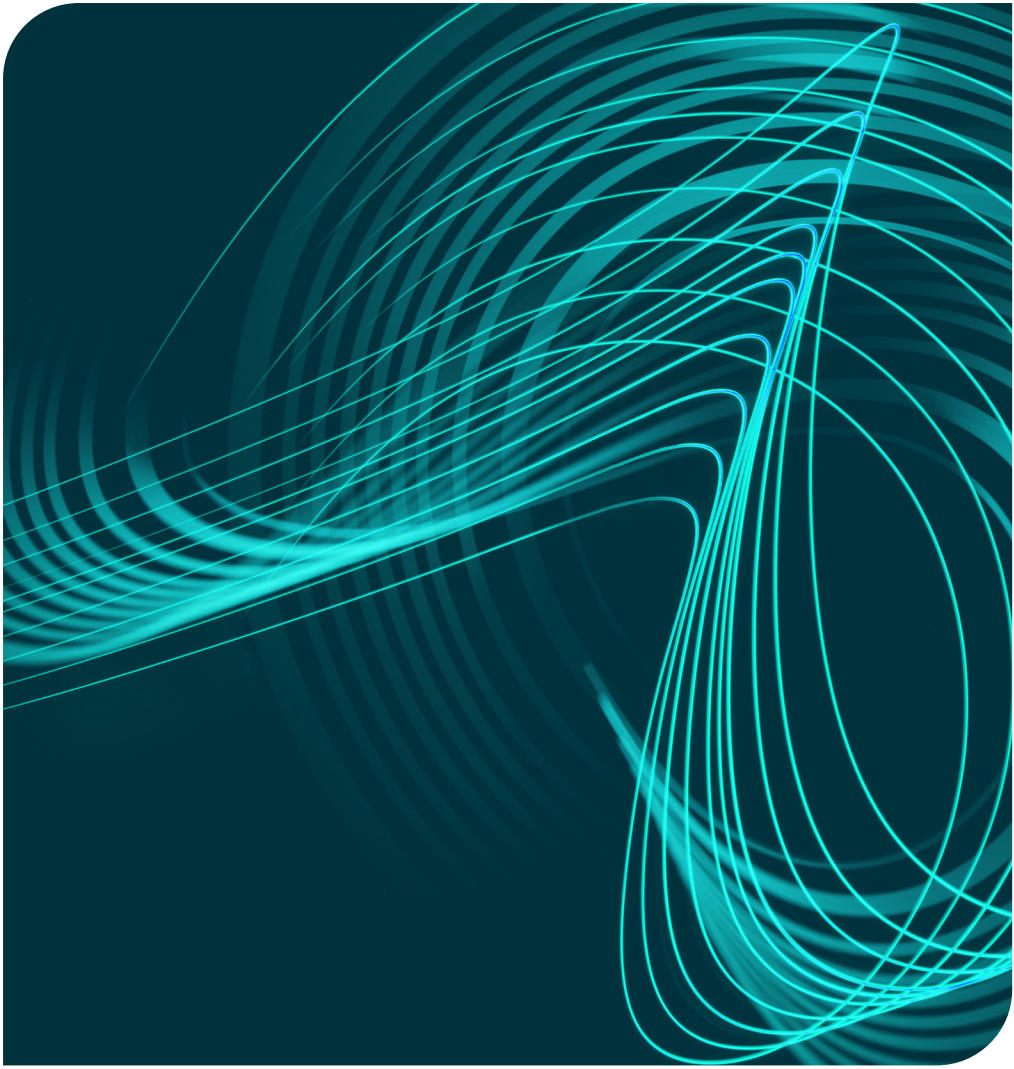
Nexia Australia

Doing business in Australia



Preface

Nexia Australia has firms in Adelaide, Canberra (Australia's capital city), Melbourne, Perth, Darwin and Sydney, and is part of the global Nexia International network of independent accounting and consulting firms. The Australian firms have over 647 personnel, including 83 partners, with gross fees of approximately AUD$124 million.

All of the Australian Nexia firms are progressive and supply a wide range of services, including expert accounting, audit, financial planning, and management and tax services to most industries operating in Australia.

This guide has been produced to give a general outline for anyone considering operating a business in Australia together with a broad overview of Australia's business environment, the levels of government with which foreign firms need to interact, and the associated banking, financial and regulatory regimes. It also includes a special COVID-19 update.

Welcome to Australia.

Mal Di Giulio
Chairman
Nexia Australia

How can Nexia Australia help you?

The decision to expand into Australia is an exciting yet challenging time for a business. No matter how good you are at what you do in your home environment, coming to grips with a foreign country's operating and regulatory environment can be a daunting process.

Obtaining the right advice from the very beginning, and knowing that the advice is relevant to your particular business, is crucial to ensuring a smooth transition and ongoing success.

Nexia Australia's experienced team can provide comprehensive and personalised advice, incorporating:

- Business structuring
- COVID-19 regulations
- Local and international tax consequences
- Asset protection
- Profit repatriation to your home country
- Transfer pricing and withholding tax issues
- Meeting your obligations as an employer
- Expatriate taxation and salary packaging
- Government incentives
- Ongoing compliance obligations
- Securing licences and permits
- Succession planning
- Outsourced CFO and Resident Director

Contact a Nexia Advisor for tailored advice and to answer any questions you might have about taking this next step for your business.

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Introducing Australia

Australia is a modern industrialised nation with a diverse, open and competitive economy. It is a major exporter and importer of commodities, manufactured goods and services, and generally welcomes foreign investment.

Geography and climate

Australia is an island continent of 7.7 million square kilometres, almost the same size as the continental United States and about twice the size of the European Union. Australia spans 3200 kilometres from north to south and 4000 kilometres from east to west.

The land is mostly flat and low-lying. It is the second-driest continent, after Antarctica.

The climate varies from the northern tropical regions, a vast and arid interior with generally low rainfall, to temperate and more fertile regions in the south. Climatic events can include widespread and long-lasting droughts, as well as floods, bushfires and cyclones (hurricanes).

History

Aboriginal and Torres Strait Islander peoples inhabited most areas of the Australian continent for tens of thousands of years before the arrival of European settlers in 1788.

Political system

The Commonwealth of Australia was created in 1901 by the federation of six former British colonies. It consists of a national government, six states (New South Wales, Victoria, Queensland, Western Australia, South Australia and Tasmania) and two territories (the Australian Capital Territory and the Northern Territory). There are also local governments, generally known as municipalities or shires.

Australia is a parliamentary democracy. The Head of State is King Charles III of Great Britain, whose powers are exercised locally through his representative, the Governor-General. Federal legislative power operates through a parliament consisting of a House of Representatives and a Senate based on the Westminster system of the United Kingdom and elements of the Congress of the United States. The executive branch of government comprises of the Prime Minister and Cabinet.

The Australian Constitution provides for the division of powers between the Commonwealth and the states and territories. Broadly, the Commonwealth can legislate in the areas of defence, foreign affairs, income and other taxes, customs and excise, social services, overseas trade, communications, banking and intellectual property. Education, justice, infrastructure, health services and housing are mainly under the control of state and territory governments.

Under the Constitution, Commonwealth tax laws cannot discriminate between the States or parts of States. Also, in matters of trade, commerce or revenue, the Commonwealth is prohibited from giving preference to any State over another. The States are also prohibited from imposing customs or excise duties, thus ensuring the flow of goods between States is not inhibited by taxation.

Legal system

The legal system developed from British law. Much of the law is codified in statutes, but common law remains important in many areas.

Property rights are robustly protected, and the strong rule of law mitigates corruption. Expropriation is highly unusual, and enforcement of contracts is reliable. Australia has transparent and well-established political processes, a strong legal system, competent governance, and an independent bureaucracy. The judicial system operates independently and impartially. Anti-corruption measures are generally effective, and corruption cases are rare.

Population

Australia's population is about 25.9 million. The population is projected to grow to 29 million by the year 2030. Although people are mainly of European origin, there are many ethnic groups reflecting large migration since World War II. About 28 per cent of Australians now living were born overseas.

Most of Australia's population is concentrated in two widely separated regions – parts of Victoria, NSW and Queensland in the south-east and east, and in the south-west of Western Australia. The south-east and east region is by far the largest in area and population. The populations within these regions are concentrated in urban centres. About 67 per cent of Australians live in the state and territory capital cities.

There are about 13.5 million people in the workforce.

People and culture

The Australian people are regarded as being laid back, tolerant and friendly, but many also are driven and hard-working with very busy lives within strong professional, corporate and business sectors.

Language

English, Australia's official language, is spoken in every part of the country and is the language of business. More than five million residents speak a second language.

Economy

Australia has a highly developed mixed economy. The Commonwealth and the States generally do not seek to take part in the production of goods and services. However, public utilities are largely under government control but there is an increasing trend towards privatisation, particularly in areas like power generation and distribution, toll roads and shipping. In some areas government enterprises do compete with private corporations. Some government and other statutory authorities conduct business operations on profit-making or cost- recovery bases.

Historically, agriculture, mineral and energy resources and manufacturing formed the basis of Australia's economy. Today, agriculture and mining represent approximately 11 per cent of Australia's total gross domestic product (GDP). Manufacturing has declined in importance over recent decades. The substantial growth area has been sales and services, which now account for 66 per cent of total output.

Australia's economy experienced annual growth in GDP of 2.3% to 31 March 2023. Australia's GDP is projected to grow by 1.8% in 2023 and 1.4% in 2024.

Australia is the world's 12th largest economy with GDP predicted to grow to $2.5 trillion in 2023. To add additional perspective, Australia is home to just 0.3% of the world's population, but accounts for 1.7% of the global economy. Australia is the 19th largest export economy in the world, and its major exports in 2023 were from the resources sector, with minerals and oil and gas accounting for 57% of the total exports. The main export destinations for all goods and services were in Asia, with China and Japan the major buyers, followed by the EU, South Korea, the USA and India.

Australia's economy is ranked 3rd freest in the world. Overall, Australia's robust mixed-market democracy has benefited from an effective system of government that facilitates vibrant entrepreneurial development. With almost all industries open to foreign competition and a skilled workforce readily available (albeit with some short- to medium-term labour shortages as a consequence of the pandemic), Australia remains an attractive and dynamic destination for investment.

Introducing Australia *continued*

Currency

Australia's currency is the dollar, divided into 100 cents. All money amounts in this publication are in Australian dollars unless otherwise stated.

Business hours

Business hours are generally between 8.30 am and 5.00 pm.

Visas

Valid passports and visas are generally required for business visitors. Visas should be obtained from an Australian embassy or consulate before arriving in Australia.

A Business (Short Stay) Visa may be issued for either single or multiple entries which normally allow for a stay of three months on each arrival. Applications are processed at most Australian embassies or consulates. The Electronic Travel Authority (ETA) for business people allows those who are nationals of certain countries to obtain an ETA normally when they book their travel.

A Business (Short Stay) Visa and the Business ETA must be obtained before entering Australia. A letter of invitation from relevant Australian businesses may be requested. Applicants must have valid passports.

Summary

Australia is a modern and economically advanced country, with a competitive mixed economy, political stability, judicial independence and very low levels of corruption. It's corporate, tax and business regulatory systems seek to strike the right balance between encouraging entrepreneurial adventure and appropriate business conduct. Australia is ranked 14th on the Ease-of-doing-business index ("Very easy").

Quite simply, Australia is a great place to do business.

CHAPTER 2

Government policies and regulations affecting business

Doing business in Australia involves a range of dealings with federal, state, territory and local government agencies, depending on where you intend establishing, operating or developing your business.

Business regulations

A foreign company wanting to carry on business in Australia must be registered with the Australian Securities and Investments Commission (ASIC) under Part 5B.2 of the Corporations Act 2001. Registration of a business name is compulsory in every state and territory from which a business operates and must be completed before trading. Restrictions can apply to the foreign ownership of businesses or developed commercial properties in Australia. Acquisitions of interests in businesses of 20 per cent or more valued at above $310 million should be notified. There is an exception for Canada, Chile, China, Hong Kong, Japan, Malaysia, Mexico, Peru, Singapore, South Korea, New Zealand, UK, USA and Vietnam investors whereby the $310 million threshold only applies for investments in prescribed sensitive sectors. A $1.339 billion threshold applies to investors from those countries in other sectors.

Foreign persons should notify the Government and get prior approval before acquiring an interest in certain types of real estate. Regardless of value, foreign persons generally need to notify before they can take an interest in residential real estate or vacant land. Investments in developed commercial property valued at less than $67 million generally do not need approval unless they are in a sensitive sector.

Sensitive sectors with specific restrictions on foreign investment include agribusiness, residential real estate, banking, telecommunications, shipping, civil aviation, airports and media. Proposals in sensitive sectors or which raise specific issues of national interest may need more detailed examination.

The Foreign Investment Review Board (FIRB), on behalf of the Federal Government, screens proposed foreign purchases of Australian businesses and properties which could be contrary to the national interest.

COVID-19 summary

Overall, Australia has weathered the COVID-19 pandemic relatively well. The death rate of 852 per one million people ranks amongst the lowest in the developed world. Whilst a sharp contraction in the economy for the June 2020 quarter resulted in the first recession in 29 years, a recovery quickly followed.

Australia has a very high vaccination rate, including booster doses. Oral COVID-19 treatments are also available from pharmacies with a prescription.

Australia's international border is open, with no quarantine requirements, and no requirement to show evidence of vaccination status. However, airlines and vessel operators may have specific requirements that travellers need to comply with.

There are no domestic travel restrictions amongst all states and territories. The states and territories no longer have any proof-of-vaccination or mask-wearing requirements, but masks are recommended in higher risk circumstances.

Government policies and regulations affecting business *continued*

Bank accounts

The Australian Transaction Reports and Analysis Centre (AUSTRAC) is Australia's anti-money laundering regulator and specialist financial intelligence unit. AUSTRAC regulates cash dealer compliance with legislation. The term 'cash dealer' includes:

- Authorised deposit-taking institutions such as banks, building societies and credit unions.
- Managers and trustees of unit trusts.
- Financial institutions.
- Insurance companies and insurance intermediaries.
- Stockbrokers.

The following transactions must be reported to AUSTRAC:

- Any transaction with a cash component of $10,000 or more.
- Any instruction for electronic transfer of funds into, or out of, Australia.
- Any transaction in which the individuals, monies or circumstances make the cash dealer suspicious, such as an apparent lack of commercial logic.

Members of the public are also required to report to AUSTRAC international cash currency transfers of $10,000 or more.

Banking

The Australian Prudential Regulation Authority (APRA) is responsible for prudential supervision of financial institutions. It oversees banks, credit unions, building societies, general insurance, life insurance and reinsurance companies, friendly societies, and most of the superannuation industry.

The Reserve Bank of Australia (RBA) is Australia's central bank. Its main responsibility is monetary policy and maintaining financial system stability and the safety and efficiency of the payments system in Australia. The RBA sets the terms of the cash rate.

Copyright and intellectual property

With the exception of copyright and circuit layout rights, which are automatic, businesses and individuals must register their intellectual property (IP) to obtain legal ownership. Types of IP that must be registered include: patents, trademarks, designs, plant breeder's rights and confidentiality agreements/trade secrets.

IP Australia is the Federal Government agency for granting rights in patents, trademarks and designs. It administers IP legislation, including the *Patents Act 1990*, the *Trade Marks Act 1995* and other relevant Acts and regulations.

Copyright is free and automatically protects original works of art, literature, music, films, broadcasts and computer programs from copying and certain other uses. Protection is provided by the *Copyright Act 1968*, administered by the federal Attorney-General's Department. Depending on the material, copyright for artistic and literary works generally lasts 70 years from the year of the author's death or from the year of first publication.

Privacy

The federal *Privacy Act 1988*, which includes the Australian Privacy Principles, covers standards for collecting personal information, its use, terms of disclosure, data security, and anonymity requirements. There is also a credit reporting code of conduct, which is binding on all credit providers. The Act covers parts of the private sector, all health service providers and Commonwealth and Australian Capital

Territory government agencies. The private sector provisions of the Act apply only to organisations (including not-for-profits) with an annual turnover of more than $3 million, subject to certain prescribed businesses.

Some states in Australia have also enacted privacy legislation.

Financial services

APRA regulates the Australian financial services industry. The *Australian Prudential Regulation Authority Act 1998* prescribes prudential standards and practices for banks, credit unions, building societies, general insurance and reinsurance companies, life insurance, friendly societies and most of the superannuation industry.

APRA has the power to conduct investigations and discipline firms or persons.

Activities of banks, insurance companies, and the superannuation industry are dealt with under separate legislation (such as the *Banking Act 1959*, the *Insurance Act 1973*, and the *Superannuation Industry (Supervision) Act 1993*).

Insurance

The *Insurance Act 1973* establishes who can carry on an insurance business in Australia and imposes standards of capital adequacy, prudent management and protection of policyholders' interests

Mergers and monopolies

The *Competition and Consumer Act 2010* prohibits anti-competitive conduct of various kinds, particularly price-fixing agreements, collective boycotts, secondary boycotts, misuse of market power, anti-competitive exclusive dealings, resale price maintenance and anti-competitive mergers.

The Australian Competition and Consumer Commission (ACCC) is responsible for policing the *Competition and Consumer Act*. It may investigate and litigate to achieve injunctions, fines and damages. The ACCC has a substantial role in regulating monopolies, especially in telecommunications, electricity, gas, airports and rail.

Mergers are prohibited where they would be likely to substantially lessen competition in a market. However, such mergers can be authorised on public benefit grounds. It is a specific requirement in mergers to regard as public benefits outcomes such as a significant increase in the real value of exports or significant import substitution.

The ACCC's guidelines for informal merger reviews are on its website at **www.accc.gov.au/business/mergers/informal-merger-review**

Trademarks

A trademark can be a word, phrase, letter, number, sound, smell, shape, logo, picture, aspect of packaging, or a combination of these, to distinguish the goods and services of one trader from those of another.

Trademarks are registered in Australia by IP Australia in accordance with the requirements of the *Trade Marks Act 1995*. A Trademarks Application Kit can be obtained from IP Australia's website, **www.ipaustralia.gov.au/trade-marks/applying-for-a-trade-mark/how-to-apply-for-a-trade-mark**.

Australia joined the Madrid Protocol relating to international registration of trademarks in July 2001.

Government policies and regulations affecting business *continued*

Import and export controls

All goods imported into Australia must be cleared by Australian Border Force (ABF). Importers are responsible for obtaining a formal ABF clearance for all alcohol, tobacco and tobacco products, and all other goods worth more than $1,000.

Goods entering Australia can attract duties, GST and other taxes and charges, including an import processing charge. Duty rates vary. ABF determines the value of imports based on the World Trade Organization Valuation Agreement. One of several types of Import Declarations must be made. See the ABF website for more information (www.abf.gov.au/importing-exporting-and-manufacturing/importing/how-to-import/import-declaration)

Many goods are subject to import prohibitions and restrictions. Full details are prescribed in the *Customs (Prohibited Imports) Regulations 1956*.

Apart from some exemptions, all goods intended for export must be declared on an Export Declaration. Exemptions include:

- Personal effects.
- Goods with a value of less than $2,000.

See the ABF website for more information on Export Declarations - www.abf.gov.au/importing-exporting-and-manufacturing/exporting/how-to-export/export-declaration.

Export licences or permits must be obtained for a range of goods, including some military goods, native animals, marine life and plants, some medicines, hazardous waste, moveable cultural heritage items, etc.

See the ABF website for a searchable list - www.abf.gov.au/importing-exporting-and-manufacturing/prohibited-goods/list-of-items.

Consumer protection

Australia has a range of federal, state and territory laws covering the supply of goods and services that apply to fair trading, consumer protection and privacy.

The broad aim is to ensure that businesses compete fairly on price and quality and that standards of consumer contracts and warranties relating to quality, fitness for purpose, title and safety are observed. Australia has legal sanctions against non-compliance with safety standards, performance criteria, design, construction, finish and packaging. Recalls and public warnings about possible unsafe goods can be required.

