessable, non-exempt income of the Australian company, and the dividend will not attract withholding tax. The exemption can also apply where foreign income is paid through one or more interposed Australian entities.

Interest income

Interest derived by a non-resident, other than interest derived by a non-resident in carrying on business in Australia at or through an Australian permanent establishment, which is paid to the non-resident by either:

- a resident of Australia; or
- a non-resident of Australia carrying on business in Australia at or through an Australian permanent establishment is subject to withholding tax.

The applicable rate is 10%.

Australian sourced interest derived by a non-resident in carrying on business in Australia at or through an Australian permanent establishment, is included in the assessable income of the non-resident and taxed in the normal manner.

Royalties

Royalties paid to non-residents are also subject to withholding tax. A royalty withholding tax of 30% applies on royalties paid or credited to non-residents. The amount of withholding tax may be reduced where a royalty is paid from Australia to a resident of a treaty country. The amount applicable to a treaty country will usually be 10% but may be as high as 25%, depending on the treaty agreement.

Dividends, royalties and interest upon which withholding tax is payable, and franked or exempted dividends paid to a non-resident, are not included in the Australian assessable income of the non-resident concerned. Withholding tax is, therefore, a first and final tax in respect of such income. Withholding tax is required to be deducted by the person paying the dividend, interest or royalty.

Managed fund

Withholding tax at the rate of 30% has applied since 1 July 2007 to certain distributions from Australian managed funds to non-resident investors. This may be reduced to 15% for residents of a country with which Australia has a treaty or exchange of information. The withholding tax covers distributions of Australian source income other than interest, dividends and royalties (which are subject to withholding tax in their own right, usually at lower rates), but excludes capital gains that do not relate to taxable Australian property.

Specific provisions providing relief from double taxation to Australian residents

Australian residents are subject to tax on their worldwide income. Australia's domestic legislation employs both the "exemption" and "foreign tax offset" approaches to relieve a resident taxpayer from double taxation.

Exemption

An Australian resident company is not assessed to tax to the extent it derives active business income through a foreign "permanent establishment". Similarly, tax is not imposed on capital gains derived by an Australian resident company from sale of capital assets used in connection with a foreign business permanent establishment or shares in a foreign company which has substantial foreign active assets.

Also, Australian resident companies are not taxable on dividends they receive from non-portfolio interests in foreign companies (i.e. holdings in foreign companies where a voting interest of more than 10% is held).

Foreign Tax Offset

Australian residents who do not qualify for a complete exemption under the above arrangements are taxable in Australia on gross foreign income or gains derived, but a tax offset is usually allowed for foreign tax paid on the income or gain to the extent of the Australian tax payable on the foreign income.

Australia's Accruals Taxation Regimes

Australian imposes a comprehensive system of accruals taxation for Australian residents' interests in foreign entities, covering both control and non-control interests.

There are three distinct accruals regimes, each having different scope of foreign income taxed and exemptions allowed. These are discussed below, with the exception of the "deemed present entitlement" rules (which generally apply to foreign unit trusts).

Controlled Foreign Companies

Part X of the Tax Act was introduced so that certain income of Controlled Foreign Companies (CFC) will be attributed to Australian resident taxpayers on an accruals basis.

There are three tests in determining whether a foreign company is controlled by Australian resident taxpayers. These are:

- **strict control** – five or fewer residents, together with their associates own, or are entitled or able to acquire, or are able to control, an interest of 50% or more in the foreign company;
- **assumed control** - a single resident, together with associates owns, or is entitled to acquire, an interest of at least 40% in the foreign company, unless the company is controlled by parties unrelated to the single resident or associates; or
- **de facto control** - five or fewer residents, together with their associates, effectively control the company.

It is both the direct and indirect interests that are taken into account in determining whether a foreign company is a CFC. An interest held in a CFC via an interposed entity will only be included when that interposed entity is either a CFC, a controlled foreign partnership or a controlled foreign trust.

Having established that the company is a CFC, income will only be attributed where the Australian taxpayer has a certain minimum interest in a CFC, the extent of which is to be determined by reference to the operative control test.

The CFC's income that may be attributable will be determined according to the residency of the CFC, which is categorised as follows:

- Listed (Comparable Tax) Country which includes Japan, New Zealand, United Kingdom, United States of America, Canada, France and Germany
- Unlisted Country

CFC's which are resident in any Listed Country will not generally be subject to attribution.