Building regulations

Federal, state, territory and local government legislation and requirements cover land use, construction, heritage, conservation issues and changes to land use. Local government approval is normally required before development can proceed.

Individuals and businesses should first seek details from the relevant local council, state or territory government about planning and building control requirements before proceeding with any property development or building proposal.

Environment, pollution and waste management

The federal Department of Environment and Energy administers a number of environmental laws to ensure the conservation and protection of the environment.

State and territory governments and local councils also administer laws relating to pollution, waste management, discharge of effluent, and transport and disposal of waste material.

Water is a precious resource in Australia. In many locations, water restrictions may be imposed because of drought.

Businesses should check with the relevant local council, state or territory government about environmental protection requirements.

Currency exchange controls

Australia has a floating exchange rate with the market determining the value of the Australian dollar.

Securing interests in property

Australia operates a Torrens title land registration and land transfer system for all real estate. Each state and territory government maintains a register of land holdings, which serves as the conclusive evidence of title of the person recorded on the register as the proprietor (owner), and of all other interests (eg, mortgages) recorded on the register.

The *Personal Property Securities Act 2009* (Cth) governs security interests in personal property. Personal property is all forms of property other than real estate. For example:

- art
- cars, boats and caravans
- crops and livestock
- inventory
- plant and machinery
- shares

Personal property can also include non-material items such as:

- accounts
- intellectual property
- investment instruments, or
- licences.

A security interest is an interest in personal property that in substance secures payment of a debt or other obligation regardless of the form of the transaction. The Personal Property Securities Register (PPSR) allows lenders and businesses to register their security interests. This is a relatively simple and inexpensive online process, and is used to determine priority for secured creditors in the case of debtor default or liquidation.

Where one party owns personal property that is in another party's possession (eg, equipment under lease or hire), the owner's interest in that property can only be secured through registering the interest on the PPSR. Privately executed documentation asserting title in the owner is not effective. Accordingly, it is critical for the owner to register their interest on the PPSR.

In summary, **without registering an interest on the PPSR, a lender (without mortgage security per above) or provider of personal property will be an unsecured creditor, irrespective of any private documentation between the parties.**

Financial institutions and sources of finance

The major financial centres in Australia are Sydney and Melbourne.

Banking system

The RBA is the central bank. Its main responsibility is setting monetary policy aimed at achieving low and stable inflation over the medium term. Other major roles are maintaining financial system stability, promoting the safety and efficiency of the payments system, printing and managing note issues and distributing coins. The bank is an active participant in financial markets, manages Australia's foreign reserves, issues Australian currency notes and serves as banker to the Federal Government.

Information provided by the RBA includes statistics on interest rates, exchange rates, and money and credit growth - and a range of publications on operations and research.

The Australian banking system consists of the following institutions:

- Australian-owned banks, including four major banking groups.
- Foreign-owned banks that are locally incorporated subsidiaries of parent banks.
- Foreign banks that operate as branches of overseas parent banks.
- Building societies, credit unions and around 200 other participants, including investment banks.

The range of products offered by banks has expanded beyond loans and deposits to include credit cards, insurance, investment banking and managed-fund products.

Since 1992, foreign banks have been able to establish operations in Australia either through subsidiaries or branches. There are now no restrictions on the number of foreign banks able to operate in Australia. The Federal Government permits the issue of new banking authorities to foreign-owned banks where APRA is satisfied the bank is of sufficient standing and that it will comply with APRA's prudential supervision arrangements.

Other financial and investment institutions

Investment banks. Commonly known as merchant banks or money market corporations, they operate principally in the wholesale segment of the finance market servicing larger corporations, public authorities and governments.

Funds management. Many banks and investment banks have established funds management operations. These include pension funds, which in Australia are known as superannuation funds.

Financial markets. The domestic securities market consists of the Australian Securities Exchange (ASX) and Over-the-Counter (OTC) markets. Instruments traded include equities, debt securities and currencies. These markets are supported by derivatives markets which themselves can be either exchanged, traded or traded OTC. The ASX also provides markets for some debt securities and equity and indexed derivatives.

Trading in equities is augmented by an active market in derivatives. The main instruments traded are futures and options on the share price index, which is based on the All Ordinaries index.

Debt markets. These include the bond market for long-term federal and state government, semi-government and corporate bonds, and money markets for short-term securities and cash.

Currency Markets. The Australian dollar has been floating freely since 1983. The RBA can intervene if the currency is subject to sharp, short-term speculative movements, but rarely does so.

Sources of funds

Australian banks and other financial institutions provide foreign investors with the same access to credit as they do for domestic investors.

The traditional form of Australian trading bank lending to businesses involves advances on an overdraft basis mainly for short-term working capital purposes.

Other sources of funds can include fixed-term loans from banks; bank bill lines from trading banks, whereby a bank agrees to accept or endorse a customer's bill of exchange up to an agreed amount; bank bridging finance; money market corporations; Euro currency borrowings; insurance companies and pension funds, life insurance and general insurance companies.

Leasing. Leasing of capital equipment is readily available through banks, finance companies and merchant banks.

Factoring. The factoring of debts is widely available and can be arranged by finance companies.

Types of business enterprises

In Australia, choosing the right business structure is important in maximising after-tax returns and managing legal and economic risks.

Taxation should not be the only factor in deciding on the most appropriate structure, but different structures have different tax implications.

The main categories of business enterprise in Australia are:

- Companies;
- Trusts;
- Partnerships;
- Sole traders;
- Joint ventures.

Companies

A company is a legal entity separate from its shareholders, who are the owners. The *Corporations Act 2001*, administered by ASIC, provides companies with separate legal personalities upon registration, which affords them legal status to enter into contracts, etc. A company's operations are governed by its constitution to the extent that the rules are not inconsistent with the *Corporations Act 2001*.

The *Corporations Act 2001* provides for different types of companies, such as:

- Companies limited by shares, the most popular type.
- Companies limited by guarantee, where the members guarantee to pay up to a stated amount in the event of winding up.
- No-liability companies, which are limited to the mining sector, and whose shareholders cannot be compelled to pay on a call of uncalled capital. Failure to pay usually results in forfeiture of the shareholders' shares.
- Unlimited companies, where the liability of members is joint and several, and unlimited in the event of winding up.

Limited companies. Limited companies protect shareholders by limiting their liabilities to the extent of any amounts remaining unpaid on their shares.

Limited companies are either 'public' (whether listed on the ASX or not) or 'proprietary' (private limited liability company).

All companies must have at least one shareholder. Proprietary companies can have up to 50 shareholders, while the number of shareholders in public companies is unlimited.

Public companies must have at least three directors, two of whom must be ordinarily resident in Australia. Proprietary companies must have at least one director, who must be ordinarily resident in Australia. Public companies are also required to appoint a company secretary who must be ordinarily resident in Australia. A proprietary company may also appoint a secretary, but is not compulsory. The company secretary may also be a director. A listed public company is subject to mandatory listing requirements imposed by the ASX.

Common to both forms of company are the following conditions:

- Directors must be natural persons;
- A public officer must be appointed to satisfy taxation reporting requirements (often fulfilled by the company secretary);
- A company must apply to ASIC to be registered and be given an Australian Company Number (ACN);
- A company must have a registered office in Australia with minimum prescribed office hours.

Directors of limited or proprietary companies do not have to beneficially own shares.

Financial reporting requirements differ depending on the type and size of the company. There are also regulations on keeping statutory records, making annual filings, etc.

Directors and other officers of a company are subject to duties imposed by the *Corporations Act 2001* and other legislation. A breach of these duties may result in civil or criminal penalties.

Taxation of companies. A company pays income tax on its taxable income. Companies with no more than 80% of their gross income being passive income, and group-wide business turnover below $50 million, pay tax at 25 per cent with no tax-free threshold. All other companies pay tax at 30% with no tax-free threshold. A company must obtain a Tax File Number (TFN), used when lodging annual income tax returns.

Branch of a foreign company. Foreign companies can operate branches in Australia, which are considered to be extensions of the foreign company.

To operate an Australian branch, a foreign company must register with ASIC. Registered foreign companies are provided with an Australian Registered Body Number (ARBN). Branch profits are subject to the normal rate of corporate tax. There is no separate branch profits tax.

Trusts

A trust is not a separate legal entity, but refers broadly to an obligation accepted by a person or persons (the "trustee" or "trustees") in relation to property (the "trust property"), for the benefit of another person or persons ("beneficiaries").

Trustees are required to undertake all obligations and transactions on behalf of the trust. As this role carries a legal liability for the activities undertaken, trustees are often companies so as to limit liability.

A trust deed sets out a trustee's obligations and the relationship between trustee, beneficiaries and the trust property. The most common types of trust are:

- Bare trust;
- Fixed trust;
- Discretionary trust;
- Unit trust.

Bare trust. This is the simplest form. It is a nominee arrangement whereby one person (usually a company) is the legal owner of an asset but another enjoys the entire beneficial interest in the asset. A common example is where a trustee company has legal ownership of shares, but another person beneficially owns the shares.

Fixed trust. In a fixed trust, each beneficiary enjoys a fixed or predetermined share of the income and/or capital of the trust.

Discretionary trust. In a discretionary trust, some or all of the entitlements of the beneficiaries in any income year are governed by the exercise of the trustee's discretionary powers. The trust instrument may specify limits on the extent of the trustee's discretion. The discretion may include the right to add or remove beneficiaries.

Unit trust. A unit trust is a form of fixed trust whereby each beneficiary (i.e. unit holder) is entitled to trust income and trust property, in proportion to the number of units owned. The trust instrument may permit units to be transferred in the same way as shares in a company. Many investment funds use this type of structure.

Taxation of trusts. Although in general law a trust is not recognised as a separate legal entity, they are recognised as such for taxation purposes.

Types of business enterprises *continued*

A trust must obtain its own TFN, used when lodging annual income tax returns. The trustee needs to register for the TFN in its capacity as trustee.

Except in limited circumstances, beneficiaries who are "presently entitled" to a share of a trust's income (as determined under trust law) are taxed on the same proportionate share of the trust's taxable income for an income year, whether the income is distributed or not. Beneficiaries must include their share of the trust's taxable income in their personal tax return for the year the entitlement arises.

If there is any part of a trust's income to which no beneficiary is presently entitled, the trustee will be liable to pay tax on the applicable proportionate share of the trust's taxable income. Typically, this occurs where the trustee fails to appoint to beneficiaries all of the trust's income for the year. Australian resident beneficiaries (except minors) to whom the trustee appoints income must quote their TFN to the trustee, otherwise the trustee must withhold 47% of the beneficiary's proportionate share of taxable income and remit to the ATO.

Partnerships

A general-law partnership is a relationship between two or more persons carrying on a business with a view to profit. Partnerships are governed by state government laws. It is usual to have a formal overriding partnership agreement which outlines the rules by which the partnership conducts its business, such as profit-share agreements and arrangements for partners' salaries, new partners, and retirement of partners.

A partnership, unlike a company, has no separate legal personality distinct from its members.

Taxation of partnerships. For tax purposes, a partnership is treated notionally as a separate entity. In this context, a partnership is an association of persons or entities that carry on business as partners or receive income jointly – except for limited partnerships, which are essentially taxed as companies (see below). A partnership needs its own TFN.

Although the partnership itself is not liable to tax, it is still required to lodge a separate income tax return to report its partnership income or loss. Each partner includes their individual shares of the partnership net income or loss in their individual tax returns. Partnership income retains its character in the hands of the partners.

Limited partnerships. In a limited partnership at least one of the partners has limited liability. Limited partnerships may be established under specific state laws or overseas. The liability of the limited partners is usually limited to their capital contribution and they are generally precluded from being involved in the management of the partnership business.

For tax purposes, most limited partnerships are corporate limited partnerships, and are treated essentially as companies.

Sole traders

Sole traders are individuals operating a business in their own right. Such a business is not an entity separate from its owner. For tax purposes, the income of the business is treated as the person's individual income and that person is solely responsible for tax payable on profits derived by the business.

Company formation and administration

Forming a company in Australia is covered by the *Corporations Act 2001* and begins with an application for registration to ASIC.

Forming a company

The application must state the type of company and name proposed, and the name and address of each person who consents to become a member.

Each person who has consented in writing to be a director or company secretary, must provide their full name and address, any former names, and date and place of birth.

The application must include the address of the proposed registered office and opening hours if not standard; and the address of the principal place of business, if different.

A proposed unlimited company, or one limited by shares, must provide:

- The number and class of shares each member agrees to take up.
- The amount, if any, each agrees to pay for each share.
- Whether they would be fully paid on registration or, if not, the amount to be unpaid on each share.
- Whether the shares each member agrees to take up would be beneficially owned by the member.

Where shares in a proposed public company limited by shares, or an unlimited company, would be issued for non-cash consideration, details must be provided. If the shares would be issued under a written contract, a copy of the contract must be lodged.

For a company limited by guarantee, the proposed amount guaranteed by each member must be stated, whether or not the company would have an ultimate holding company.

If the proposed company would have an ultimate holding company registered in Australia, the application must include its name and details such as its Australian Business Number (ABN). The place of formation for a foreign holding company must be stated.

Formation costs. Companies can be incorporated in Australia and are typically formed quickly, often within two days at a cost of about $1,900, which includes a standard constitution and registration with ASIC.

Shares and capital structures

There are no restrictions on the level of issued share capital or the number of shareholders, except for proprietary companies, which are limited to 50 non-employee shareholders. All companies must have at least one shareholder.

Classes of shares. Most companies only issue one class of share, but companies may differentiate shares by voting, dividend and other rights. Preference shares entitle shareholders to receive a dividend up to a specified amount and allow for preference to ordinary shareholders in the event of liquidation or wind-up, but may have restricted voting rights. Ordinary shares usually have voting rights and no restriction on dividends.

Debentures. In addition to capital raised by issuing shares, companies may issue debentures. A debenture is a loan made to a company and may include debenture stock, bonds and other securities with or without a charge on the company's assets, however, a charge often applies. Debenture stock may be issued at a discount and be redeemable or non-redeemable.

Company formation and administration *continued*

Changes to share capital. Under the *Corporations Act 2001,* a company may reduce its share capital provided it is authorised by its constitution and the members make a special resolution to do so. The Act allows companies to buy back their own shares.

Share registration and transfer. Shareholder details are entered into the share register and shareholders are issued with share certificates.

Shares are normally transferable unless the company's constitution provides otherwise. Transfers are only valid if the transferee lodges a share transfer form with the company. Stamp duty is generally not imposed on share transfers, except for land-owing companies.

Shareholder agreements. Proprietary companies often have shareholder agreements that deal with issues that may arise in the event of a dispute, disagreement or disposal of shares.

Restrictions on dividends. Under the *Corporations Act 2001*, companies may only pay a dividend if immediately before the dividend is declared the company's assets exceed its liabilities. The dividend payment must also be fair and reasonable to the company's shareholders as a whole, and must not materially prejudice the company's ability to pay its creditors.

Public companies must make adequate provision for any excess of unrealised losses over unrealised profits. They must also ensure that net assets are not less than the total of called-up share capital and undistributed reserves both before and after the dividend distribution.

Company administration

Before applying to register a company certain decisions must be made about how it will be run. That is, if its internal governance will operate under the 'replaceable rules' in the *Corporations Act 2001* (not applicable for sole director/shareholder proprietary companies), its own constitution, or a combination of both.

Replaceable rules. The basic rules for internally managing a company are included in the *Corporations Act 2001* as 'replaceable rules'.

If a company uses these rules, it does not need a written constitution of its own. Such companies would not incur the expense of keeping their constitutions up to date with the law, even if the replaceable rules are amended.

The replaceable rules do not apply to a proprietary company with a single shareholder who is also the sole director as there is no need for formal rules governing internal relationships.

This does not mean that sole director/shareholder proprietary companies have to adopt constitutions, although they may do so. Such companies only need rules to allow them to conduct business and deal with contingencies. The *Corporations Act 2001* sets out basic rules that apply only to sole shareholder/director proprietary companies. These cover:

- The powers of a single director/shareholder of a proprietary company to sign, draw, accept, endorse or otherwise execute negotiable instruments;
- The remuneration of a single director, who is also the sole shareholder and any reimbursement of his or her expenses.
- Special rules for appointing additional directors to a single director/shareholder company.

Although a sole director/shareholder proprietary company may have a constitution, the rules in the Act cannot be modified.

If an additional director is appointed or an additional person takes up shares in a single director/shareholder company, the replaceable rules will automatically apply, except to the extent they are displaced by a constitution.

Constitutions. A company may choose to adopt a constitution rather than use the replaceable rules. If it is a proprietary company it does not have to lodge its constitution when applying to register. However, the constitution must be kept with the company's records and be available.

If a public company adopts a constitution or a combination of replaceable rules and constitution, a copy must be lodged with ASIC when applying to register.

The Act requires a no-liability company to be a public company and have a constitution that restricts its activity to mining purposes only and states the company's objectives.

Directors

Shareholders delegate the day-to-day management of a company to the board of directors. Every public company must have at least three directors and a proprietary company must have at least one.

Role of directors. Directors are accountable to the shareholders for overall management of the company in accordance with the powers and duties set out in its constitution. Directors may also be shareholders: their responsibilities and liabilities are not limited by the dual role. Occasionally, a constitution may require a director to hold a specified number of shares.

Eligibility. Unless specified in the company's Constitution, there are no qualifications for becoming a director. People who cannot become directors include:

- Undischarged bankrupts, unless permitted by a court.
- The company's auditors.
- Anyone disqualified by a court.

The company's Constitution normally disqualifies anyone of unsound mind or who is absent from board meetings without prior agreement over an extended period.

Foreigners can be directors, but at least two directors of a public company incorporated in Australia must be ordinarily resident in Australia. Directors must be natural persons.

Appointing directors. A company's first directors are named in a form filed on registration of the company. Subsequent appointments are usually made by a simple majority of shareholders at a general meeting in accordance with the company's constitution.

Existing directors are usually permitted to appoint additional directors to fill casual vacancies, subject to a maximum specified in the constitution. Every time a new director is appointed, the company must file a notice of change of office holder with ASIC.

Director Identification number. All directors (including non-resident directors) are required to have a 15-digit Director Identification Number (DIN) that will be unique to each director. A director will need to apply for a DIN only once, and they will keep their number forever, even if the director changes their name, their directorships, or ceases being a director. A person must have a DIN before being appointed as a director.

Company formation and administration *continued*

Retirement and removal. Directors may resign at any time. A notice becomes effective as soon as it is given and cannot be withdrawn. ASIC must be notified within 28 days. However, if the notification is made after 28 days, the date of resignation will be effective from the date ASIC is notified.

In public companies one-third of the directors, excluding the managing director, must retire each year in rotation. They are then eligible for re-election at the annual general meeting unless the company's constitution states otherwise. There is no age limit for directors but the minimum age is 18 years.

Shareholders may remove a director from office at any time by passing an ordinary resolution. They must notify the company of the proposed resolution at least 2 months before the meeting at which it is to be proposed. Directors may not be removed from office by written resolution. A director whose removal is proposed has the right to have written representations circulated to shareholders and to speak at the meeting at which the resolution is to be considered.

Types of directors

While directors may have different powers, they all share the same responsibilities to the company.

Executive director. As employees of the company, executive directors carry out a management role and fulfil board duties. An example of an executive director is the managing director, who is entrusted with the overall management of the company by the board.

Non-executive director. Although they have the same powers as executive directors, non-executive directors are not employees of the company and usually only serve on a part-time basis. They are appointed for their commercial, management or political skills. Non-executive directors contribute independence and impartiality through not being involved in the day-to-day running of the business.

Permanent director. A company may decide that certain directors should not have to be re-elected periodically and the company's constitution will provide for this. It is common for the managing director not to retire by rotation.

Alternate director. A director may appoint an alternate director to exercise some or all of the director's decisions for a specific period.

Duties of directors

Fiduciary. As directors are in a position of trust, they must always act in the company's best interests.

Companies are liable for all contracts entered into by directors on their behalf. However, a director may be liable for any action taken in their own name without mention of the company.

Any conflict of interest, e.g. a personal matter, must not affect the actions a director takes on the company's behalf. Directors must also declare to the company any personal profit made while carrying out the role.

Duty of skill and care. Directors must carry out their duties with a reasonable degree of skill and care, taking into consideration their skills and experience.

If duties are delegated to managerial staff, a director must be completely satisfied that the manager is honest, reliable and suitably experienced for the job. If a person entrusted with a particular duty is suspected or has been suspected of acting dishonestly and is not monitored, the director can be charged with negligence.

Directors' liabilities. Directors' liabilities are potentially very great, although companies are permitted to insure directors against this eventuality.

Situations in which directors might be held personally liable include:

- being in breach of the common law duties to:
  a) act in good faith in the interests of the company;
  b) exercise a reasonable level of skill and care;
- acting beyond the powers set out in the constitution or replaceable rules;
- including false or misleading statements on listing particulars in a disclosure document;
- jeopardizing the interests of the company's creditors through incompetent or fraudulent management.

Directors may be held liable to compensate investors who suffer loss as a result of false or misleading statements. Directors of insolvent companies may incur extensive penalties and disqualification.

Directors can also be made personally liable for a company's unpaid Pay As You Go withholding, Superannuation guarantee obligations (Chapter 10) and GST liability (Chapter 12). This is effected through the issuing of a Director Penalty Notice (DPN) to one or more directors.

Company secretary. All companies (except single director/shareholder companies) must have a company secretary, who is ordinarily resident in Australia, responsible for the administration of the company and, in particular, compliance with statutory legal requirements.

The secretary is appointed and removed by the directors. A director may also be the company secretary.

There are no qualification requirements for the secretary of a proprietary company. However, a public company must employ a secretary with appropriate knowledge and experience. Such a person might be a chartered secretary, chartered accountant, solicitor or barrister.

Company secretaries must be natural persons.

Other statutory requirements

The *Corporations Act 2001* imposes extensive duties on a company and its directors including:

- **substantial property transactions**
  Arrangements to acquire from, or transfer to, the company a substantial asset must not be entered into unless first approved by the company in general meeting;
- **loans to directors**
  With a limited number of exceptions, loans (or security or guarantee for a loan) must not be accepted from the company. Exceptions are loans under a specific amount and funds provided to meet legitimate business expenditure;
- **interests in shares and debentures**
  All interests (and changes in interests) in the shares and debentures of a listed company and other group companies must be disclosed to the company within 14 days. This includes the interests of any spouse and infant children;
- **insider dealing**
  Inside knowledge must not be used to deal in the shares of a public company. This is a criminal offence. It is also an offence to pass on this knowledge to an outside party knowing that they may deal in the shares;
- **company name and ACN**
  The name of the company and its ACN must be included on all correspondence. The company name must be legible on all stationery;

Company formation and administration *continued*

- **shareholder meetings**
  Periodic annual general meetings must be called in accordance with the *Corporations Act 2001*;
- **annual reviews**
  An Annual Review must be filed with ASIC in the prescribed form
- **annual accounts**
  The requirements to prepare annual financial statements, appoint an auditor and lodge financial statements with ASIC vary depending on the nature (public or proprietary company) and size of the company. Where required, financial statements that comply with the *Corporations Act 2001* and Australian Accounting Standards must be prepared and filed with ASIC within the prescribed timescale (four months for unlisted public companies and three months for listed public companies). The financial year is 1 July to 30 June unless approval to adopt a different financial year has been granted to the company;
- **auditors**
  Unless specific ASIC audit relief applies, an auditor is required to be appointed for:
  - Public Companies listed on a stock exchange;
  - Other disclosing entities (as defined in the *Corporations Act 2001*);
  - Large Proprietary Companies;
  - Small Proprietary Companies if at least 5% of shareholders resolve in a general meeting to appoint an auditor;
  - Large companies limited by guarantee; and
  - Any company being an Australian Financial Services (AFS) Licensee.
- **tax matters**
  Tax returns must be prepared and submitted to the Australian Taxation Office (ATO) within the prescribed time periods.

Meetings

Company meetings comprise shareholders' general meetings and board meetings. Shareholders' meetings include annual general meetings and extraordinary general meetings.

Meetings are permitted to be held virtually, provided the company's constitution expressly permits virtual meetings. Otherwise, meetings will need to be held in a physical location or in hybrid form. Documents can be executed electronically and in counterpart.

Annual general meeting. Companies must have an initial annual general meeting (AGM) within 18 months of incorporation and each subsequent calendar year, with no more than a 15-month gap between meetings. It is the duty of the directors to call an AGM. Failure to do so can lead to penalties.

AGM's normally consist of:

- receiving the annual financial statements, auditors' report and Director's report;
- electing or re-electing directors; and
- appointing or reappointing auditors.

Proprietary companies can elect not to have AGM's and elect not to lay the accounts and reports before the members at general meetings. This must be decided by elective resolution at a general meeting.

Extraordinary general meetings. The directors can call an extraordinary general meeting (EGM) at any time and for any purpose. Shareholders with 5 per cent or more of the voting share capital of 100 or more shareholders can require the directors to call an EGM.

An EGM might deal with matters such as changes in the Constitution or related party benefits.

Conduct at general meetings. General meetings are governed by the company Constitution and by company law generally. They can only continue if a quorum, as set out in the articles, is achieved.

At least two members are required unless the company only has one member. Voting is generally by show of hands, although members have the right to a poll of one vote per share and can appoint proxies to vote on their behalf.

There are two types of resolution:

- ordinary resolutions require 28 days' notice for listed entities (21 days for unlisted company) and a simple majority (> 50 per cent) to be passed;
- special resolutions require 28 days' notice (21 days' notice for a private company) and a 75 per cent majority;

The chairman of the board normally chairs shareholders' meetings. If the chairman is absent, the directors must appoint another director to chair the meeting. The shareholders retain the right to elect another director to take the chair.

The minutes of all general meetings must be formally reported and the minute book available for inspection by any shareholder. This should include a list of attendees and a record of the major decisions taken.

Written resolutions. Private companies have the statutory right to adopt a resolution in writing. All members must sign a document containing the resolution or several identical documents, in lieu of passing it in general meeting. The only exceptions are resolutions to remove a director or the auditor, which may only be considered in general meeting.

Single member companies. If a private company has a single member, that member has the same duty to record resolutions and major decisions in a minute book.

Board meetings. There are no legal requirements in respect of board meetings. Meeting frequency and subject matter is at the board's discretion. Generally, board meetings address broad management issues, such as strategic planning, and record important policy decisions.

Insolvency

A company is insolvent when it is unable to pay its debts as and when they fall due.

The legislation governing insolvency is contained in the Corporations Act 2001. This legislation deals, amongst other things, with the conduct of directors when a company is leading up to and is in an insolvent position. Most importantly, it sets out the circumstances in which directors may be disqualified or become personally liable for the company's debts - termed insolvent trading.

If a company gets into financial difficulties, its directors can first look at the various options available to solve any cash flow problems, including the possibility of raising additional equity or loan capital, or selling to or merging with a third party. It is usual for the directors to consult a Licensed Insolvency Practitioner or solicitor to obtain advice on the options available and to ensure that they do not become personally liable under the provisions of insolvent trading.

There are a number of options should a formal insolvency procedure become necessary.

Company formation and administration *continued*

Voluntary Administration

The voluntary administration process is designed to assist insolvent companies satisfy their debts, by ensuring that they can either:

- come to a formal arrangement with their creditors to pay those debts through a Deed of Company Arrangement (DOCA); or
- be placed into liquidation, quickly and inexpensively.

The voluntary administration process offers a collaborative approach that maximises the chances of a company continuing to exist by giving it the opportunity to propose a DOCA to its creditors. It restrains creditors from enforcing their claims, and can assist a company to trade out of short-term cash-flow difficulties.

A voluntary administration is usually initiated by the directors of a company that is, or about to become, insolvent, appointing a voluntary administrator, who is typically a Licensed Insolvency Practitioner. The voluntary administrator takes control of the company's affairs for the duration of the process. Generally, at the conclusion of the process, either control is handed back to the directors upon execution of a DOCA, or the company is placed into liquidation.

Small business restructuring

Companies (including trustee companies) with total debts of $1 million or less have the option of a simplified and less expensive restructuring process. The directors can appoint a "small business restructuring practitioner", who oversees the development of a restructuring plan, which is put to creditors for acceptance or rejection. The directors maintain control of the company during this process.

To qualify for this option, the company must be up-to-date with its employee entitlement obligations (mainly wages and superannuation guarantee (Chapter 10)), and all tax lodgments (tax returns, Business Activity Statements, etc) must be up-to-date (albeit tax liabilities may still be outstanding).

Liquidation

Liquidation is a means of winding up the affairs of a company.

Compulsory liquidation occurs when a stakeholder (usually a creditor) petitions the court and the court appoints a liquidator.

The function of the liquidator is to:

- realise the assets of the company;
- pay the company's creditors in order of priority;
- distribute any remaining surplus to the members in accordance with the company's constitution.

A voluntary liquidation is initiated by a shareholders' special resolution. A members' voluntary liquidation is only possible where the directors believe that the company's liabilities can be settled. In these circumstances, the members are entitled to appoint the liquidator and there is no involvement of the creditors.

Receivership

A secured creditor has the power to appoint a Receiver to realise the company's assets in satisfaction of its outstanding debt. This does not necessarily result in the liquidation of the company. A Receiver will, if possible, allow the company to continue to trade with the aim of selling the business as a going concern as this is usually the best method of maximising the recovery from the charged assets. A Receiver does not deal with the ordinary unsecured creditors.

Financial reporting and audit requirements

Financial reporting in Australia is governed by two broad sources of regulation: legislation, (such as the *Corporations Act 2001*, the *Association Incorporations Act 1981*, and the *Superannuation Industry (Supervision) Act 1993)*, and regulations covering specific industries, such as travel agents and real estate agents; and requirements established by the accounting profession.

The applicable regulation will depend on the nature and type of incorporated entity and the industry in which it operates. Most organisations carrying on business in Australia incorporate under the *Corporations Act 2001* (the Act).

Part 2M.3 of the Act governs these aspects of preparing and auditing financial reports:

- Annual financial reports and directors' report.
- Half-year financial report and directors' report.
- Audit and auditor's report.
- Annual financial reporting to members.
- Lodging reports with ASIC.
- Special provisions about consolidated financial statements.
- Financial years and half-years.
- Disclosure by listed companies of information filed overseas.

Types of business entities

Financial reporting and audit requirements in Australia depend on an organisation's structure.

The more common types are:

- Disclosing entities.
- Public companies.
- Large proprietary companies.
- Small proprietary companies.
- Registered schemes.
- Australian financial services licensees.

Companies may also be:

- Limited by shares.
- Unlimited, with share capital.
- Limited by guarantee.
- No-liability companies.
- A banking or life insurance company where the financial reporting provisions of the *Banking Act 1959* or *Life Insurance Act 1995* should be followed.

The following definitions will help international organisations to assess their requirements based on their intended activities in Australia.

Registered scheme. A managed investment scheme registered under the Act where:

- Individuals contribute money to acquire rights to benefits produced by a scheme.
- Contributions are pooled to produce financial benefits.
- Members do not have day-to-day control over operation of the scheme.

Financial reporting and audit requirements continued

These entities are normally for fund managers, property syndicates and other activities requiring the pooling of investors' money.

Disclosing entity. A body that issues enhanced disclosure financial reporting securities, including entities that have:

- Securities listed on a stock exchange.
- Issued securities pursuant to a prospectus.
- Issued securities pursuant to a takeover scheme.
- Issued securities pursuant to an arrangement.
- Issued or made an offer of debentures which requires a trustee to be appointed.

Financial report. Includes financial statements, notes to financial statements and directors' report and declaration.

Financial statements. Consist of a Statement of Comprehensive Income, Statement of Cashflows, Statement of Financial Position, statement of changes in equity and notes to the financial statements prepared in accordance with Australian Accounting Standards.

Proprietary company. A company limited by shares or an unlimited company that has share capital, has no more than 50 non-employee shareholders, and must not engage in any activity that would require publishing a prospectus.

Large proprietary company. A proprietary company that satisfies at least two of the following tests:

- Consolidated gross financial year operating revenue for the company and any entities it controls is $50 million or more.
- Consolidated gross assets at the end of a financial year of the company and any entities it controls is $25 million or more.
- The company and any entities it controls have 100 or more full-time equivalent employees at the end of the financial year.

Small proprietary company. A proprietary company other than a large proprietary company.

Public company. A company that is not a proprietary company.

Australian financial services (AFS) licensee. An entity registered to provide financial advice.

Foreign company is defined as:

- a body corporate incorporated in an external territory or outside Australia and the external territories, not being:
  - a corporation sole; or
  - an exempt public authority; or
- An unincorporated body that:
  - is formed in an external territory or outside Australia and the external territories; and
  - under the law of its place of formation, may sue or be sued, or may hold property in the name of its secretary or of an officer of the body duly appointed for that purpose; and
  - does not have its head office or principal place of business in Australia.

Foreign controlled company. A public company, or large or small proprietary company, incorporated in Australia that is controlled by a foreign company.

Reporting and audit requirements

The entities listed below must prepare financial reports under Australian Accounting Standards, lodge them with ASIC, and have them audited:

- Listed public companies.
- Disclosing entities.
- Unlisted public companies, including large companies limited by guarantee.
- Unlisted registered schemes under the Managed Investments Scheme provisions.
- Large proprietary companies.
- Small proprietary companies that are foreign controlled and are directed by ASIC, or where 5 per cent of members have requested them to prepare, lodge and have audited their financial reports.
- AFS licensees.
- Registered foreign companies.

ASIC relief from the financial statement preparation and audit requirements in the *Corporations Act 2001* is available in specific circumstances. This relief is provided through ASIC Corporations Instruments discussed below. Deadlines for preparing, lodging and auditing financial reports will depend on the nature of the company. A summary is in Appendix A at the end of this chapter.

ASIC Corporations Instruments (ASICCI)

ASICCI are particularly relevant to foreign organisations doing business in Australia.

Applicability	ASICCI	Content
Synchronisation of financial year with foreign parent company	2016/189	Allows synchronisation of entity's financial year with that of its foreign parent entity in certain circumstances.
Small proprietary companies which are controlled by a foreign company but which are not part of a large group	2017/204	Provides relief from financial report preparation and lodgement requirements, provided that the company is not part of large group. The definition of a large group is the same as that of a large proprietary company as discussed above.
Rounding in financial reports and directors' reports	2016/191	Subject to certain restrictions, rounding in financial and directors' reports is permitted.
Dual lodgement relief	2016/181	Relief provided from lodgement of financial statements with ASIC on the proviso that the relevant financial report is lodged with the ASX.
Audit relief for proprietary companies	2016/784	Relief provided to large proprietary companies and small proprietary companies that are controlled by foreign companies from audit requirements. This instrument is very restrictive in application.
Wholly-owned entities	2016/785	Relief from preparing and lodging a financial report, directors' report and auditor's report for wholly-owned subsidiaries. It provides relief subject to certain conditions relating to a requirement of a deed of cross guarantee between the economic entity and the holding entity lodging consolidated financial reports.

Financial reporting and audit requirements continued

Applying International Financial Reporting Standards

Australian Accounting Standards (AAS) converged with International Financial Reporting Standards (IFRS) for full financial years beginning 1 January 2005. The Australian approach has been to adopt the wording and content of IFRS with changes only to accommodate Australian legal requirements and some modifications for not-for-profit and public sector entities.

All entities that are required or elect to prepare a general-purpose financial statement will be required to adopt AAS in its entirety. This includes recognition, measurement and disclosure requirements. All other entities that prepare a special-purpose financial report may apply differential policies, with some Australian accounting standards being mandatory.

For-profit entities preparing financial statements in accordance with the Corporations Act 2001, other legislation, their constituting documents or other agreements, are not permitted to prepare special-purpose financial statements (which can depart from Australian Accounting Standards). Rather, they are required to prepare general-purpose financial statements, which must be in accordance with all accounting standards. However, such entities may be permitted to prepare simplified financial statements under AASB 1060 General Purpose Financial Statements – Simplified Disclosures for For-Profit and Not-for-Profit Tier 2 Entities (SDR).

Corporations Act requirements

Books and records. Every company is required to keep for a minimum of seven years accounting records which correctly explain its transactions, including any transactions as trustee, and enable:

- True and fair financial statements to be prepared periodically.
- Financial statements to be conveniently and properly audited.

In most cases these records would include financial statements, general ledgers, journals and supporting work papers, and transaction source documents, such as invoices.

Directors must ensure appropriate accounting records are kept.

Every company must keep financial and other records that will sufficiently explain its transactions, financial position and performance and enable true and fair financial reports to be prepared, and audited if required.

The financial records of the company can be kept in any language; however, an English translation should be available to the person who is entitled to inspect the records. The company's financial reports must be in English and Australian currency.

Annual financial report. An annual financial report would normally include:

- A directors' report.
- Auditor's report and independence declaration.
- Financial reports comprising profit and loss statement, a statement of financial position, cash-flow statement, statement of changes in equity and notes to the financial statements.
- Directors' declaration.

The disclosure requirements for financial reports are set out in the Act and regulations, AAS issued by the Australian Accounting Standards Board (incorporating IFRS), and the Listing Rules of the ASX for listed companies and other entities.

Directors must ensure the financial reports are prepared in accordance with the Act and AAS.

Appendix A: Reporting and audit deadlines

Type of entity	Deadline for reporting to members	Deadline for lodgement with ASIC
Disclosing entities	**Annual financial report** The earlier of: • 21 days before next AGM; or • 4 months after the financial year-end **Half-year financial report** No legal requirement	**Annual financial report** Within 3 months of financial year-end **Half-year financial report** Within 75 days of half-year-end
Listed entities	**Annual financial report** The earlier of: • 21 days before next AGM; or • 4 months after the end of the financial year **Half-year financial report** No legal requirement	**Annual financial report** Within 3 months of financial year-end **Half-year financial report** Within 75 days of half-year-end
Unlisted registered schemes	Within 3 months of financial year-end	Within 3 months of financial year-end
Unlisted public companies	The earlier of: • 21 days before next AGM; or • 4 months after the financial year-end	Within 4 months of financial year-end
Public companies and large proprietary companies which are wholly-owned entities and have obtained relief under ASICCI 2016/785	N/A	N/A (Form 389 must be lodged within 4 months of financial year-end)
Large proprietary companies	Within 4 months of financial year-end	Within 4 months of financial year end
Large proprietary companies that are grandfathered proprietary companies	Within 4 months of financial year-end	N/A
Small proprietary companies (not controlled by a foreign company) where ASIC requests a financial report	In accordance with the terms of the direction	In accordance with the terms of the direction
Small proprietary companies controlled by foreign companies	Within 4 months of financial year-end	Within 4 months of financial year-end
Small proprietary companies controlled by foreign companies where a parent company lodges consolidated financial statements with ASIC	N/A	N/A
Registered foreign companies	Will be determined by requirements in the company's place of origin	Once each calendar year at intervals of not more than 15 months

Business taxation

In Australia there are several different types of business structures available, each with different implications for taxation. The following table lists typical business structures and the maximum rate of tax payable.

Type of structure	Maximum income tax rate
Sole trader - individuals	45%
Partnership (individuals taxed on profits)	45%
Trusts (beneficiaries usually taxed on profits)	45%
Companies (foreign branch or Australian incorporated) - Base Rate Entity	25%
Companies (foreign branch or Australian incorporated) - All Others	30%
Individuals and trusts are generally subject to a Medicare Levy of a further	2%

The most common structure for larger businesses is a company. However, discretionary trust structures are also common in the small to medium enterprise sector because they provide asset protection (especially with a company trustee) and flexibility in distribution of taxable profits. Often, a discretionary trust would also have a corporate beneficiary such that after the distribution of taxable income to the individuals who actually "operate" the trust's business, excess taxable income is distributed to the corporate beneficiary, which is taxed at the (usually lower) Australian company tax rate.