In respect of all other countries, the accruals measures seek to tax tainted income of CFCs, which is basically passive income such as interest and dividends, as well as business income derived from transactions with Australian associates.

Certain income which would otherwise be subject to the accruals tax measures would not be attributable if it satisfies the active income exemption. Thus, the tainted income of a CFC will not be attributed to Australian resident shareholders if the CFC derives more than 95% of its income from genuine business activities (active income). This is basically income that is not tainted.

Dividends paid by CFCs out of previously attributed income will be exempt from tax. A credit, however, is allowed for any withholding tax deducted in respect of dividends paid.

Dividends that are not sourced from previously attributed income may be exempt where it is received by a resident company holding a non-portfolio interest (i.e. greater than 10%) in the foreign company paying the dividend.

Transferor Trust Rules

The transferor trust measures in Division 6AAA relate to the accruals taxation of income derived by non-resident trust estates.

The legislation was introduced to overcome the problem of the accumulation of foreign sourced income in a non-resident trust estate which would not be subject to Australian tax until actually distributed to resident beneficiaries.

The circumstances in which a resident taxpayer will be attributed income of a non-resident trust estate depends upon whether the relevant trust is a discretionary or non-discretionary trust.

Exceptions to the rule apply where:

- the transfer was made in the ordinary course of carrying on a business and made on identical or similar terms to those that relate to transactions with ordinary clients or customers;
- the transfer was made under an arm's length transaction not in the ordinary course of carrying on a business and the transferor was not in a position to control the trust at any time after the transfer and before the relevant year of income; or

- if the transfer was made before 12 April 1989, the taxpayer was not in a position to control the trust at any time after that date and before the end of the relevant year of income.
- For a non-discretionary trust estate, a resident taxpayer may be an attributable taxpayer if the taxpayer transferred property or services to the trust after 12 April 1989 and the consideration for the transfer was nil or less than arm's length.
- The attributable income of a non-resident trust is: where the trust is not resident in a broad exemption listed country, i.e. a low tax jurisdiction, the whole of the net income of the trust, determined according to the Australian tax law, with certain modifications;
- where the trust is resident in a listed country, i.e. comparable tax jurisdiction, so much of the net income which benefits from concessional tax treatment.

The amount to be attributed is reduced by amounts already subject to tax in Australia or in a listed country. The attributed amount is also reduced by amounts already assessable to a resident beneficiary or to the trustee of a non-resident trust estate.

Distributions made by non-resident trusts out of income previously attributed, is exempt when received by the Australian beneficiary.

In the absence of a resident transferor to whom income may be attributed, the measures seek to apply an interest penalty to resident beneficiaries when they become presently entitled to the accumulated trust income.

Thin Capitalisation

Thin capitalisation refers to the situation where an entity is financed heavily from borrowings and by relatively little equity. The objective of thin capitalisation rules is to ensure that multinationals do not allocate excessive amounts of debt to their Australian operations.

Scope

Thin capitalisation rules were amended to apply from 1 July 2001 so that:

- Australian permanent establishments must prepare financial statements from 1 July 2002
- Limits may apply on the deductibility of interest expenses for Australian entities investing overseas

Control is usually considered to be 50% ownership by five or fewer entities but can apply when one entity owns 40% or more and no other entity controls the entity.

Thin capitalisation rules which existed prior to 1 July 2001 was considered deficient as it only applied to foreign controlled Australian operations and non-residents deriving Australian assessable income, and only sought to limit debt borrowed from a foreign controller or their associates.

The rules apply to groups and they are considered as one consolidated entity for this purpose.

Deductions of less than A$2 million and outward investors whose Australian assets make up at least 90% of their total assets are not affected by this legislation.

Tax treatment

The rules act to limit the allowance of debt deductions (interest expenses) on debt attributable to the Australian operations of multinationals (entities that are foreign controlled).

Debt deductions (debt interest) are the returns payable on debt capital. Reference is made to the debt and equity legislation to determine debt capital for thin capitalisation purposes.

The effect of the rules on non-banks is that debt deductions will be reduced where the amount of debt exceeds 60% of the entity's Australian assets, although alternative approaches may be available in specific situations where the "safe harbour" percentage is exceeded.