Company taxation

Companies are subject to a flat tax rate on their taxable income, with no tax-free threshold. Australia presently has a two-rate system for companies. A company that is a Base Rate Entity (BRE) for a particular financial year is subject to a rate of 25 per cent. All other companies pay 30 per cent. A company is a BRE for a financial year if it satisfies both of the following criteria:

- No more than 80% of its gross income for the year is passive income; and
- The group-wide business turnover (ie, the company and related parties) is below $50 million.

If either (or both) of the above is not satisfied for a financial year, the company is not a BRE, and is subject to the 30 per cent rate. BRE status is a year-by-year determination on a stand-alone basis. That is, a company can be a BRE for a financial year, then not for the following year, and so on.

The following information applies to incorporated entities conducting business in Australia, whether incorporated in Australia or elsewhere. Companies resident in Australia are liable to Australian income tax on their worldwide profits, wherever earned and regardless of whether or not remitted to Australia. The position of sole traders, partnerships and trusts, is similar, unless otherwise noted.

Resident companies

Generally speaking, a company is a resident of Australia for income tax purposes if it is incorporated in Australia; or if not incorporated in Australia, satisfies both of the following:

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

It has been announced that the above residency rule for companies not incorporated in Australia will be simplified. Such companies will be a resident where they have a "significant economic connection to Australia". This test will be satisfied where both the company's core commercial activities are undertaken in Australia and its central management and control is in Australia. However, this change has not yet been legislated.

An individual is a resident if:

- the person resides in Australia;
- the person's domicile is in Australia, unless the person's permanent place of abode is outside Australia; or
- the person has been in Australia for more than one half of the year of income, unless their place of abode is outside Australia and the person has no intention to take up residence in Australia.

It has been announced that the above existing individual tax residency rules will be replaced with a new, modernised framework. The primary test will be a simple 'bright line' test, whereby a person will be an Australian tax resident if they are physically present in Australia for 183 days or more in any income year.

Secondary tests will then apply to individuals who do not meet the primary test, which will depend on a combination of physical presence and measurable, objective criteria. However, this change has not yet been legislated.

A partnership is not a tax-paying entity because all of the partnership's profits are distributed to the partners. In that event, only the residency of the partners is relevant. A trust is a resident if its trustee is a resident or if the trust's central management and control is in Australia.

Non-resident companies and entities

Non-resident companies and other non-resident entities are liable to Australian income tax on the profits arising directly or indirectly from the carrying on of a business in Australia through a branch or an agency.

Non-resident companies (and other entities) may also be liable to Australian income tax, usually via a withholding tax regime, from sources not connected with trading in Australia, such as interest, dividend and royalties payable to the non-resident by an Australian resident entity. The relevant withholding tax rules and rates of withholding may be modified by a Double Tax Agreement (DTA) between Australia and the relevant country.

Capital Gains Tax (CGT) applies only to non-residents who dispose of:

- Australian real property;
- Rights relating to natural resources situated in Australia
- Interests in companies or trusts whose main assets are comprised of Australian real property (and only when you own 10% or more); and
- Assets in connection with an Australian permanent establishment.

This limited CGT exposure makes Australia a more attractive place to invest in for non-residents, because most interests in Australian companies and unit trusts will be exempt from Australian CGT.

Non-resident individuals are taxed on their Australian-sourced income, subject to the terms of any relevant DTA.

Tax returns and assessment

Business taxation in Australia is collected through a system of self-assessment. Each entity must lodge an income tax return for each financial year - from 1 July to 30 June. Foreign-owned entities can apply to substitute an accounting period in line with their foreign head office. Companies usually pay income tax by quarterly instalments, with a squaring-up payment or refund upon lodgment.

Generally, businesses must lodge income tax returns within 10 months after the end of their financial year. Penalties apply for late lodgment.

Tax deductions include depreciation, tax amortisation of certain expenses (such as buildings used in business) and trading losses from previous years. A tax consolidation regime allows wholly-owned groups of companies operating within Australia to elect to be taxed as one entity (see 'Tax consolidation' in this chapter).

Business taxation *continued*

Claims for repayment of income tax deducted at source and for payment of tax credits can be made in the annual income tax return, by an amended return, or by written request.

Profit subject to tax

Taxable income for businesses includes:

- trading income;
- interest;
- dividends from resident and non-resident companies (although some corporate taxpayers may be exempt);
- rent;
- royalties;
- any other annual profits or gains; and
- capital gains computed in accordance with the CGT rules.

Imputing tax credits onto dividends paid

When a company has paid tax on its taxable income, it can then impute a credit for that tax onto a dividend paid to shareholders. This is known as "franking" the dividend. Australian resident shareholders are assessed on the dividend and the amount of the attached credit, but then allowed a credit against their tax liability. This prevents double-taxation on company profits when those profits are distributed to Australian resident shareholders.

For example, a company derives $100 of taxable income, and pays $30 tax. The company then pays a dividend of $70 to its lone shareholder, who is an individual, and franks the divided, resulting in a $30 credit attaching to it. The individual shareholder is assessed on the total $100, but is allowed a $30 credit against their tax liability. If the shareholder is on the top personal tax rate of 47%, they are assessed $47 tax on the dividend, but the $30 credit leaves them with a net $17 payable. This is known as "top-up" tax. The shareholder is left with $53, being the $70 dividend, less $17 top-up tax. The original $100 of company taxable income has ultimately borne tax at the shareholder's personal tax rate of 47%. For resident individuals and superannuation funds only, if the shareholder's tax liability is less than the imputed credit, they receive a cash refund of the difference.

Calculating trading profits

In calculating trading profits, a distinction is made between capital and income. The distinction is not defined in Australian tax legislation. Instead, the courts have laid down general principles to determine whether a receipt or expense is on capital or income account. Australia has had a CGT regime in place since 20 September 1985 and capital gains made on assets acquired on or after that date are subject to the normal income tax rates. However, capital gains made on disposal of assets used in a business by non-company business taxpayers may be eligible for concessions that reduce the CGT exposure or even make the capital gains effectively not taxable.

Tax deductions are permitted for expenditure incurred in the production of assessable income, or necessarily incurred in carrying on a business for the purpose for gaining or producing assessable income. However, the two exceptions to this general principle are where the expenditure is considered to be private or capital in nature. Such expenditure may be eligible for depreciation or be included in the cost of an asset when determining capital gains.

Allowable deductions include:

- tax depreciation for capital assets used in the business;
- tax amortisation of buildings and certain intellectual property rights used in the business;
- a five-year tax write-off for business establishment costs; and
- loan establishment costs over either the life of the loan or five years, whichever is shorter.

Examples of expenditure which is not tax deductible include:

- goodwill amortisation;
- provisions for expenditure such as bad debts (compared to an actual bad debt write off); and
- fines and penalties.

Interest deduction

The tax deductibility of interest has been a source of considerable litigation. Generally, interest incurred on a loan which is used in the business will be tax deductible. This is so even when the business may have ceased, but ongoing payment of interest can be directly connected with the former business. Interest is deductible when the loan is used to acquire a capital asset, provided that it is used for a purpose of producing assessable income.

Capital assets

Capital allowance deductions are available for capital assets used to produce assessable income.

They are self-assessed by reference to the cost and effective life of the asset. The Australian Taxation Office (ATO) publishes an annual list of 'safe harbour' depreciation rates on most assets used in business. Most taxpayers elect to follow these rates. As an example, here are some ATO depreciation rates:

- Commercial buildings 2.5%
- Motor vehicles 12.5%
- Computer hardware 25.0%
- Acquisition of copyright 4.0%

In most cases, there are provisions for balancing adjustments when the relevant depreciating asset is disposed of. A loss on sale of a building is usually considered a capital loss and only deductible against future capital gains.

A Small business entity (SBE) may choose to calculate depreciation deductions under a simplified pooling system, where all depreciating assets are combined into a pool with a single depreciation expense calculation. When an asset is sold, the sale proceeds simply decrease the opening balance of the pool before calculating that year's depreciation deduction. An entity is a SBE if it carries on a business, and its group-wide turnover is below $10 million.

Instant asset write-off

A SBE that has chosen to adopt the abovementioned simplified pooling depreciation method is entitled to an instant deduction for the full cost of a depreciating asset (new or second-hand) that cost less than $20,000. Accordingly, only assets costing $20,000 or more go into the pool for calculating the business's depreciation deduction. The cost is exclusive of any input tax credit for GST included in the cost (refer Chapter 12).

The under-$20,000 threshold applies on a per-asset basis, so small businesses can instantly write off multiple assets. However, the threshold is temporary, and will revert to the standard under-$1,000 threshold from 1 July 2024. That is, the full cost of depreciating assets acquired from 1 July 2024 will be deductible only when their cost is less than $1,000.

Deductions limited for vacant land

Broadly, expenses incurred in relation to vacant land are not deductible. Typical expenses include interest, local government rates, maintenance, land tax and insurance. Vacant land generally means land with no substantial and permanent structure on it. Land with residential property on it is treated as being vacant unless the property is lawfully able to be occupied, and is rented or available for rent.

Business taxation *continued*

However, this rule denying deductions does not apply where the land is used in carrying on a business. There are other exceptions, such as for natural disasters and other unforeseen events.

Denied deductions will usually be added to the cost of the land for the purpose of calculating any capital gain on sale.

Double taxation relief

Double taxation relief may be either a credit for foreign tax, or complete exemption of the relevant income, depending on several factors and the type of Australian taxpayer. For resident taxpayers, all foreign income is taxable in Australia. Under the Australian Foreign Tax Credit rules, relief for foreign income tax paid on a portion of the foreign income is creditable up to the amount of Australian income tax on that income.

However, foreign dividends payable to an Australian resident company owning at least 10 per cent of the shares of the foreign company (and where the foreign company passes an active income style test) are exempt from Australian income tax. Otherwise, foreign dividends payable to an Australian company will be assessable income, but will normally be entitled to a credit for any foreign tax paid on that income or for any foreign withholding tax. This is limited to the amount of Australian company tax payable on such dividends.

Tax File Number and Australian Business Number

Every Australian taxpayer must have a Tax File Number (TFN). This is issued by the ATO after proof of identity similar to opening a bank account. Some entities may apply for a TFN on the ATO website. In addition to including the TFN on income tax returns, taxpayers may also need to quote it to avoid a withholding of tax (see below).

An Australian Business Number (ABN) is required where businesses wish to, or are required to, register for the Goods and Services Tax (GST), which is covered in Chapter 12. The ABN may eventually replace other registration numbers (such as the Australian Company Number and the Australian Registered Body Number) in the future and become the number through which an entity deals with government agencies. It will not replace the TFN. In many instances, a taxpayer may quote an ABN instead of a TFN to avoid withholding tax being charged on certain receipts.

Withholding tax

In certain circumstances, Australian business taxpayers must withhold tax at 47 per cent on payments to third parties who have not provided either a TFN or an ABN.

Australian companies paying interest, dividends or royalties to a non-resident can elect to pay the amount by reference to the relevant DTA provided they believe the recipient is entitled to the treaty provisions.

For residents of non-treaty countries, the withholding tax rate (which is a final tax in Australia) is generally 30 per cent for dividends, 10 per cent for interest and 30 per cent for royalties.

Capital Gains Tax

Since 1985 Australia has had a comprehensive CGT regime. Capital gains are included in the taxable income of Australian companies and company tax at the relevant corporate rate applying to the entity is paid on the gain.

For individuals and trusts, most capital gains may be eligible for a general 50 per cent reduction of the taxable gain. To obtain the reduction, the individual or trust must hold the asset on capital account and have owned it for more than 12 months before disposal. The 50 per cent reduction is no longer available to non-residents.

Assets that come under the CGT regime include:

- profits arising from the disposal of assets, tangible or intangible, anywhere in the world;
- capital sums derived from assets;
- capital sums received for the surrender of rights; and
- capital sums received for the use of an asset.

Tax on capital gains may be deferred ('rolled over') where sale proceeds are reinvested in qualifying assets within specified time limits. As well, CGT can be deferred on roll-overs, including:

- transfer of a business from a sole trader to a wholly-owned company in exchange for shares;
- transfer of assets from a trust to a wholly-owned company in exchange for shares;
- transfer of a partnership business to a company in exchange for shares in the company;
- where one company acquires 80 per cent or more of the shares in another company by way of issuing new shares to the shareholders of the target company; and
- demerger roll-overs where a subsidiary company is proportionately transferred out to the shareholders of the parent company.

Small business capital gains tax relief

There are four CGT concessions available to small businesses in Australia: The 15-year asset exemption, the 50 per cent active asset reduction, the retirement exemption, and roll-over relief.

To qualify, the net assets of the taxpayer and connected entities cannot exceed $6 million just before the asset is disposed, and it must satisfy an "active asset" test. Where the asset sold is a share in a company or an interest in a trust, an additional requirement is that the company or trust must satisfy a controlling individual test.

An active asset is one used in the course of carrying on a business. Shares in a company or interests in a trust will be considered active assets at a point in time where at least 80 per cent of the entity's assets by value are active.

These CGT concessions are generally applied in the order in which they are listed. Before these concessions are applied, any capital losses (current year and prior year) must be deducted from the gain, with the balance discounted, if available (see the section on Capital Gains Tax above).

15-year asset exemption. Where the active asset was held for 15 years or more, and the disposal is in connection with the retirement of an individual over 55 years of age, any capital gain on disposal is ignored for tax purposes.

50 per cent active asset reduction. In effect, where the 50 per cent general discount referred to earlier is available to a taxpayer, the capital gain is discounted by a further 50 per cent under the active asset concession, resulting in 25 per cent of the capital gain being taxable.

Retirement exemption. Where certain conditions are met, taxpayers may reduce the remaining capital gain by up to $500,000. If under 55 years of age, the amount must be rolled over into a complying superannuation fund. The $500,000 limit is a per-person lifetime limit.

Replacement asset rollover. Any remaining capital gain may be deferred for two years, or rolled over beyond that where the taxpayer acquires a qualifying replacement asset within two years of the disposal. The rolled over capital gain is taxed when the replacement asset is disposed.

Business taxation *continued*

CGT withholding for non-resident vendors

To combat non-disclosure of capital gains derived by non-residents, purchasers of real property, shares in certain property-owing companies, and options to acquire such assets, are required to withhold 12.5% of the purchase price and pay it to the ATO.

However, no withholding obligation arises in some circumstances, including:

- The market value of the property, etc, acquired is less than $750,000; or
- The shares are listed; or
- The vendor has obtained a clearance certificate from the ATO, confirming that they are an Australian tax resident.

In short, when purchasing real property, or shares in certain property-owing companies, with a value of $750,000 or more from an Australian resident vendor, the vendor must obtain the abovementioned clearance certificate before settlement. Otherwise, the purchaser's withholding obligation will arise.

A vendor can apply to the ATO for a reduced rate of withholding. The amount withheld is claimable as a credit against the vendor's tax liability upon lodging the relevant year's income tax return.

Small business income tax offset

Individuals deriving business income with turnover below $5 million are entitled to a tax offset that reduces the tax impost on their business income component. The offset is 16%, capped at $1,000 per individual per year.

Use of tax losses

The Australian rules on deductibility of revenue and capital tax losses are complicated. This section outlines some of the issues. Professional advice should be sought before acquiring an Australian company or trust with tax losses.

Trading losses may be deducted against trading and non-trading income for the same accounting period. Alternatively, if there is no other income in the same period, the tax losses can be (subject to meeting certain tests), carried forward indefinitely and set off against future income of the same entity.

For Australian companies with tax losses from an earlier year, one of two tests must be satisfied to use prior-year losses. The first is 'continuity of ownership' which requires a majority of individuals to continue to own the shares directly or indirectly in the relevant company. If that test fails, the company may still deduct its prior-year losses where it can pass the 'similar business' test. This test requires a near-same business to be carried on from the time the continuity of ownership test failed to the year that the losses are eligible for deduction. Where a company is unable to pass either test, the prior-year losses will be forfeited.

A trust wanting to use prior-year losses must pass certain tests depending on whether it is a fixed, widely held, public, or discretionary trust. The category is important in determining the applicable rules. Most trusts would need to pass a '50-per cent stake' test and an 'income injection' test to deduct the tax losses in a future year. Publicly listed unit trusts can, in certain circumstances, use a 'similar business' test.

Tax consolidation

Australia has a tax consolidation regime for commonly owned corporate groups. These rules provide that all wholly owned Australian subsidiary companies are treated as divisions of the Australian parent company.

An Australian tax-consolidated group must have a 'head' company and at least one wholly owned

resident subsidiary. The companies must elect to consolidate from a fixed date. Once the election is made, transactions between entities within the group are ignored for income tax purposes.

Foreign-owned companies which are commonly owned by a non-resident parent company with multiple entry points into Australia are subject to special rules to allow them to consolidate their Australian resident subsidiaries for income tax purposes.

Before 2002, Australia had a number of grouping rules, such as for CGT roll-over relief of assets transferred among wholly owned companies; for rebates on unfranked dividends paid among group companies; and for transfer of tax losses among commonly owned companies. The only way in which such group roll-over relief can now be obtained is by consolidating.

Once the election to consolidate is made, only one income tax return is lodged by the Australian parent company. This takes into account the results for each subsidiary. The tax consolidation rules also allow for tax sharing agreements between the Australian companies in the group. This is particularly useful where, for example, the group has several distinct businesses run by different entities within it.

The 'continuity of ownership' and 'similar business' test rules are still relevant. However, a further layer of rules apply to tax losses in a tax consolidated group.

Special rules also exist where related companies, which have not consolidated, deal with each other. The ATO has the power to impose arm's length values on any related party dealings.

Reporting outstanding tax debts

The ATO has the power to report your business's outstanding tax debts to Credit Reporting Bureaus (CRB). Broadly, any person or entity who satisfies all of the following criteria is at risk of their tax debts being reported to CRBs:

- Has an Australian Business Number (ABN).
- Has one or more "tax debts" totalling $100,000 or more, each of which is more than 90 days overdue.
- Does not have an active complaint in progress with the Inspector-General of Taxation.

Certain types of entities are exempt from being reported, such as superannuation funds and charities. For all other entities, certain tax debts will be ignored when measuring whether the $100,000 threshold is reached. Such excluded tax debts include those under a payment arrangement that is being complied with. Being reported could compromise your business's ability to secure new finance or supplier credit.

General anti-avoidance provision

Australian income tax legislation contains a general anti-avoidance provision known as Part IVA. Generally, Part IVA applies where an arrangement has been entered into for the sole or dominant purpose of obtaining a tax benefit. A tax benefit can include a reduction in taxable income, an increase in tax-deductible expenditure and obtaining franking credits.

Transfer pricing

Australian tax law, and all Australia's DTAs, require the arm's length principle to be applied to all related party cross-border dealings.

Business taxation *continued*

Thin capitalisation

Australia's thin capitalisation rules apply to the Australian operations of both foreign entities investing into Australia and Australian entities investing overseas. They limit deductions (mostly interest) relating to the total debt of Australian operations of those investors where the entity's debt-to-equity ratio exceeds certain limits. Putting aside certain exemptions, and application of the rules to authorised deposit-taking institutions such as banks, the maximum debt allowable for an Australian entity, beyond which, limitations apply to deductions, will be the greater of either the 'safe harbour' or the 'arm's length' tests.

Under the safe harbour test, the amount of debt used to finance the Australian investments will be treated as being excessive when it is greater than that permitted by the safe harbour gearing limit of 1.5:1.

The arm's length debt amount is determined by analysing the entity's activities and funding to determine a notional amount that represents what would reasonably be expected to have been the entity's maximum arm's length debt funding of its Australian business during the period.

There is also a worldwide gearing test available for non-deposit-taking Australian entities with foreign investments. This test is not available if the Australian entity is controlled by foreign entities.

There are two de minimis exemptions which excludes a taxpayer from the thin capitalisation provisions:

- Taxpayers and their associates claiming annual debt deductions of $2 million or less;
- Outward investing Australian entities if at least 90 per cent of their assets are Australian assets.

With effect from 1 March 2014, a tax deduction is no longer available for intercompany interest where the recipient is based in a low tax jurisdiction or is subject to a special tax regime.

There are also special rules for banks and finance companies.

The Government has a policy to replace the abovementioned 1.5:1 safe harbour gearing limit with an earnings before interest, tax, depreciation and amortization (EBITDA) test, while retaining the arm's-length debt test and worldwide gearing test. Net interest expense deductions will be limited to 30% of an entity's taxable EBITDA. A Bill is before Parliament to implement this change. Although it has not yet passed, the change will apply from 1 July 2023.

Hybrid mismatch rules

Australia has implemented in part the OECD-recommended hybrid mismatch rules, which mainly prevent a double non-taxation benefit arising from exploiting differences between the tax treatment of entities and instruments across different countries. The double non-taxation benefits generally fall into two categories. The first is where a payment is deductible in one country, but not assessable in another, and the second is where a deduction is allowed twice across two countries.

Significant Global Entities (SGE)

A SGE is a global parent entity, or a member of a group of entities that report consolidated financial statements, with global annual income of $1 billion or more. For example, an Australian-incorporated company with relatively little activity may nonetheless be a member of a much larger group with global annual income of $1 billion or more, and is incorporated into the group's consolidated financial statements. The Australia company is a SGE, and a number of SGE reporting obligations arise. Significant penalties arise where these reporting obligations are not met.

Australian Debt/Equity rules

Australia has rules that determine what instruments are treated as debt or equity for income tax purposes. In other words, the legal position of the instrument may be ignored under these rules such

that, for example, it is possible that a share in a company could be treated as debt for tax purposes.

The rules have relevance on whether, for example, the return on an investment is interest (and therefore deductible) or a dividend (not deductible but frankable where franking credits are available).

Generally, an instrument will satisfy the debt test where all the following conditions are met:

a) it is a financing arrangement for the entity, or the entity is a company and the scheme does not give rise to an interest as a member or stockholder of the company;

b) the entity or a connected entity receives or will receive financial benefits under the instrument;

c) the entity or both the entity and the connected entity have an effectively non-contingent obligation to provide financial benefits to one or more entities after the first of the financial benefits in point (b) above is received; and

d) it is substantially more likely than not that the value provided under point (c) above will be at least equal to the value received under point (b) above.

A scheme will satisfy the equity test if:

a) it gives rise to an interest in a company as a member or stockholder;

b) it is a financing arrangement that gives rise to an interest carrying a right to a return from the company, and the right or return is contingent on the economic performance of the company, a connected entity or part of their activities;

c) it is a financing arrangement that gives rise to an interest carrying a right to a return from the company and the right or return is at the decision of the company or a connected entity; or

d) it is a financing arrangement that gives rise to an interest issued by the company that either -

   (i) gives its holder (or a connected entity of the holder) a right to be issued with an equity interest in the company or in a connected entity of the company; or

   (ii) is or may be convertible into such in interest.

Where an instrument is both equity and debt under these rules, a tiebreaker provision provides that it is debt.

Australia as a 'holding company' jurisdiction

Australia provides similar benefits to a 'participation exemption' common in some European countries. These include:

- a CGT exemption for disposal of substantial shareholdings in foreign trading companies; and
- a general exemption for foreign non-portfolio dividends received by Australian companies and their controlled foreign companies and, subject to some exceptions, foreign branch profits.

Planning points for foreign investors

Branches and subsidiaries. One of the first decisions to be made by foreign investors is whether to establish a branch of an existing foreign company, or to form a new Australian (possibly subsidiary) company. Both can be established relatively quickly and easily. However, foreign-owned Australian companies may incur the extra expense of having their financial accounts audited in Australia.

Provided a foreign incorporated company with a branch in Australia prepares accounts that are audited and lodged with the equivalent of ASIC, then only a copy must be lodged with ASIC.

The branch of the foreign company must register with ASIC and is subject to continual disclosure requirements under the Corporations Act.

Business taxation *continued*

Branches of foreign companies operating in Australia and Australian incorporated companies are subject to the 30 per cent or 25 per cent company tax rate. Once Australian company tax has been paid, branch profits may be remitted outside Australia without extra Australian taxation. Subsidiary company profits remitted as dividends do not attract further taxation or withholding tax (provided the Australian company has paid tax on those profits). Otherwise, there may be Australian dividend withholding tax based on the applicable DTA, or at rates pertaining to non-treaty countries.

Grouping issues. Foreign groups with interests in more than one Australian company, branch or other entity, should seek professional advice to ensure optimal use of group losses and tax-free asset transfers. Foreign groups need to consider the Australian tax consolidation rules in such a case. In addition, the Australian transfer pricing rules and the transfer pricing rules in the home country need to be considered.

Loans. Factors such as interest rates, rates of tax relief and currency risks should be taken into account to ensure maximum tax relief for debt funding the Australian operations. In addition, the previously mentioned Australian thin capitalisation and debt/equity rules need to be considered.

Shares or assets. Where a business is being acquired in Australia, an issue is whether the shares in the Australian company, or merely the business's assets are to be acquired. In addition, the Australian rules largely exempting a non-resident from Australian CGT on the disposal of shares in an Australian company (that was not land-rich) would also need to be considered.

If a foreign entity is acquiring a subsidiary from an Australian tax consolidated group, the rules dealing with de-consolidation of such an entity will need to be considered. Generally, purchasers prefer to buy assets, and vendors prefer to sell shares. Tax warranties for a share versus an asset purchase, are also an important factor.

Research and development incentives

The Government has a R&D assistance scheme whereby Australian companies that incur expenditure on, or that is related to, R&D may qualify for a R&D Tax Incentive.

Companies engaging in eligible R&D activities can avail themselves of a tax offset, which is worked out at a premium to the particular company's tax rate (ie, 25% or 30%). For companies with group-wide turnover of $20 million or more, there is a two-rate premium. Companies that commit a greater proportion of their expenditure to R&D are rewarded with the higher premium rate on the incremental expenditure beyond a set threshold.

Where group-wide turnover is below $20 million, the offset is refundable, and the cap on eligible R&D expenditure is $150 million per annum.

R&D expenditure must be on "core R&D activities" or "supporting R&D activities". Broadly, core R&D activities are experimental activities whose outcome cannot be known, are conducted for the purpose of generating new knowledge, and are necessary to test a technical or scientific hypothesis in a systematic progress of work based on principles of established science. Supporting R&D activities are activities that have a direct, close and relatively immediate relationship to the core R&D activities.

Fuel Tax Credits

Generally, GST-registered businesses are entitled to a credit for most types of fuels acquired. Exclusions include aviation fuel and fuel used by vehicles weighing 4.5 tonnes or less travelling on public roads. The exclusion means, for example, that no credit is available for fuel used by an ordinary car travelling on public roads. However, a credit is available for fuel used by such vehicles when off a public road.

There are two credit rates, based on the type of fuel use, and these are indexed twice a year. The credit rates for the period 1 August 2023 - 4 February 2024 are:

Eligible fuel type	Vehicles >4.5 tonnes, on-road use Cents per litre	All other fuel use Cents per litre
Liquid fuels (eg, petrol, diesel)	20.0c	48.8c
Blended fuels: B5, B20, E10	20.0c	48.8c
Blended fuel: E85	0c	20.92c
Liquefied petroleum gas (LPG) (duty paid)	0c	15.9c
Liquefied natural gas (LNG) or compressed natural gas (CNG) (duty paid)	0c	33.4c
B100	0c	13.0c

The credits are claimed on the business's BAS, similarly to GST input tax credits, reducing the net amount payable, or increasing the refund. The credits are assessable income, but not subject to a GST liability.

Other incentives

There are also a number of employment related incentives including workforce assistance programs, tax exempt rebates to employers and wage subsidy programs. The incentives are often State based and are offered in the main to employers who employ longer term unemployed persons and apprentices.

Personal taxation

Whether a person is a resident or non-resident is important in determining the impact of Australian tax on income.

Residents and non-residents

A non-resident will only pay tax on Australian-sourced income. In relation to capital gains, a non-resident is only assessed on net capital gains derived from assets that are 'taxable Australian property' (see below).

A resident, for income tax purposes, is someone who resides in Australia according to the ordinary meaning of the word (to "have one's settled abode, dwell permanently or for a considerable time, live in or at a particular place" – *Concise Oxford Dictionary*), but in some circumstances this can be difficult to determine.

Another way to determine residency is by satisfying one of these statutory tests:

- **The domicile or permanent place of abode test.** A person whose domicile is in Australia is deemed to be a resident unless the Commissioner of Taxation is satisfied that the person's permanent place of abode is outside Australia.
- **The 183-day test.** Constructive residence is attributed to a person who is present in Australia for a total of more than half a financial year, unless it can be established that the person's usual abode is outside Australia and there is no intention to take up residence.
- **The Commonwealth superannuation fund test.** An individual is a resident if a contributing member (or is the spouse or child under 16 of a person who is a contributing member) of a superannuation fund for Commonwealth government officers.

It has been announced that the above existing individual tax residency rules will be replaced with a new, modernised framework. The primary test will be a simple 'bright line' test, whereby a person will be an Australian tax resident if they are physically present in Australia for 183 days or more in any income year. Secondary tests will then apply to individuals who do not meet the primary test, which will depend on a combination of physical presence and measurable, objective criteria. However, this change has not yet been legislated.

Australian taxes on income

As an Australian tax resident, all income derived from sources in or out of Australia will be taxable at resident rates. To prevent double taxation, agreements exist between Australia and many developed countries. These provide taxing rights to the country of residence (or if both countries' domestic rules claim residence, to the country with which the individual has the closest personal and economic ties) or, in some cases, to the country of the source of that income. If taxed in Australia, tax credits are available against Australian tax for taxes paid offshore. The credit is restricted to the lesser of the foreign tax paid and the amount of Australian tax payable on the relevant income. The credit for foreign taxes paid is only available after payment of the foreign tax either on assessment, or when withheld.

Capital Gains Tax

For Australian tax residents, almost all assets will come under the CGT provisions except for assets purchased before 20 September 1985. To determine future taxable capital gains and losses, individuals becoming residents for the first time are deemed to have acquired post-19 September 1985 assets for a cost equal to their market value at the time of becoming a resident. Where applicable, these values are then converted to Australian dollars at the exchange rate prevailing at that time.

Exceptions are assets considered 'taxable Australian property' to which the normal acquisition date and cost base rules apply, and assets acquired before 20 September 1985. Taxable Australian property includes:

- land and buildings in Australia;
- indirect interests in land and buildings in Australia, such as through investments in shares;
- mining, quarrying and prospecting rights and information;
- assets used in carrying on business through a permanent establishment in Australia; and
- options or rights to acquire any of the above mentioned assets.

Essentially, a capital gain is made if an asset is sold (or deemed to be sold) for more than its cost base. A capital loss is made if the reverse happens.

Providing the relevant asset has been held for at least 12 months, an individual will only be taxed on 50 per cent of the gain, whereas companies are assessed on the full gain. Individuals deemed to have acquired an asset at the time of becoming a resident will only be eligible for the 50 per cent discount if the asset is held for at least 12 months from the time of becoming a resident, even if it was owned before that time. Non-residents can no longer avail themselves of the discount.

A net capital gain is the total of a taxpayer's capital gains for an income year, reduced by certain capital losses made by the taxpayer. A capital loss may only reduce a capital gain in the current year or a later income year; it cannot be offset against a gain made in a prior year or against ordinary income. The net capital gain is included in the taxpayer's assessable income.

Certain assets are excluded from the CGT rules. These include:

- cars and motorcycles;
- decorations for valour;
- collectables costing $500 or less;
- life insurance;
- personal use assets costing $10,000 or less; and
- an individual's main residence.

Main residence exemption. A taxpayer can have only one main residence at a time. When changing residences, a taxpayer can have two residences for a maximum of six months. This applies only where the first residence has been the main residence for at least three months continuously in the 12 months before disposal, and has not been used to produce income in this 12-month period.

Where a person is a non-resident at the time disposing of a property, the main residence exemption is not available. It does not matter if the property was previously their main residence, nor for how long. There are some limited exceptions to this denial of the main residence exemption.

Personal taxation *continued*

Rates of personal tax

For the income year beginning 1 July 2023 the rates of tax for individuals are:

Resident Individual Rates		Non-Resident Individual Rates	
Taxable Income $	**Rate**	**Taxable Income $**	**Rate**
0 - 18,200	0c	-	-
18,201 - 45,000	19c	-	-
45,001 - 120,000	32.5c	0 - 120,000	32.5c
120,001 - 180,000	37c	120,001 - 180,000	37c
180,001+	45c	180,001+	45c

In addition, residents are liable for an additional national health insurance (Medicare) levy of 2 per cent on taxable income, subject to shading in rules for low income earners.

A Medicare levy surcharge of between 1 and 1.5 per cent on taxable income also applies to higher income earners who do not have adequate private patient hospital health insurance. The Medicare levy surcharge threshold for a single taxpayer is $90,000 or a combined income of $180,000 for a couple, plus $1,500 per dependent child after the first.

The surcharge is levied on the sum of a taxpayer's taxable income and their reportable fringe benefits (see below).

Temporary residents

There is a third category of residence: the temporary resident. Temporary residents must hold temporary visas under Australia's migration laws, cannot be an Australian citizen or permanent resident, and cannot be the spouse of a citizen or permanent resident.

Temporary residents are subject to resident tax rates, but are taxed only on Australian-sourced income and foreign-earned salaries and wages. Broadly, they are taxed as non-residents (with the exception of foreign-earned salary payments) even though they may otherwise have been considered Australian tax residents.

Other taxes

Fringe Benefits Tax. Fringe benefits tax (FBT) is payable by employers on the value of non-cash benefits provided to employees. The rate is equal to the top marginal individual tax rate, plus the Medicare levy (47 per cent). Examples of fringe benefits are a company car, payment of employees' expenses such as school fees, credit card debts, and private health insurance. Special rules apply to calculate the taxable values. Superannuation paid on behalf of employees is not subject to FBT. Certain other benefits are also exempt (see Chapter 10 - Employer's payroll responsibilities).

Fringe benefits are not included in an employee's assessable income, but most are taken into account in calculating the Medicare levy surcharge, superannuation surcharge, child support payments and eligibility for various government benefits and allowances. These are called reportable fringe benefits.

Australia does not have death duties or wealth, inheritance, local or state income taxes.

Goods and Services Tax (GST). Sales taxes were abolished in 2000 on the introduction of a Goods and Services Tax (GST) of 10 per cent on most goods and services (see Chapter 7 – Business taxation).

Tax File Number rule. A Tax File Number (TFN) is issued by the ATO for each taxpayer. If an individual does not provide a TFN in connection with an investment, the investment body must withhold an amount (calculated using the maximum personal marginal tax rate plus Medicare levy) on account of tax from any income which it becomes liable to pay in connection with that investment. For example, when setting up a bank account, if no TFN is provided, the bank is required to withhold 47 per cent from any interest payments.

This rule also applies to employment income where no TFN has been provided.

Pay-As-You-Go (PAYG). PAYG is a system for collecting and paying income tax. It applies to individuals, companies, certain trusts and superannuation funds.

Employers must withhold tax from salaries or wages earned in Australia for remitting to the ATO on the employee's behalf. This is referred to as 'PAYG withholding'.

People earning income from carrying on a business, renting property, dividends, interest and other sources not subject to compulsory PAYG withholding, are generally liable to pay PAYG instalments. No liability exists to make PAYG instalments until the Commissioner of Taxation issues a notice to pay.

Lodging an income tax return including this type of income will be the trigger to place the taxpayer in the PAYG instalment system.

Lodging an income tax return for a particular year will crystallise the amount of tax payable for that year, from which any PAYG withholding or PAYG instalments will be deducted, to determine the final net liability or refund due.

Calculating taxable income

Taxable income is calculated by deducting from the assessable income, a taxpayer's allowable deductions. Assessable income comprises ordinary income (such as salaries, wages, commissions, dividends, interest, and rent) and statutory income (such as net capital gains).

Deductions are allowable for revenue expenditure and specific statutory deductions (see below). Tax calculated on taxable income is then adjusted for any allowable rebates (personal tax offsets) and credits.

Payments on termination of employment. Lump sum payments made in consequence of a termination of employment or from a superannuation fund are subject to special tax treatment. Such payments are called 'Superannuation Benefits' or 'Employment Termination Payments' (ETP), depending on the entity making the payment.

Income derived relating to foreign employment while a non-resident is generally tax exempt in Australia. So are payments from a non-resident superannuation fund relating solely to foreign employment while the taxpayer was a non-resident, if received within six months of becoming a resident.

If a person receives payments more than six months after becoming a resident, any increase in value since commencing residency will be taxable at the taxpayer's marginal rate (plus Medicare levy).

Redundancy and early retirement payments. Limited tax concessions apply to bona fide redundancies and approved early retirement payments by an employer.

Redundancy payments arise where the employer pays an amount in addition to what could reasonably have been expected on voluntary resignation or retirement.

Approved early-retirement payments arise under an arrangement approved by the ATO for specified employees and resulting from a rationalisation of the employer's business.

Limits apply to the maximum amount of redundancy or approved early retirement payments, which are tax free. Any additional amounts are treated as an ETP and special tax rates apply.

Personal taxation *continued*

Employee share schemes

Australia has complex tax rules regarding employee share schemes (ESS).

The rules apply when an employee acquires an ESS interest under an employee share scheme at a discount. An employee share scheme is a scheme under which ESS interests in a company are provided to employees, or their associates, in relation to the employee's employment.

The rules tax discounts on ESS interests either up-front at acquisition or on a deferred basis – the method will depend upon the nature of the scheme. Deferred taxation generally only applies where the ESS interest is at a real risk of forfeiture or was obtained under a salary sacrifice arrangement.

The discount, being the market value of the ESS interest less any consideration paid by the employee, is assessable in the year of receipt. The term "market value" is given its ordinary meaning but the Regulations set out an amount that can be used instead of market value for valuing unlisted rights.

Where an employee is assessable on a discount received a $1,000 exemption applies where certain conditions are satisfied.

Where tax on the acquisition of an ESS interest is deferred, it is delayed until whenever the earliest ESS taxing point occurs. The deferred taxing point is the earliest of:

- When there is no real risk the employee will forfeit or lose the shares and there are no genuine restrictions preventing disposal of the shares;
- 15 years after your employee acquired the share (or seven years for ESS interests acquired before 1 July 2015).

The rules also contain a number of integrity provisions, including reporting requirements and TFN withholding tax provisions.

An employer which provides ESS interests to an employee during an income year must, at the end of the income year, give a statement to the ATO and to the employee if:

- The employer provided interests to the employee during the year which were taxed up-front; and/or
- The employer provided deferred tax interests to the employee (either within the year or an earlier year) and the deferred taxing point occurred during the year.

A refund is available for tax paid on an ESS interest where the employee had no choice but to forfeit the interest (other than to cease employment) and where the conditions of the scheme were not constructed to protect the employee from market risk.

A very limited, specific deduction is available to employers that provide discounts on ESS interests to employees; however, the employee must be eligible for the upfront exemption mentioned above.

Other income

Individuals are taxed also on interest income, rents, royalties, dividends, pensions and income from business activities.

Rental income received from any real estate is taxable and a tax deduction is allowed for all relevant outgoings. Losses can be offset against other income sources. Tax losses incurred from rental properties held offshore can also be deducted from other Australian sourced income.

Receipts of parental maintenance or alimony, winnings from gambling or lotteries and life insurance proceeds are not regarded as assessable income.

Receipt of dividends and associated franking credits are classified as assessable income.

All business earnings are assessable and a deduction is allowed for all relevant outgoings.

Deductions

General provision. Allowable deductions are available for expenses that are:

- incurred in gaining or producing assessable income; or
- necessarily incurred in carrying on a business for gain or producing such income.

However, if it is of a capital nature, a private or domestic nature, or incurred in producing exempt income, the loss or outgoing is not deductible.

Specific provisions. There are deduction provisions for items including borrowing expenses, capital allowance amortisation, donations to approved deductible gift recipients such as charities, tax agent fees and income protection insurance.