From 1 July 2023, the safe harbour method is replaced with a new test to limit debt-related deductions to 30% of profits.

The effect of the rules on banks is that debt deductions will be reduced where equity used to fund the Australian operations is less than 4% of its Australian risk weighted assets.

Transfer Pricing

Division 815 of the *Income Tax Assessment Act 1997* deals with transfer pricing, or the pricing of dealings between two related parties. Pricing that is not in accordance with Division 815 may be profit shifting. The provisions are self executing, meaning the commissioner is not required to make a determination before they apply. The provision provides that if an entity gets a transfer pricing benefit from conditions that operate between related parties with specific conditions, those conditions are taken not to operate and instead the arm's length conditions apply.

Tax law is concerned with the underpricing of goods and services supplied or the overpricing of goods and services acquired by Australian resident taxpayers or non-residents deriving Australian sourced income.

Underpricing of supply

Where a taxpayer supplies property or services under an international agreement in circumstances where the ATO is satisfied that the parties to the agreement are not dealing with each other at arm's length, and the taxpayer either fails to receive consideration or receives consideration which

is less than the arm's length consideration, the ATO may determine to apply the provisions of Division 815.

The consequences of the application of Division 815 in these circumstances, is that the taxpayer is deemed for all purposes of the Tax Act, to have received consideration equal to the arm's length consideration in respect of the supply of the property or services. As such, the taxpayer's assessable income will be increased by the difference between the consideration received (if any) and the arm's length consideration.

Overpricing of acquisition

Conversely, where a taxpayer acquires property and services under an international agreement in circumstances where the ATO is satisfied that the parties to the agreement are not dealing with each other at arm's length, and the taxpayer gives consideration which is greater than the arm's length consideration, the ATO may also determine to apply the provisions of Division 815.

The consequences of the application of Division 815 in these circumstances, is that the taxpayer is deemed for all purposes of the Tax Act, to have given consideration equal to the arm's length consideration in respect of the acquisition of the property or services. As such, the deduction claimed by the taxpayer in respect of the acquisition of the property or services will be reduced by the excess of the consideration paid over the arm's length consideration.

Borrowings

The ATO has also released guidelines where Division 815 may be applied to attribute income to a resident company on a loan made by it to a non-resident company, if there is no interest on the loan, or the interest on the loan is less than the amount that would have been received by an independent party dealing at arm's length with the borrower.

Where interest expense is claimed by a resident company, Division 815 may be applied to reduce the deduction for interest on a loan received by it from a non-resident company, if the interest expense is greater than the arm's length amount.

Where the ATO exercises the powers conferred upon it by Division 815, it is also empowered to make compensating adjustments to the returns of the other taxpayers where this is considered to be just and reasonable. Tax penalties may also be applied if Division 815 is determined to apply.

The articles of a double tax treaty may also apply to permit transfer pricing adjustments to be made. This would be the case if the other party was resident in a country with which Australia has a double tax treaty. In general, the article of the double tax treaty and Division 815 of the Tax Act are applied in the same manner by the ATO.

Transfer pricing documentation

To ensure that Australian profits are being taxed in Australia, the ATO requires taxpayers to hold transfer pricing documentation on their international related party dealings to support that the parties are dealing an arm's length terms, i.e. profits are not being diverted overseas.

Legislative guidelines relating to the preparation of transfer pricing documentation are contained in Subdiv 284-E of the *Taxation Administration Act 1953*, and the ATO has also released a Taxation Ruling TR 2014/8.

Case law such as *Chevron v Commissioner of Taxation (2015)* has highlighted the importance of holding transfer pricing documentation, especially in relation to financial transactions, and the ATO has released a Practical Compliance Guide PCG 2017/D4 that includes a risk framework matrix to help taxpayers determine their specific risk levels.

Rules for Significant Global Entities (SGEs)

In line with the general approach by Organisation for Economic Co-operation and Development (OECD) member countries to combat Base Erosion Profit Shifting (BEPS), Australia has passed a number of general anti-avoidance measures aimed at multinational groups qualifying as SGEs, being those with aggregate annual global revenue of A$1 billion or more.

Measures include the exchange of financial account information under the Common Reporting Standard, voluntary public disclosure of income and taxation information by taxpayers with annual turnover of A$100 million or more, and legislation targeting hybrid mismatches.

Country-by-country (CbC) reporting

Country-by-country reporting is an additional reporting requirement for SGEs that has been implemented on a global scale by the OECD. Australia was one of the first countries to implement CbC reporting which applied from 1 January 2016. The below three reports will be due 12 months after the year end, unless an exemption applies:

1) CbC Report – disclosure of all transactions between each member of the global group, the profits reported in each group and the total tax paid by each entity. This is usually prepared and lodged by the parent. If the head parent is in a tax jurisdiction that has not yet implemented CbC reporting, it is possible to apply to the ATO for an exemption from the requirement to prepare this report.

2) Master File – a high-level view of the group's global business operations, including an outline of its organisational structure and use of intangibles and intercompany financial activities. This is usually prepared and lodged by the parent. The same exemption rules as for the CbC Report may apply for the Master File.

3) Local File – information about a local entity's management structure and business strategy; specific cross-border related party transactional data, including information about how transfer pricing decisions have been made; and financial information, including the local entity's annual financial accounts. Regardless of whether the Australian entity is exempt from lodging a CbC Report and Master File, it is still required to lodge the Local File. This is in a similar format to the International Dealings Schedule that is attached the tax return. Much of the information in the entity's transfer pricing documentation can be replicated in this Local File.

Failure to Lodge (FTL) penalties

Australian taxpayers that are SGEs have been subject to significantly increased penalties for the late lodgement of any document that is required to be lodged with the ATO. These potentially include any "statements" to the ATO income tax returns, CbC reporting requirements, FBT returns, and activity statements.

The current penalties are:

DAYS LATE	28 OR LESS	29 TO 56	57 TO 84	85 TO 112	MORE THAN 112
From 1 July 2023	$156,500	$313,000	$469,500	$626,000	$782,500

Anti-avoidance rules

The Tax Act targets tax avoidance using both general and specific anti-avoidance provisions. The general anti-avoidance laws are designed to be a catch all of last resort to deny the tax benefit of arrangements that do not have any commercial substance and the sole or dominant purpose of which is to obtain a tax benefit. Specific anti-avoidance law includes the diverted profits tax, multinational anti-avoidance law, general value shifting rules, and commercial debt forgiveness rules.

Diverted Profits Tax (DPT)

The DPT was enacted with effect from 1 July 2017. The DPT acts as a penalty for SGEs that divert profits that are from Australian activities to low tax jurisdictions. DPT will apply if the SGE has Australian turnover of A$25 million or more; entered into an arrangement with a foreign related entity for the principal purpose of obtaining a tax benefit; the arrangement results in a tax mismatch, whereby the increase in the foreign entity's tax liability is less than 80% of the reduction of the Australian entity's tax liability; and it is reasonable to conclude that the arrangement was designed to reduce a tax liability.

The ATO will first determine there is a risk from a review of the CbC reports and other documents lodged with the ATO and then audit the taxpayer. If the Australian taxpayer is determined to be diverting profits from Australian activities, then 40% tax applies.

This is an example to illustrate how DPT works:

AusCo and SingaporeCo are related parties and are SGEs. SingaporeCo provides marketing and administrative services to AusCo for A$50 million annual fee. This fee is deductible in Australia, providing a 30% reduction in tax and the fee is taxable in SingaporeCo at 17%. As the tax liability in Singapore is less than 80% the Australian deduction, there is an effective tax mismatch.

The ATO concludes that this fee is inflated compared to an arm's length amount. The DPT assessment is A$6 million calculated as:

- Diverted Profits Amount of A$15 million (30% x inflated expense of A$50 million)
- DPT Assessment = A$6 million (40% x Diverted Profits Amount of A$15 million) plus interest.

As a result of the DPT anti-avoidance measure, it is important that Australian taxpayers hold transfer pricing documentation that qualifies with Australian requirements.

Multinational Anti-Avoidance Law (MAAL)

The MAAL was enacted with effect from 1 January 2016 as a special anti-avoidance measure aimed at SGEs, to provide the ATO with another tool that they can use, where appropriate to combat global profit-shifting.