In Australia, a system of self-assessment exists where taxpayers determine what income and expenditure is relevant to include for tax purposes. In addition, most expenses claimed must be substantiated by documentary evidence, such as receipts.

Personal tax offsets. Numerous tax offsets or rebates exist to reduce taxation. They include zone rebates for those living in a remote location within Australia and certain neighbouring islands, spouse rebates for childless couples where one spouse does not work, pensioners' and seniors' rebates.

Employment and industrial relations

Australia's national workplace relations system operates under the *Fair Work Act 2009* and other laws, and covers the majority of private sector employees and employers in Australia.

Industrial relations

The *Fair Work Act 2009* provides for the National Employment Standards (NES), which lists ten minimum entitlements for employees in Australia. Together with pay rates in modern awards and minimum wage orders, the NES makes up the safety net that cannot be altered to the disadvantage of the employee.

The 10 minimum entitlements of the NES are:

- Maximum weekly hours
- Requests for flexible working arrangements
- Parental leave and related entitlements
- Annual leave
- Personal carers leave and compassionate leave
- Community service leave
- Long service leave
- Public holidays
- Notice of termination and redundancy pay
- Fair Work Information Statement

Employee-employer relations. The workplace relations framework regulates employee-employer relations in a number of ways, including:

- A system of enterprise-level collective bargaining underpinned by bargaining obligations and rules governing industrial action.
- Provision for individual flexibility arrangements as a way to allow an individual worker and an employer to make flexible work arrangements that meet their genuine needs, provided that the employee is better off overall.
- Protections against unfair or unlawful termination of employment.
- Protection of the freedom of both employers and employees to choose whether or not to be represented by a third party in workplace matters and the provision of rules governing the rights and responsibilities of employer and employee representatives.

Union representation. The role of unions has changed enormously in the last 30 years in that membership can run as low as 25 per cent of employees in some industries and is virtually unknown in others. Overall, 12.5% of the workforce are a member of a union.

Union membership in Australia is not compulsory, however a general preference for unionism exists among workers in the 'blue collar' industries and those in the public sector. Union representation is not present in all places of employment. The IT and E-commerce sectors are generally devoid of union representation, as are small independent businesses.

Workers councils are not common.

Same job, same pay. The Government has proposed new "same job, same pay" laws to address circumstances in which host employers use labour hire to deliberately undercut the bargained wages and conditions set out in enterprise agreements made with their employees. The details are not yet known, and a consultation process is in progress.

Working conditions

In addition to wages and salaries, fringe benefits may be given to employees at all levels.

Workers compensation insurance. No-fault insurance systems are instituted in each state to provide compensation to employees who are injured at work or travelling to or from their place of employment. Such insurance is compulsory for employers, with premiums that vary from industry to industry.

Superannuation and pensions. Employers are obliged to make superannuation contributions to a registered fund on behalf of employees. The normal retirement age is 67, but employees may retire as early as 55 in some industries. The Federal Government has power to supervise the conduct of trustees and their managing of superannuation, pension and other retirement funds. Under the Superannuation Guarantee legislation, employers are required to contribute 11 per cent of an employee's "ordinary times earnings" to a registered superannuation fund or a retirement or savings account.

This is not intended to be an additional cost for employers, but rather an income sacrifice by employees. For example, if the remuneration for a particular job is judged to be worth $100,000, that would typically mean paying the employee a salary or wage of $90,090, and contributing $9,910 (ie, 11 per cent) on the employee's behalf to their superannuation fund. An employer who fails to make superannuation guarantee contributions on time is liable for a non-deductible penalty of 200%, plus additional costs.

Working hours. Federal legislation provides for a standard working week of 38 hours.

Public holidays. The incidence of public holidays varies from state to state. However, there are generally ten public holiday days per year.

Annual leave. Minimum annual vacation provisions are set by law. The standard is four weeks' paid annual vacation. A vacation bonus of 17.5 per cent is payable under some industry awards.

Long-service leave. Entitlements are usually based on a ratio of two months' leave for 10 years' continuous service, although the qualifying period of service will vary according to the applicable state government legislation or agreement.

Personal/Carer's leave. This effectively covers both sick leave and carer's leave. The entitlement is 10 days each year for full-time employees, which accrues progressively during a year, and accumulates from year to year.

Equal opportunity. Equal opportunity legislation prevents discrimination on the basis of sex, race, sexual preference, religion, marital status and age.

Termination of employment. Some employees are entitled to be paid an additional amount when their employment is terminated, especially if they are made redundant. Redundancy payments may be subject to concessional tax rules.

Social Security. The Australian Social Security system is non-contributory. Payments are made from overall consolidated revenue.

Employers' payroll responsibilities

Australian employers are required to deduct tax from payments to employees and, using official schedules to calculate the correct amounts, remit them to the Australian Taxation Office (ATO). This system is known as 'PAYG withholding'.

Pay-As-You-Go

Registration. An employer (which may include an individual, company, partnership or trust) who is required to pay PAYG withholding must be registered with the ATO. The employing entity must apply for registration by the first day on which it is required to withhold an amount.

Examples of withholding payments are:

- a payment of salary or wages to an employee;
- a payment of remuneration to a company director;
- an employment termination payment;
- a payment for unused leave on an individual's retirement or on termination of employment;
- superannuation payments to temporary residents departing Australia permanently;
- a payment for a supply where the payee does not quote its ABN (see Chapter 12 - GST and other indirect taxes);
- a payment arising from an investment where the payee does not quote a TFN; and
- certain payments to foreign residents or received on behalf of foreign residents.

As a general rule, there is no requirement to withhold an amount from a payment if all of it is exempt income of the payee. This could include a living-away-from-home allowance, and other types of fringe benefits such as expense-payment fringe benefits.

TFN Declarations. An individual who receives, or is likely to receive, a payment for work or services, or a retirement payment, must give the payer a TFN declaration in the approved form. In relation to a voluntary agreement to withhold, the voluntary agreement should disclose the payee's ABN.

An individual can choose whether or not to provide a TFN but, if one is not provided, the payment is subject to withholding at the top marginal rate plus Medicare levy (47 per cent). To avoid this, an individual should complete a TFN declaration each time a new relationship is commenced with a payer, such as starting a new job.

The payer must send the TFN declaration to the ATO within 14 days.

Determining the amount to withhold. ATO withholding schedules for weekly, fortnightly, or monthly payments should be used to determine the amount to be withheld from a withholding payment according to the payer's payment period.

Payer's obligations. A payer of a withholding payment has various obligations, including:

- registering as a PAYG withholder;
- to pay withheld amounts to the ATO, the timing of the payment being dependent on whether the entity is a large, medium or small withholder;
- to provide certain information to the ATO; and
- to provide certain information to the payee.

The table below lists the due date for payments and the methods of payment:

Withholder Status	Test	Due Date of payments	Method of Payment
Large	Amounts withheld during a financial year exceeds $1 million	Varies but generally between 6 and 8 days of the withholding date	Electronic
Medium	Amounts withheld during a financial year between $25,000 and $1 million	21st or 28th day after the end of the month in which amount withheld	Electronic or other means approved by the Commissioner
Small	Amounts withheld during a financial year less than $25,000	21st or 28th day after the end of the quarter in which amount withheld	Electronic or other means approved by the Commissioner

The extended dates (to the 28th day) apply to any entity that has a Business Activity Statement (BAS) or Instalment Activity Statement (IAS) quarterly obligation under the GST laws. Failing to withhold from a payment results in a non-deductible penalty equal to the amount that ought to have been withheld.

Obligation to provide information to the ATO

An employer or entity that must pay an amount (even if it is a nil amount) to the ATO must notify the ATO of the amount. The notification is made through the Single Touch Payroll (STP) system discussed further below. Failure to notify the ATO on time of your PAYG withholding results in denial of an income tax deduction for the relevant gross payment amount.

Annual payment summary. This states:

- the payer and recipient;
- the payer's ABN;
- the recipient's TFN or ABN (where provided);
- the total of the withholding payments (if any) made by the payer and the total of the amounts withheld by the payer from those withholding payments;
- the financial year in which the withholding payments were made;
- the reportable fringe benefits amount (if any) for the income year; and
- other information that the ATO requires.

A payer must generate through STP a payment summary if:

- during the year, the payer made a withholding payment in respect of the recipient;
- the recipient is an individual and has a reportable fringe benefits amount for the income year in respect of their employment by the payer; or
- during the year, the payer received a withholding payment in relation to a dividend, interest or royalty payment when the recipient is a foreign resident.

Where a payer makes a withholding payment for a supply (under the GST rules) to a recipient who does not quote an ABN, the payer must give the recipient a payment summary when making the payment, or as soon as practicable afterwards. The payment summary must cover only that payment.

Employers' payroll responsibilities *continued*

Recipient's rights and obligations. A recipient of a withholding payment also has rights and obligations, including:

- the right to a tax credit for amounts withheld;
- the right to a refund from the payer when amounts are withheld in error; and
- the obligation to keep certain records for five years after the financial year-end.

Single Touch Payroll

Employers are required to run their payroll and pay their employees through accounting and payroll software that is Single Touch Payroll (STP) compliant. Employees' tax and superannuation information is also sent to the ATO through STP. The streamlined STP reporting system means reporting payments such as salaries and wages, allowances, deductions, other payments, PAYG withholding and superannuation information directly to the ATO either on or before you pay your employees (i.e. align ATO reporting obligations to payroll processes). Such reported information is used to pre-fill business activity statements and remove the need for employers to provide payment summaries to individuals or payment summary annual reports to the ATO. Payment summaries will be available to employees through myGov.

Information not reported or captured in the STP system will still need to be reported on payment summaries to individuals and payment summary annual reports. Some examples of payments that cannot be included in the STP system include superannuation income stream and lump sum payments, social security or compensation payments, certain payments from closely held trusts, dividend, interest and royalty payments, partnership distributions and payments to suppliers.

Nexia has identified a number of STP-compliant software products, and assists clients with choosing, installing and running the software.

Taxable Payments Annual Report (TPAR)

Business in the following industries are required to lodge a TPAR by 28 August each year:

- Building and construction services
- Cleaning service
- Courier services
- Road freight services
- Information technology
- Security, investigation and surveillance services

The TPAR sets out information about contractors, subcontractors, consultants and independent contractors engaged. For each such entity or person engaged, the TPAR includes:

- Their ABN, if known
- Their name and address
- Gross amount you paid to them for the financial year (including any GST).

The ATO uses this information to identify contractors who haven't met their tax obligations.

Fringe Benefits Tax

Fringe benefits tax (FBT) is payable by employers on the value of certain benefits, known as 'fringe benefits', which have been provided to employees or associates in respect of their employment.

The FBT year commences on 1 April and ends on the following 31 March.

Fringe benefits are any benefits other than salaries or wages and contributions to complying superannuation funds, which are provided by:

- the employer;
- an associate of the employer; or
- another person under an arrangement with the employer.

The benefit may be provided to an employee, including company directors, and an associate of the employee, such as a family member.

Calculating FBT. The taxable value of fringe benefits provided by an employer is calculated for Type 1 and Type 2 benefits which are grossed-up by specified factors. The grossed-up value is multiplied by the FBT tax rate of 47 per cent to determine the FBT payable by the employer.

For example, in the 2023-24 FBT year, there are two possible gross-up rates depending upon whether or not GST input tax credits were able to be claimed by the employer on the fringe benefits provided to employees. The two gross-up methods are as follows:

TYPE 1 AGGREGATE FRINGE BENEFIT AMOUNT

The gross-up rate of 2.0802 is used to calculate the Type 1 Aggregate Fringe Benefit Amount where GST input tax credits are able to be claimed by an employer registered for GST on benefits (Type 1 benefits) provided to an employee (or their associate).

The Type 1 Aggregate Fringe Benefit Amount is calculated by multiplying the taxable value of all Type 1 fringe benefits by the Type 1 gross-up factor of 2.0802. This gives the grossed-up value of Type 1 fringe benefits.

TYPE 2 AGGREGATE FRINGE BENEFIT AMOUNT

The gross-up rate of 1.8868 is used to calculate the Type 2 Aggregate Fringe Benefit Amount where GST input tax credits cannot be claimed by an employer on benefits (Type 2 benefits) provided to an employee.

Type 2 Aggregate Fringe Benefit Amount is calculated by multiplying the taxable value of all Type 2 fringe benefits by the Type 2 factor of 1.8868. This gives the grossed-up value of Type 2 fringe benefits.

The sum of the grossed-up values of Type 1 and Type 2 Aggregate Fringe Benefit Amounts is an employer's fringe benefits table amount. An employer is liable for FBT at 47% of this amount.

Car fringe benefits. A fringe benefit arises when a car owned or leased by an employer is made available to an employee for private use, such as one garaged overnight at an employee's home. The provision of a motor car to an employee under a novated lease agreement also gives rise to a car fringe benefit.

Where an employer pays an employee's car lease payments, without a novated lease in place, an expense payment benefit arises instead of a car fringe benefit.

Employers' payroll responsibilities *continued*

FBT applies to:

- sedans;
- station wagons;
- panel vans (see exemption below);
- utilities (see exemption below); and
- other vehicles designed to carry less than one tonne, or fewer than nine passengers.

An exemption from FBT is provided for commercial vehicles designed to carry 1 tonne or more, or more than eight passengers, and taxis, utilities, panel vans or other vehicles designed to carry less than 1 tonne. The exemption applies where the private use of those vehicles is only travel to and from work, or is minor, infrequent and irregular private travel.

Electric car exemption. An exemption from FBT applies for eligible zero- or low-emission cars, including battery electric vehicles, hydrogen fuel cell vehicles and plug-in hybrids. The exemption is available only for cars that cost below the luxury car tax threshold for fuel efficient vehicles ($89,332 for 2023-24). This includes second-hand cars, but only where the original retail price was below the threshold.

The two methods for calculating the FBT on car fringe benefits are the 'statutory method' and the 'operating cost method'.

Statutory method. To calculate the taxable value of a fringe benefit under this method, the GST-inclusive cost price of the motor vehicle (or if leased, the vehicle's GST-inclusive market value when first leased) is multiplied by a statutory fraction of 20 per cent. The cost price of a motor vehicle includes GST, non-business accessories and delivery charges but excludes stamp duty and registration costs.

Reduction in taxable value. The taxable value of a car benefit is reduced to take into account the days during the FBT year the car was not provided for the employee's use.

A record should be kept of the days the car is not available for the employee's private use. This may reduce FBT otherwise payable. A car is available for private use if available to the employee for part of a day. Examples of when a car would be considered not available for private use are when under repair after an accident or garaged at the employer's premises. However, a car is considered to be available for private use where it is in the workshop for routine servicing or maintenance.

Where a motor vehicle has been held for four years before the beginning of an FBT year, the original cost or leased value, can be reduced by one-third in calculating the taxable value of fringe benefits.

Employee contributions, known as a recipient's payment, may reduce the taxable value of the private use of a car. An employer is liable for GST in respect of employee contributions paid to them towards a Type 1 fringe benefit. An employer is not liable for GST in respect of employee contributions towards a Type 2 fringe benefit. The total amount of the contribution reduces the taxable value of a car fringe benefit, irrespective of whether the contribution relates to a Type 1 or Type 2 fringe benefit.

A recipient's payment can also arise for payments by an employee to third parties in respect of the employer-provided car (for example, fuel costs paid to a petrol station). No GST liability arises for an employer in respect of recipient's payments to third parties.

Operating cost method. The taxable value of car fringe benefits under this method is calculated by multiplying the total operating costs (including recipient's payments by employees to third parties) by the percentage of private use from logbook records. This taxable value may then be reduced by any employee contributions made towards the costs of operating the vehicle.

Operating costs include lease payments or other funding costs (such as deemed interest and depreciation), registration, fuel, repair and maintenance costs, and insurance.

The operating cost method may result in a lower taxable value than the statutory method where the percentage of business use of the vehicle is substantial.

To use the operating cost method, a logbook must be kept in the first year and then every five years. The logbook must be kept for a minimum of 12 consecutive weeks to determine the business usage percentage. That percentage must be compared in each FBT year with estimated business kilometres, particularly if there have been variations in the pattern of use. A record must be kept of the odometer reading on acquisition and disposal and at the beginning and end of the FBT year. Documentary evidence must also be kept of all expenses incurred.

Other fringe benefits

Entertainment fringe benefit. An entertainment benefit provided to an employee is generally subject to FBT. Examples include attendance at sporting events and parties and meals. Entertainment benefits with a value of less than $300 per employee that are irregular and infrequent, as well as meals and alcohol consumed by employees while travelling in the course of their employment, may not be subject to FBT.

Expense payment fringe benefit. Where an employer pays an expense on behalf of an employee, or reimburses an employee for private expenditure, FBT is payable on the private portion of that expense. The taxable value of the benefit is reduced where the employee would have been entitled to a once-only tax deduction if the employee had incurred the expense. In this event, the employee must complete a declaration. This is known as the 'otherwise deductible' rule.

Loan fringe benefit. FBT applies to any loan to an employee where interest has not been paid, or where interest is charged at a rate less than the ATO's statutory rate. If interest is charged on the loan, FBT also applies if that interest is not paid for more than six months. Cash drawings by the directors of a company may constitute loan fringe benefits. The 'otherwise deductible' rule may reduce the value of a loan fringe benefit to nil if the employee would have been entitled to an income tax deduction had the employee incurred interest on the loan.

Debt waiver fringe benefit. FBT applies where an employee has been released from repaying an amount owing to an employer. The taxable value is the amount of the forgone debt.

Housing fringe benefit. FBT is usually payable where employees are provided with residential accommodation which constitutes their usual place of residence.

Board fringe benefit. A board fringe benefit arises where meals are provided to employees also given residential accommodation. There must be an entitlement to at least two meals a day, on the employer's premises, and not part of a social function.

Living away from home allowance. FBT may be payable where an employee is required to live away from their usual residence for work and receives an allowance as compensation for additional non-deductible expenses and other additional disadvantages experienced. Valuable concessions apply to exempt from FBT certain components of living away from home allowances provided to employees.

Property fringe benefit. FBT may be payable where employees are provided with free or discounted goods or services other than those consumed on the employer's premises.

Car parking fringe benefit. FBT applies where car-parking facilities are made available to employees to park on the employer's premises and there is a commercial parking station within a 1-kilometre radius. For a liability to arise, the parking station must charge more than the ATO's statutory rate for all-day-parking at the start of the FBT year.

Employers' payroll responsibilities *continued*

Car-parking benefits will be exempt from FBT where:

- the car is not parked at a commercial parking station, but at the employer's premises; and
- the employer is not a public company, or subsidiary of a public company; and
- the employer's group-wide turnover is less than $50 million.

Residual fringe benefits. Where an employee receives any other non-cash benefit, an FBT liability may arise. For example, the private use of a motor vehicle that is not a car, such as a motorcycle or truck, may give rise to a residual fringe benefit.

Other FBT information

Taxis. Taxi travel is exempt from FBT if it is a single taxi trip beginning or ending at the employee's place of work. Taxi travel is also exempt if undertaken to a place to which an employee must go as a result of sickness.

Third parties. An employer will be subject to FBT on certain benefits provided by a third party where the employer arranges for the provision of the benefit.

Loyalty reward programs. FBT may apply where circumstances reveal that a benefit was provided by a third party (e.g. an airline) under an 'arrangement' for FBT purposes, or provided to an employee (or associate) in respect of employment.

A payment by an employer for an employee's membership of a loyalty reward program (eg, frequent-flyer program) may be subject to FBT, the taxable value of which will depend on the extent of private use.

Record keeping. To simplify record keeping, certain employers need only retain FBT records for a 'base year' where:

- the employer carried on business throughout the base year;
- lodged an FBT return;
- retained all FBT records; and
- benefits provided did not exceed a certain threshold ($8,923 for the current FBT year).

The employer's aggregate fringe benefits amount for the base year can then be used to calculate FBT liability for the current year and the next four years. An employer may choose to use its current year aggregate fringe benefits amount to determine its FBT liability if that amount is less than the base year amount. FBT records for the base year must be kept for five years.

Base year records cannot be used to determine an employee's reportable fringe benefits.