The MAAL seeks to tax global entities making supplies into the Australian market without attributing the income from those supplies to an Australian permanent establishment ("PE"), is aimed at multinational groups that in the opinion

of the ATO may be shifting profits out of Australia by having an Australian subsidiary provide services to foreign related parties at an arguably inflated price, while the revenue from customers is received directly by a foreign member of the group.

In general terms, for the MAAL to apply, the following are required:

1. The global group must qualify as an SGE; and
2. There is a scheme with the following features:

- a foreign entity makes a supply to customers in Australia;
- activities are undertaken in Australia directly in connection with those supplies by an Australian entity that is an associate of, or commercially dependent on the foreign entity; and
- the foreign entity derives income from those supplies, some or all of which, is not attributable to a permanent establishment in Australia of the foreign entity.

OTHER TAXES AND LEVIES

Goods and Services Tax

Goods and Services Tax (GST), similar to value-added tax (VAT), is an indirect broad-based consumption tax. The tax is refunded to all parties in the value chain of production other than the final consumer, so is ultimately borne by the final consumer.

GST is administered by the ATO under the *A New Tax System (Goods and Services Tax) Act 1999* and associated regulations. The GST tax period is 1 July to the 30 June following.

GST is levied at a rate of 10% on transactions relating to most goods and services supplied in Australia. The supply must have a connection with Australia, such as if it is done, delivered or made available in Australia; removed from Australia; imported into and assembled in Australia; or supplied through an enterprise that is carried on in Australia.

There are two types of supplies: GST-free, and input taxed.

- GST-free supplies (generally referred to as “zero rated” in other jurisdictions) do not attract GST but the producer of the supply is entitled to claim back the GST paid on the inputs that created the supply. These include exported goods, food, health and education.
- Input taxed supplies (generally referred to as “exempt” in other jurisdictions) do not attract GST and the producer of the supply is not entitled to claim back the GST paid on the inputs that created the supply. These include financial supplies (for example, interest) and residential property.

Registration

An entity must collect and remit GST to the ATO if it is registered or required to be registered for GST. Registration is compulsory for enterprises if its annual turnover is at least A$75,000. Supplies which are input taxed are excluded from the definition of turnover.

An entity can claim an input tax credit for the amount of GST included in its payments.

Returns

Returns must be lodged monthly where annual turnover exceeds A$20 million. For enterprises with lower annual turnovers, returns may be lodged on a quarterly or monthly basis.

Enterprises with annual turnover of less than A$2 million have the choice of adopting either a cash or accruals method for GST reporting purposes.

Fringe Benefits Tax

Fringe Benefits Tax (FBT) is payable by employers on the value of non-cash benefits provided to employees or their associates. The tax is administered by the ATO under the *Fringe Benefits Tax Assessment Act 1986* and associated regulations. The FBT year is 1 April to the 31 March following.

Taxable fringe benefits may be provided either by the employer itself, by an associate of the employer or by any other person under an arrangement with the employer or an associate of the employer. In all cases, however, the benefit must be provided in respect of the employee’s employment.

FBT is payable in respect of a wide range of benefits, including:

- motor vehicles which are available for private use by the employee;
- interest-free or low interest loans;
- certain residential accommodation provided by employees;
- discounted or free goods and other property provided to employees;
- entertainment; and
- discounted air travel for employees in the airline or travel industry.

An annual FBT return showing the taxable value of all benefits must be lodged. Employers must pay quarterly FBT instalments in anticipation of each year’s FBT tax liability where the liability exceeds A$3,000, with any balance payable at the time of lodgement of the annual return.

The rate of tax payable in respect of the value of the taxable fringe benefits is 47%, representing the top marginal tax rate including the Medicare Levy. This rate is applied to the benefit grossed up by 2.0802 times (if GST applies to the benefit) or 1.8868 times (if GST does not apply). The grossed-up amount reflects the pre-tax salary that employees would have to earn (at the highest tax rate) to buy the benefits themselves.

Income tax deductions are allowed for the amount of fringe benefits tax paid by the employer. When benefits provided exceed A$1,000, the value of the benefits provided must be reported in the employee's Payment Summary.

FBT effectively means that the benefit of the tax saving to an employee, as represented by the difference between the taxpayer's marginal rate and the company tax rate, will be negated for certain fringe benefits. However, fringe benefits that retain concessional status, such as motor vehicles, will remain an effective means of remuneration packaging.

Payroll Tax

Each of the states and territories imposes payroll tax on employers in respect of wages (including fringe benefits) paid to employees. Certain exemptions exist where the monthly or annual payroll amount does not exceed a specified limit. Some states have an additional mental health and wellbeing payroll tax surcharge which applies to entities with Australian wages over a specified threshold.

Stamp Duty

Stamp duty is a tax imposed on specified classes of written instruments and generally not on the transactions affected by them. State legislation imposes stamp duty on written instruments that have a nexus or connection with the relevant state and federal legislation imposes that duty on those written instruments that have a nexus or connection with a federal territory, regardless of where the taxpayer resides.

It is possible for stamp duty to be payable for the same transaction in more than one jurisdiction. However, the ability of a government to enforce the collection of duty from a party to a written instrument who is outside the jurisdiction is limited by the legislative competence of the relevant government.

Superannuation

Employers must pay a minimum amount of contribution on behalf of employees to the employee's superannuation fund (a form of private pension scheme). From 1 July 2023, the minimum contribution is 11% of earnings. This will increase to 12% by 2025. The contributions must be paid at least on a quarterly basis. Employer contributions are generally tax deductible for the employer.

A superannuation guarantee charge (comprising of the contribution shortfall, interest component and administration charge) will be imposed on employers failing to meet these requirements. An income tax deduction will not be allowed for this amount.

Compulsory Workers Compensation Insurance

Each state has laws requiring insurance cover to be provided for employees in relation to work-related injuries. The particular arrangements vary between states, but generally involve private-sector insurance companies underwriting the risks. Premium rates vary between states and industry groupings, reflecting various levels of risk, and the employer's total wages, superannuation and fringe benefit expenses.

Land Tax

Land tax is levied by each of the states and is paid upon the value of all lands owned by a taxpayer which are situated within the state concerned. The tax is levied on the unimproved value of the land (so excluding buildings and other improvements on the land). Foreign landowners may also need to pay a surcharge land tax in relation to residential land. Certain land is exempt from tax, including (as a general rule) the taxpayer's principal place of residence and primary production property.

In recent years, "absentee owner" surcharges have been introduced for non-residents owning certain land in NSW, Victoria and Queensland, with the relevant criteria, exemptions, thresholds and surcharge rates varying between each state. Foreign owners are also required to pay an annual vacancy fee where the residential property is not occupied or available for rent for at least 6 months during a 12-month period.

Local Rates and Taxes

Each state and territory in Australia is divided into a number of Local Government Areas (LGAs). Each LGA levies various rates and taxes to fund local services, generally charged to landholders and most commonly classified as general rates (calculated based on unimproved land values and used to fund general council expenditure), utility rates (for items such as water, waste management services and gas usage) and other special charges and levies.

In some cases where duty would otherwise be avoided by the parties to a transaction not bringing a dutiable written instrument into being, they are required to prepare a written record of the transaction and have duty paid on it.

The stamp duty legislation and regulations are not currently uniform throughout Australia, although duty rates are uniform in some cases to avoid jurisdiction shopping.

Some of the types of written instruments that attract stamp duty are conveyances of land and other property (such as buildings, plant and equipment, intellectual property and motor vehicles), transfers of indirect interests in land such as shares in landholding companies; declarations of trust

and other trust transactions; financing agreements and security documents; leases; transfers of leases; motor vehicle registration and transfers; bills of exchange and promissory notes; various bonds and covenants; hire purchase and instalment purchases agreements; policies of insurance; returns evidencing credit and rental business.

The rate of stamp duty payable, in the case of a transfer or conveyance of property, is typically calculated by reference to the higher of the amount or value of the consideration paid (including GST) and the true unencumbered value of the item of property transferred or conveyed, and is payable at ad valorem rates on a sliding scale by reference to the result of that calculation. The stamp duty authorities are empowered to require proof of independent arm's length values.

In a number of states, there is an additional foreign surcharge duty (which can be up to 8%) on foreign persons who acquire direct or indirect interest in residential land. Exemptions or concessions may be available for property development meeting certain criteria, build to rent developments, and residential developments that make a significant contribution to the housing supply or economy of the state.

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