The peculiar aspect of these rules is that accurate records must be kept to determine whether the thresholds are exceeded and for reportable fringe benefits. Our recommendation is that accurate records be maintained each year.

Reportable fringe benefits amount (RFBA). Employers must maintain records to determine the value of benefits provided to employees. If an employee receives benefits with a taxable value more than $2,000 in the FBT year, the grossed-up value of those benefits must be shown on the employee's payment summary for the financial year ending on the following 30 June. For this purpose, the gross-up rate is always 1.8868. The amount shown is the RFBA.

Even though these reportable benefits appear on employee payment summaries, they are not included in the employee's assessable income and are not subject to income tax. However, the RFBA is taken into account when determining an employee's liability for Medicare Levy surcharge and

Superannuation Contributions Surcharge, entitlements to some government benefits, child support obligations and the HECS-HELP student loan repayments.

Other RFBA information

All taxable fringe benefits are included in an employee's RFBA except car parking, remote area housing, meal entertainment and benefits wholly or partly attributable to entertainment facility leasing expenses. Pooled cars are also excluded as a RFBA.

Benefits provided to an associate of an employee are treated as being provided to the employee for RFBA purposes. Particular difficulties will arise in the case of shared benefits. In these cases, the amount allocated to employees must 'reasonably reflect' each employee's share of the benefit.

Benefits such as electronic diaries, laptops and mobile phones are exempt from FBT and do not have a taxable value. Consequently, these benefits need not be reported for RFBA purposes.

Employers who are entitled to the FBT rebate or threshold exemption must still report the RFBA for an employee. An employee leaving during the FBT year may request a payment summary in writing. The summary must show the relevant RFBA.

Superannuation guarantee

Under Federal superannuation guarantee legislation, employers must provide a minimum level of superannuation support for eligible employees, equal to 11 per cent of base earnings. Contributions must go to a complying superannuation fund or retirement savings account.

Most employees are able to choose the superannuation fund into which their employer contributions are paid. If an employee does not make a choice, the contributions will be paid into a fund chosen by the employer.

Employers are required to make superannuation contributions at least every quarter to obtain income tax deductions for them. If employers fail to meet this obligation, the superannuation guarantee charge may be applied. This has three components – the employer's shortfall by not paying minimum superannuation contribution, an interest component and a penalty.

An employer may make contributions to a superannuation provider within 30 days of the contributions due date which may offset the portion of any superannuation guarantee charge for the quarter that relates to that employee.

The Government proposed that from 1 July 2026, employers will be required to pay an employee's superannuation at the time that they pay their wages. This change will affect all employers, but the Government has provided a three-year lead-in period in order to allow employers adequate time to adjust their systems accordingly. This has yet to be legislated.

Payroll tax

Payroll taxes are imposed by each of Australia's eight state and territory governments on wages, in cash or kind. Employers are liable for payroll tax when their total Australian payrolls exceed exemption thresholds which vary between states and territories. If an employer is a member of a group, the total Australian wages paid by all members of the group determines whether the employer should register for payroll tax.

Employers' payroll responsibilities *continued*

A particular allowance or benefit that is subject to payroll tax in one state or territory may be exempt in another. Variations include:

- the definition of 'wages';
- the tax-exempt threshold;
- allowable deductions applying to the threshold; and
- the applicable rate of tax.

Payroll tax liability. Most employer-employee relationships are readily identifiable. The various legislatures deem certain relationships to be that of an employer-employee so that payments are subject to payroll tax. For example, where independent contractors provide services in a work-related contract, the relationship may be deemed to be one of an employer-employee nature.

Employers who are not members of a group must register within seven days after the end of a month in which they commence to pay wages, where average wages exceed the thresholds shown below.

Payroll tax rates vary from 4 per cent in Tasmania to 6.85 per cent in the Australian Capital Territory.

State	Registration Threshold ($)		Annual Wages Threshold ($)	Payroll Tax Rates %
New South Wales	98,630	(30-day month)	1,200,000	5.45
Victoria	58,333	monthly	700,000	4.85 1.2125% for regional employers. Additional surcharges apply, totalling to: • 1% on payroll >$10m • 2% on payroll >$100m
Queensland	108,333	monthly	1,300,000	4.75 - <$6.5m 4.95 - >$6.5m 1% discount may apply for regional employers (until 30 June 2030). Additional levy applies: • 0.25% on payroll >$10m • 0.75% on payroll >$100m
South Australia	125,000	monthly	1,500,000	4.95
Northern Territory	125,000	monthly	1,500,000	5.50
Western Australia	80,333	monthly	1,000,000	5.50 - 6.50
Tasmania	102,740	(30-day month)	1,250,000	4.00 - < $2m 6.10 - > $2m
ACT	166,166	monthly	2,000,000	6.85

Some states apply the exemption threshold on a sliding-scale basis, such that the exemption cuts out entirely once the employer's annual wages bill exceeds a certain amount.

Most states advise employers that they must register when wages exceed the applicable monthly exemption levels.

In all states and territories, the deduction available is first calculated on total Australian wages. The result is then reduced on a pro-rata basis by comparing the wages the employer paid in a particular state or territory with the total Australian wages.

Wages. The definition of 'wages' generally includes any wages, salaries, commissions, bonuses or allowances paid or payable in cash or kind.

In all jurisdictions, fringe benefits and superannuation contributions are included as wages. In some, such as NSW, trust distributions made in lieu of wages may be included.

Employees vs Contractors

As set out above, you are required to withhold from most payments to your employees, but not from a payment to a supplier or contractor who quotes their ABN. It is therefore very important to ensure that you have not incorrectly classified someone as a contractor when they are in fact an employee.

This would result in a failing to uphold your withholding and reporting obligations, as well as your employer superannuation obligations and payroll tax liability.

The consequential failure-to-withhold and superannuation guarantee penalties, coupled with the loss of a tax deduction for the gross payment, can more than triple the after-tax cost of your payment. Accordingly, if there is any doubt whatsoever as to whether any of your people are employees or contractors, we recommend obtaining formal advice.

Retirement planning

Australia's retirement income policy is predicated on a compulsory minimum level of superannuation support for most employees and tax concessions to encourage people to use superannuation to build wealth for retirement.

As well, a means-tested social security system is intended to provide a base level of financial support for Australians in retirement and additional concessions which encourage people moving into retirement to convert their superannuation funds into pensions.

What is superannuation? In Australia, superannuation is a concessionally taxed structure and long-term savings vehicle designed to build up funds for retirement. The Federal Government's Retirement Incomes Policy has the long-term objective of moving retired Australians from dependence on the age pension and increasing the level of national savings.

Superannuation contributions are made to superannuation funds, which are specialised trusts. While many funds are employer-sponsored funds, industry funds or public offer funds, there is a growing trend for individuals to take control of their own superannuation through the use of self-managed funds. Australia is unusual in this regard, allowing individuals to in effect invest their own superannuation savings, subject to compliance with government regulations and an annual audit. Self-managed funds can have up to six members, all of whom must be individual trustees or directors of a corporate trustee. This imposes responsibilities that need to be considered before establishing such a fund.

For many Australians, superannuation offers an excellent means of accumulating capital for retirement without the same tax impost as other tax structures.

For a person born	Preservation age is
Before 1 July 1960	55
1 July 1960 to 30 June 1961	56
1 July 1961 to 30 June 1962	57
1 July 1962 to 30 June 1963	58
1 July 1963 to 30 June 1964	59
After 30 June 1964	60

The Federal Government adopts a 'carrot and stick' approach to ensure that individuals contribute sufficiently to fund their own retirement. The 'carrot' comprises various tax concessions to make saving via superannuation attractive. The 'stick' is the Government's Superannuation Guarantee, which requires employers to make at least a minimum level of superannuation contribution for employees.

The concept of 'preservation age', which depends on date of birth, is important in a number of aspects of superannuation. Preservation age is determined from the above table.

Superannuation Funds

Superannuation funds are specialised trusts which are used to receive contributions and invest superannuation savings on behalf of their members, and later pay benefits to their members. The payment of benefits is subject to certain 'conditions of release', of which the most common are retirement after preservation age, reaching age 65, and death of the member.

Provided the fund meets government regulations, tax is levied on fund earnings at concessional rates:

Accounts in Accumulation Phase	Pension Accounts in Retirement Phase
15% (10% on capital gains from assets held for more than 12 months)	0%

The Government has proposed that an additional 15% tax impost will apply to a proportion of the growth in value of a person's Total Superannuation Balance (TSB) from 1 July 2025. This will apply only where a person's TSB exceeds $3 million, and the 15% tax is applied to the proportion of the growth generated by the part of the TSB exceeding the $3 million threshold. This has yet to be legislated.

Contributions received by a fund which have been tax deductible for the person making the contribution (whether an employer or an individual), known as 'concessional contributions', are subject to tax at 15% when received by the fund. Other contributions received by a fund, known as 'non-concessional contributions', are not taxed when received by the fund.

Each member of a superannuation fund should provide the fund with their TFN. If a TFN is not provided, the superannuation fund is required to deduct additional tax of 32 per cent on all concessional contributions and to reject non-concessional contributions (see below for these definitions).

Transfer Balance Cap

As noted in the table above, the investment earnings on pension accounts in retirement phase is exempt from income tax in the superannuation fund. In order to manage the cost to government revenue of this exemption, from 1 July 2017 the Federal Government has introduced a limit on the total amount a person can transfer into retirement phase. This is achieved by the ATO maintaining a running balance of amounts transferred into or out of retirement phase by each individual, called their 'transfer balance account'. When an individual commences a pension in retirement phase, the initial value of the pension account must be reported by the superannuation fund to the ATO, and this amount becomes a credit to their transfer balance account. In the event of a partial or full commutation of the retirement phase pension, the amount of the commutation again must be reported by the superannuation fund, and this amount becomes a debit to the member's' transfer balance account.

The credit balance of a member's transfer balance account is not permitted to exceed their 'transfer balance cap', which is currently $1.9 million. In the event of an excess balance, the member is compelled to withdraw the excess from retirement phase, along with estimated earnings on the excess.

Many government and military pensions are also regarded as being in retirement phase, and need to be taken into account in ensuring that a person's transfer balance cap is not exceeded.

Superannuation Contributions

For tax purposes, contributions are classified as either:

- 'concessional contributions' – which are tax deductible to the person making the contribution (whether an employer or an individual), and taxable at 15 per cent in the superannuation fund; and
- 'non-concessional contributions' - which are not tax deductible to the person making the contribution (usually an individual), and not taxed in the superannuation fund.

The total amount of contributions of each class made for a member is subject to annual contribution caps. These are:

- concessional contributions - $27,500 per year
- non-concessional contributions - $110,000 per year, but a member can bring forward the next two years' caps (making a total cap of $330,000) while they are under 75. This ability to 'bring forward' is also subject to other restrictions where the member's 'total superannuation balance' (basically the value of balances in all superannuation funds and other retirement vehicles) is $1.68 million or more. The non-concessional cap is nil where the member's total superannuation balance is more than $1.9 million.

Retirement planning *continued*

In addition to the above:

- A person with a superannuation balance below $500,000 can make additional concessional contributions if such contributions in earlier years were below the applicable caps. The unused limit amounts are available for five years, after which they will expire.
- Individuals aged 55 or more can use the proceeds from the sale of their private home owned for at least 10 years to make "downsizer contributions" of up to $300,000.

Superannuation funds can accept compulsory superannuation guarantee contributions for a member at any age, but there are restrictions on the acceptance of other types of superannuation contributions, depending on the member's age. If you are aged 67-74 years, you will be required to meet the work test in order to claim a personal superannuation contribution deduction. If you are under 75 years of age, you do not need to meet the work test to make non-concessional super contributions and salary sacrifice contributions. In order to satisfy the work test, the member must have been gainfully employed for at least 40 hours in a period of not more than 30 consecutive days in the year. No contributions other than compulsory superannuation guarantee contributions from an employer can be accepted by a fund for members over 75.

Contributions made in excess of the annual contribution caps ('excess contributions') can have adverse consequences for the member. The amount of any excess concessional contributions are included in the member's personal taxable income and taxed at their marginal tax rate, after allowing a 15 per cent tax rebate for the tax paid on receipt of the contribution by the superannuation fund. The member has the option to apply to release money from the superannuation fund to pay the tax. In the case of excess non-concessional contributions, the member can either elect to withdraw the excess from the superannuation fund, in which case an estimate of the superannuation fund's earnings on the excess contribution will be included in the member's personal taxable income and taxed at their marginal tax rate. If the member elects not to release the excess, the full amount of the excess non-concessional contribution will be subject to tax at 47 per cent.

Superannuation Guarantee Contributions

All employers are required to provide a minimum level of superannuation contributions, based on a percentage of 'ordinary time earnings', required to be paid quarterly, by 28 days after the end of each quarter. The rate in 2023-24 is 11%, and will increase incrementally to 12% from 1 July 2025. As noted earlier, these compulsory employer contributions are not intended to be an additional cost for employers, but rather an income sacrifice by employees, and are factored into negotiating award rates. Employers who fail to make the required tax deductible contributions on time are liable to pay the superannuation guarantee charge (which is not tax deductible) and penalties.

The scheme applies to full time, part time and casual employees, with limited exceptions. There is no de minimus threshold. That is, employers are required to make the contributions on behalf of an employee from the first dollar of ordinary times earnings. However, the obligation applies per individual employee only up to ordinary times earnings of $62,270 per quarter. Employers are not required to provide support for:

- employees under 18 and working less than 30 hours per week, and
- persons paid for private or domestic work for less than 30 hours per week for a non-business employer.

Salary sacrifice contributions

Salary sacrifice to superannuation involves an agreement between employee and employer under which part of the employee's pre-tax salary is sacrificed in exchange for an additional superannuation contribution by the employer of the same amount. This allows the employee to take advantage of the

difference between their own marginal tax rate and the 15 per cent rate applicable to concessional contributions received by the superannuation fund. Such contributions are a preserved benefit held in the superannuation fund, and are subject to the preservation rules.

Spouse Contributions

A person may be able to make substantial non-concessional contributions to superannuation on behalf of their spouse (including same-sex couples). This can be an effective strategy in splitting a person's eventual retirement income and reducing or even eliminating tax payable on that income. The receiving spouse must meet the conditions for being able to receive non-concessional contributions. A tax rebate of $540 is available to the contributing spouse where the receiving spouse's assessable income is $37,000 or less. The rebate reduces when the spouse's income exceeds $37,000, and reduces to nil upon reaching $40,000.

A person is able to 'split' concessional contributions made by or for them with their spouse, up to 85 per cent of their concessional contributions (that is, the amount after payment of 15 per cent tax by the superannuation fund), and subject to the receiving spouse's concessional contributions cap.

Super Co-contribution

This is a Government contribution to a person's superannuation fund of up to $500 for people who make non-concessional contributions to a superannuation fund, and whose assessable income is less than $58,445 in the 2023-24 income year.

Payment of Superannuation Benefits

Balances in superannuation funds are classified into preserved benefits and unrestricted non-preserved benefits. There is a third category of restricted non-preserved benefits, but these are rare. All contributions made and all earnings since 30 June 1999 are preserved benefits, and must remain in the superannuation system until the member meets a condition of release, and subject to any relevant cashing restrictions. Unrestricted non-preserved benefits don't require a condition of release to be met, and may be paid on demand by the member. This include benefits for which a condition of release has been previously met but the member decided to keep the money in the superannuation fund.

The most common conditions of release are:

- attaining preservation age - the member may commence a 'transition to retirement pension'. The amount of pension paid each year must be not less than a certain percentage of the value of the pension account at the start of the year, and not more than 10 per cent of the value of the pension account at the start of the year. A transition to retirement pension is not regarded as being in 'retirement phase', and the income on the assets supporting a transition to retirement pension are not exempt from tax in the superannuation fund;
- retiring from gainful employment after preservation age – the member may take benefits as a lump sum or a pension;
- reaching the age of 65 – the member may take benefits as a lump sum or a pension.
- death of the member - the member's benefits must be cashed out as soon as practicable.

Retirement planning *continued*

Generally, superannuation benefits may be paid as a lump sum or a pension. If paid as an account based pension, the minimum amount required to be paid each year is calculated as a percentage of the value of the pension account at the start of the year. Transition to retirement pensions are also subject to a maximum each year of 10 per cent of the value of the pension account at the start of the year.

The percentages are determined by the age of member at the beginning of the year:

Age	Percentage of Opening Balance of Pension Account
Under 65	4%
65 to 74	5%
75 to 79	6%
80 to 84	7%
85 to 89	9%
90 to 94	11%
Over 95	14%

The tax treatment of a benefit received from a superannuation fund depends on a number of factors:

- the age of the recipient;
- whether the benefit is a lump sum or an income stream (a pension);
- whether the benefit comprises a 'tax-free component' and/or a 'taxable component' – the tax-free component includes non-concessional contributions and government co-contributions; and
- whether the taxable component includes an 'element untaxed in the fund' – amounts 'untaxed in the fund' are generally paid by government pension funds which have not paid income tax on their contributions or earnings.

Payments to members during their lifetime - 'Member benefits'

The payment of any tax-free component is exempt from tax. Generally, the payment of superannuation benefit, either as a lump sum or a pension, to a person over 60 is exempt from tax if the benefit does not include any element untaxed in the fund.

The taxation of superannuation member benefits is summarised in the following tables.

TAXATION OF THE TAXABLE COMPONENT – ELEMENT TAXED IN THE FUND

Age of recipient	Lump sum	Income stream
60 and over	Exempt from tax	Exempt from tax
Preservation age to 59	0% up to the 'low rate cap'. Up to 15% on the amount above the low rate cap.	Taxed at marginal rates, subject to a 15% tax offset.
Under preservation age	Up to a maximum of 20%	Taxed at marginal rates, with no tax offset.

TAXATION OF THE TAXABLE COMPONENT – ELEMENT UNTAXED IN THE FUND

Age of recipient	Lump sum	Income stream
60 and over	Amount up to the 'untaxed plan cap amount' is taxed at up to 15%. Amount above the cap is taxed at the top marginal rate.	Taxed at marginal rates, subject to a 10% tax offset
Preservation age to 59	Amount up to the 'low rate cap amount' is taxed at up to 15%. Amount above the low rate cap amount up to the untaxed plan cap amount is taxed at up to 30%. The amount exceeding the untaxed plan cap amount is taxed at up to 30%.	Taxed at marginal rates, with no tax offset
Under preservation age	Amount up to the untaxed plan cap amount is taxed at up to 30%. The amount exceeding the untaxed plan cap amount is taxed at the top marginal rate.	Taxed at marginal rates, with no tax offset.

The low rate cap is $235,000 and the untaxed plan cap is $1,705,000 in the 2023-24 year.

Payments after death – 'Death benefits'

The tax treatment of death benefits also depends on whether the benefit is paid to a 'death benefits dependant' or not. Death benefits dependants are:

- the spouse or a former spouse (including a same-sex spouse) of the deceased member;
- a child under 18 of the deceased member;
- any other person with whom the deceased member had an 'interdependency relationship' just before they died; or
- any other person who was financially dependent on the decreased member just before they died.

Retirement planning *continued*

The taxation of superannuation death benefits is summarised in the following tables.

PAYMENTS TO DEPENDANTS

Age of deceased	Type of benefit	Age of recipient	Taxation treatment
Any age	Lump sum	Any age	Exempt from tax
60 and over	Income stream	Any age	Element taxed in the fund is exempt. Element untaxed in the fund is taxed at marginal rates with a 10% tax offset.
Below 60	Income stream	Above 60	Element taxed in the fund is exempt. Element untaxed in the fund is taxed at marginal rates with a 10% tax offset
Below 60	Income stream	Below 60	Element taxed in the fund is taxed at marginal rates with a 15% tax offset available. Element untaxed in the fund is taxed at marginal rates with no tax offset.

PAYMENTS TO NON-DEPENDANTS

Age of deceased	Type of benefit	Age of recipient	Taxation treatment
Any age	Lump sum	Any age	Element taxed in the fund is taxed up 15%. Element untaxed in the fund is taxed at up to 30%.
Any age	Income stream	Any age	Cannot be paid as an income stream.

GST and other indirect taxes

The Goods and Services tax (GST) is an indirect consumption tax imposed by the Federal Government and is similar to the Value-Added Tax adopted in other countries.

Goods and Services Tax

State Governments, who share directly in the benefits of GST collections, do not impose a similar tax. However, the states levy a range of other taxes, such as payroll tax and stamp duties.

Taxpayers who make a supply of goods or services, which are taxable supplies, are generally required to pay GST. For this reason, GST is usually passed on to the customer and identified as such on the tax invoice.

In determining the net amount of GST to be paid to the ATO in any tax period, taxpayers are entitled to a credit for any GST paid by them in respect of creditable acquisitions during that period. This is the "value-added" element of the GST, in that it is not a tax-upon-tax, but rather results in private consumption bearing the GST rate of tax.

Tax is collected on a self-assessment basis. Businesses submit regular GST returns to the ATO, usually on a monthly or quarterly basis.

Basic principles. The standard rate of GST is 10 per cent. That is, if goods are supplied for a consideration of $1,100, the amount of GST would be $100, being 1/11th of the total consideration, if the supply is taxable.

You make a taxable supply if you meet four basic criteria:

- you make a supply for consideration;
- in the course or furtherance of an enterprise that you carry on;
- the supply is connected with the indirect tax zone (essentially, Australia); and
- you are registered, or required to be registered, for GST.

A supply is not a taxable supply to the extent that it is GST-free or input taxed.

The terms "supply" and "enterprise" are widely defined.

Connected with Australia. Generally, goods are connected with Australia if the goods are delivered, or made available to the recipient in Australia.

A supply of real property is connected with Australia if the property or the land to which it relates is in Australia.

A supply of anything other than goods or real property is connected with Australia if the thing is done in Australia, or the supplier makes the supply through an enterprise that the supplier carries on in Australia (e.g. the Australian branch of a UK law firm giving advice to an Australian client).

The term 'carries on in Australia' is defined by reference to the term 'permanent establishment' as defined under Australian income tax law.

Registration. You cannot be registered for GST unless you are carrying on an enterprise (i.e. a business and certain other prescribed activities). You are required to be registered for GST when your level of turnover exceeds a registration turnover threshold (currently an annualised rate of $75,000 in taxable supplies, providing you are not a non-profit body).

You may choose to register for GST, even though you may not be required to be registered (e.g. you may not have exceeded the turnover threshold).

GST and other indirect taxes *continued*

If you operate through an agent, the agent may be registered on your behalf.

Taxpayers may choose to register for GST where they are making GST free supplies for which they have the right to claim input tax credits.

GST-free supplies. Where supplies are GST-free, the actual supply is free of GST and, in addition, a credit is available to the person making the supply for any GST paid on inputs, providing the input is incurred for a creditable purpose. The effect of this is that the person making the final GST-free supply becomes entitled to a credit equal to the full amount of any cumulative GST which may have been paid in getting the goods to the current state. Accordingly, no GST will have been paid in respect of the supply.

Supplies which are GST-free include basic foods, health services, education, childcare, religious services and charitable activities, supplies by local governments (e.g. water, sewerage and drainage rates) and strategic supplies such as exports for consumption outside Australia, supplies of businesses as a going concern, farm land and the cost of certain transport.

Input taxed supplies. Where supplies are input taxed, the actual supply is not subject to GST, and credit is not available to the person making the supply for any GST paid on inputs. Such supplies include financial supplies such as dealings in securities and dividends, interest, etc., the supply of residential rent and/or premises, precious metals, school canteens and fund-raising events conducted by charitable institutions.

Input tax credits. Taxpayers are entitled to claim input tax credits if the acquisition of the supply is for a creditable purpose. A supply will be for a creditable purpose to the extent that you acquire it in carrying on your enterprise.

The acquisition will not be for a creditable purpose to the extent that the acquisition relates to making supplies which would be input taxed. Unless specific approval has been given, taxpayers are not entitled to claim an input tax credit, unless they are in possession of a tax invoice in relation to the supply.

The GST law contains specific requirements for what must be included in a tax invoice.

Importations. GST is payable when goods are imported into Australia for home consumption (within the meaning of the *Customs Act 1901*), for use in or for purposes of on-selling in Australia.

Where goods are taxable imports, the GST is payable by the importer and not by the supplier.

Goods imported into Australia which would have been GST-free or input taxed, or which are non-taxable importations, are not subject to GST. There are specific non-GST taxable importations. These are defined by reference to certain categories of goods referred to in the *Customs Tariff Act 1995*.

GST is payable when goods are cleared by Customs in most circumstances.

Offshore supplies of digital products, intangibles to consumers. Supplies to non-business consumers from overseas of things like streaming or downloading of movies, music, apps, games and e-books, as well as consultancy and professional services are subject to GST. This is despite the fact that they are not "connected" with Australia.

Offshore supplies of "low-value" goods to consumers. Until 1 July 2018, imported goods up to a value of $1,000 were broadly exempt from the abovementioned GST impost. From that date, overseas suppliers with Australian turnover of $75,000 or more are required to register for GST, and collect and remit GST on their supply of such goods.

GST returns. Taxpayers who are registered for GST must lodge GST returns for each tax period, even if no net tax is payable. Payment of GST is required to be made by the due date, regardless of when the actual GST return is lodged. Returns are generally required to be made quarterly. Monthly returns are required when the annual rate of taxable supply of an enterprise exceeds $20 million. Returns can be lodged electronically.

GST groups. Companies, partnerships, trusts and individuals who satisfy the GST regulations, may form a GST group. The representative member of the group is responsible for lodging group returns and meeting all GST obligations on behalf of the group. Intra-group transactions are ignored for GST purposes.

To qualify as a group member, companies are only required to be a 90 per cent owned company. Entities can only be members of one GST group. All entities of a group must be registered for GST and have the same accounting period.

Amendments to returns. Specific rules apply for adjustments for GST where there is a change in the basis upon which the GST has been calculated.

Accounting for GST

Accounting for GST is usually on an accruals basis. Charities may account for GST on a cash basis. Other taxpayers may choose to account for GST on a cash basis where their group-wide annual business turnover is below $10 million, or turnover below $2 million for non-business taxpayers. Also certain entities where the Commissioner of Taxation determines, in writing, that the enterprise which you carry on is the kind of enterprise in respect of which such choice can be made.

Record-keeping. Taxpayers are obliged to maintain records in support of all GST transactions for a period of five years. These records must be made available in the event of a GST audit. No claim can be made for an input tax credit unless the taxpayer is in possession of a tax invoice.

Penalties. Penalties apply for breaches of the GST law, including incorrect registration, late lodgement of returns and late payment of GST.

GST withholding on residential property

Purchasers of new residential property and potential residential land must withhold an amount from the purchase price, representing the vendor's GST liability, and pay it to the ATO. The vendor is required to issue a notice to the purchaser of their requirement to withhold. However, for potential residential land only, there is no obligation to withhold if the purchaser is registered for GST and makes the acquisition in the course of carrying on an enterprise.

The required amount to withhold is generally 1/11th of the purchase price. Where the margin scheme applies to the sale, 7% of the purchase price must be withheld. The vendor receives a credit against their GST liability for the amount withheld.

Other taxes

Australia has significantly reduced tariff barriers over recent decades. It has commitments under the World Trade Organisation (WTO) on tariffs and tariff quotas, export subsidies and domestic support for agricultural products.

Many goods are still subject to import duties. The rate of duty is determined by tariff classification which can be found in the *Customs Tariff Act 1995*.

Australia has seventeen Free Trade Agreements (FTAs) with other countries in force and another two under negotiation.

GST and other indirect taxes *continued*

Transfer Duty. Transfer duty is imposed on dutiable transactions in the state where the transaction has its situs. It is imposed under the laws of the various states and territories in Australia and is payable on the value of the transaction, inclusive of GST. Transfer duty is imposed predominantly on transfers of land. Certain transfers of interests in companies or trusts that own land are subject to transfer duty. Western Australia, Queensland and Northern Territory impose transfer duty on transfers of businesses.

There are different rates of duty applicable to different types of transactions. In addition, the rates vary between states and territories. Transfer duty is usually payable by the transferee. There is no Federal Transfer duty.

The Australian Capital Territory is phasing out transfer duty on land, replacing it with a broader land tax. New South Wales has proposed a similar reform.

When GST was introduced in 2000, the states and territories agreed to reduce and eliminate many of their existing taxes and duties. Progress in this area has been slow.

Transfer duty surcharge for foreign purchasers. Foreign purchasers of residential property are subject to a transfer duty surcharge in addition to the standard imposition above. The rules and rates vary amongst the states. The surcharge rates are as follows:

State	Surcharge
New South Wales	8%
Victoria	8%
Queensland	7%
South Australia	7%
Northern Territory	None
Western Australia	7%
Tasmania	8%
ACT	None

Payroll tax. Most states and territories impose a tax on employers based on the payment of wages and salaries over prescribed thresholds. The rates and thresholds vary marginally between the states and territories. Related entities are grouped to determine whether the thresholds have been exceeded.

Payroll tax is covered in Chapter 10.

Land tax. Land tax is levied on non-exempted land, where the value of land held by the land owner exceeds a certain threshold.

The tax is due from landowners and certain lessees, based on a valuation determined by each state's Valuer-General. The rules vary from state to state.

Local government taxes. Local Governments impose rates and taxes on residents of their council areas. These rates and taxes are based on services provided and may be imposed on the value of property owned by taxpayers, or on a usage basis.

HECS-HELP. This is a loan program to help eligible supported university students to pay their student fee contribution amounts. Students who do not pay the fee `up front' have several options available to progressively pay off their debt.

Foreign investment and exchange controls. Generally, the rules and regulations governing foreign investments have been relaxed. The exclusions to this are urban real estate, banking, civil aviation and media.

Generally, there are no exchange controls in Australia.

The *Financial Transaction Reports Act 1988* provides measures to counter tax evasion, the cash economy and money laundering. Under the legislation, the Australian Transactions Reporting and Analysis Centre (AUSTRAC) was formed to compile, analyse and disseminate information it receives in consultation with the Commissioner of Taxation. Effectively all transactions, other than exempt transactions, must be reported. Reportable transactions which the Act encompasses include:

- Transfers of $10,000 or more in cash (or the foreign currency equivalent).
- Transfers of funds of any value into or out of Australia, made either electronically or under a designated remittance arrangement.
- When you have a suspicion that a customer or transaction is related to criminal activity. You must submit your report within 24 hours of becoming suspicious if it relates to terrorism financing, or within three business days for anything else.

Non-bank cash dealers in Australia must also report details of international funds transfer instructions that they remit and receive.

Cross-border taxation for corporations

This chapter considers the Australian tax rules pertaining to international taxation. As with other comparable tax regimes, the Australian tax rules on international taxation are complicated and have been changing rapidly in recent years.

Residence of companies. A company is resident in Australia if:

- it is incorporated in Australia; or
- although not incorporated in Australia, it carries on business in Australia and has either its central management and control in Australia, or its voting power is controlled by Australian resident shareholders.

The place of central management and control will usually be where the directors meet to conduct the business of the company, but ultimately, it is a question of fact and degree to be decided in each case. Residency may be divided between two places, in which case the company will be a tax resident in two separate jurisdictions.

As noted in Chapter 7, it has been announced that the above residency rule for companies not incorporated in Australia will be simplified, adopting a test based on "significant economic connection to Australia".

Liability to tax. Generally speaking, Australian resident companies are liable to Australian corporate tax on their worldwide income and capital gains, wherever arising and regardless of whether or not remitted to Australia.

In contrast, a non-resident company is generally liable to Australian company tax only on ordinary and statutory income from Australian sources, subject to certain exceptions or modifications (such as an applicable DTA).

Financial year. The Australian financial year runs from 1 July to 30 June and income tax returns are based on the same period. However, application may be made to the Commissioner of Taxation for a substituted accounting period. This is normally granted where it is desired that the substituted tax year coincides with the tax year of an overseas parent company.

Tax rates. An Australian resident company is subject to Australian company tax at the rate of 30 per cent on its income and capital gains from all sources, whether in or out of Australia. Alternatively, the 25 per cent rate applies where a company is a BRE for a particular year (refer Chapter 7).

Prima facie, the taxation treatment of assessable income arising from a foreign company's Australian operations, whether derived through a subsidiary or branch (e.g. where it constitutes a permanent establishment of the foreign company for the purposes of Australia's DTA with the relevant country or under Australia's domestic tax rules), is subject to tax at the same rate of 30 per cent or 25 per cent, as applicable.

Purchase of local businesses or property. The *Foreign Acquisitions and Takeovers Act 1975* regulates the purchase by foreign residents, including corporations, of Australian businesses or shares in Australian companies. The Act is administered by the Foreign Investment Review Board whose approval is specifically required (in many instances) in regard to the acquisition by foreigners of businesses and shares in Australian companies. Permission is also required (in many instances) where foreigners, including foreign corporations and trusts, seek to acquire Australian real estate.

Capital Gains Tax and non-residents. Foreign resident taxpayers pay Australian CGT only on the disposal of "taxable Australian property".

Generally speaking, taxable Australian property is defined as real property located in Australia and the assets used in carrying on a business through a permanent establishment in Australia.

However, the rules also include the following types of assets;

- "Indirect Australian real property interests" - broadly where a non-resident has a 10 per cent or more interest in an entity and more than 50 per cent of the market value of the entity's assets are attributable to Australian real property;
- options and rights to acquire Australian real property, assets used in carrying on a business through a permanent establishment in Australia or indirect Australian real property interests;
- mining, quarrying or prospecting rights and information where the minerals, petroleum or quarry materials are situated in Australia; and
- assets where the person ceases to be a resident and where the taxpayer chooses to defer the CGT liability under the election available under the Australian tax rules.

Funds remitted into or out of Australia. Australia does not usually restrict the flow of currency into or out of the country however foreign or domestic currency amounts of $10,000 or more exported from Australia or received from outside Australia, have to be reported to the Australian Transaction Reports and Analysis Centre.

Consolidation regime. The Australian tax consolidation regime allows wholly-owned Australian groups to operate as a single entity for income tax purposes. Entry into the tax consolidation regime is optional, but irrevocable. Consolidation is available to Australian-owned groups and the wholly owned Australian-resident subsidiaries of foreign-owned groups.

Anti-avoidance rules

Australia has numerous anti-avoidance rules. The following information is of particular relevance to foreign investors.

Transfer pricing. Australia has comprehensive transfer pricing rules which apply to non-arm's length cross-border transactions. Legislative provisions exist which allow the Commissioner of Taxation to adjust consideration received or payable to an "arm's length" price. Entities must keep detailed and appropriate documentation of intra-group cross-border pricing and be able to demonstrate how the pricing satisfies the arm's length principle. Penalties apply for non-compliance.

Australia has taken several initiatives directed at base erosion and profit shifting.

There are some carve-outs and *de minimis* concessions which reduce compliance obligations in this area, particularly for smaller businesses.

Australian foreign exchange rules. The treatment of foreign exchange gains or losses is primarily governed under the Taxation of Financial Arrangements (TOFA) regime.

The TOFA measures prescribe the way in which foreign exchange gains and losses are identified and calculated, and provide strict timing rules for ascertaining when foreign exchange gains and losses are recognised for tax purposes. The measures also set out rules for translating amounts of foreign currency to Australian dollars for Australian tax purposes.

Debt and equity rules. As discussed in Chapter 7, the Australian Debt/Equity rules provide tests under which an interest is characterised as debt or equity for Australian taxation purposes. The object of these rules is for the underlying substance of the arrangement to give rise to the debt/equity classification rather than the legal form of the arrangement.

Cross-border taxation for corporations *continued*

The effects can be summarised as:

- interests classified as debt interests for tax purposes will give rise to the result that:
  - returns on the interest may be tax deductible (subject to the deductibility and thin capitalisation rules); and
  - franking rules will not apply to such interests; and
- interests classified as equity interests for tax purposes will give rise to the result that:
  - returns on the interest will not be tax deductible; and
  - franking provisions may apply to such interests.

Thin capitalisation. The debt and equity rules are also used to identify debt for the purposes of the Australian thin capitalisation rules. These were discussed in Chapter 7.

Hybrid mismatch rules. Australia has implemented in part the OECD-recommended hybrid mismatch rules, which mainly prevent a double non-taxation benefit arising from exploiting differences between the tax treatment of entities and instruments across different countries. These were discussed in Chapter 7.

Controlled foreign companies (CFC) legislation. Under the Australian CFC rules Australia has a sophisticated regime for taxing foreign entities controlled by Australian residents. Under the CFC rules Australian resident shareholders of Australian-controlled companies located in low-tax jurisdictions are effectively taxed on unremitted profits on an accruals basis. More specifically, the rules seek to tax Australian shareholders on their share of a non-resident CFC's "tainted income" as it is earned, unless that income is comparably taxed offshore or the CFC derives its income almost exclusively from foreign active business activities. This result is achieved by "attributing" tainted income to the Australian resident controllers of the CFC.

Tainted income is generally income from investments or arrangements likely to be significantly affected by taxation considerations, such as interest, dividends, royalties or amounts arising from related party transactions.

Australia also has a regime which taxes on an accruals basis, the income of ex-Australian trusts to which Australian entities have transferred property.

Withholding from Australian-sourced income. Australia collects tax from non-residents from certain Australian-sourced income by a withholding tax system. Basically, the payer of this income is required to withhold a designated percentage of the income and pay it to the ATO. The withholding tax rate varies depending upon the type of income and the country of residence of the recipient (as the rate may be prescribed in the relevant DTA).

The following table provides an overview of the relevant rates for treaty and non-treaty countries.

Type of Income	Amount Withheld
Interest	10% (reduced in very limited circumstances in some of the more recent DTAs)
Dividends*	30% (reduced to 15% under most DTAs – a number of exceptions exist)
Royalties	30% (reduced to 10% under most DTAs)

*Note that if dividends paid to non-residents are "fully franked" (paid out of post-tax profits) they can be remitted free of dividend withholding tax. Dividends are also free of withholding tax if they are paid out of 'conduit foreign income'. This is foreign income of the Australian company not subject to Australian tax, e.g. non-portfolio dividends received by the Australian company and paid on to a foreign resident.

Global minimum 15% corporate tax. Australia has committed to supporting the OECD's Two-Pillar Solution for this minimum level of global corporate tax impost.

Planning points for foreign investors

Investment structure (branch vs subsidiary). The Australian tax regime does not substantially differ in its application to an Australian Subsidiary or Australian branch of a foreign company. Both forms of operation are subject to the 30 per cent or 25 per cent tax rate.

An Australian Subsidiary is liable to Australian Tax on its worldwide income whilst an Australian branch is only liable to tax on its Australian income. However, the application of conduit foreign income rules (see above) may reduce the impact of this rule. The after-tax profits repatriated by Australian subsidiaries are free of withholding tax. Australia has no branch profits tax.

A foreign company with an Australian branch is taxable on its Australian income that is attributable to the branch. The arm's length transfer pricing rules apply to transactions between the Australian branch and head office, and between the Australian branch and other branches.

Australia as a "holding company". Australia has introduced a "Participation Exemption" to reduce a capital gain (or a capital loss) an Australian resident company makes from disposing of some or all of a non-portfolio interest (i.e. 10% or more) in a foreign company with an active underlying business.

The Australian company must have held the non-portfolio interest for a continuous period of at least 12 months in the 2 years proceeding disposal. If so, the capital gain or loss is reduced by the value of the foreign company's active business assets as a percentage of the value of its total assets.

Use of units, trusts and limited partnerships. Even though this chapter is primarily aimed at corporate issues, foreign groups may also wish to consider whether other entities may be more appropriate for their investment into Australia. For example, Australia also permits businesses to be operated by unit trusts or limited partnerships.

General exemption for foreign non-portfolio dividends. All non-portfolio (i.e. holding 10% or more) foreign dividends paid by a foreign company to an Australian corporate shareholder are exempt from Australian company tax, whether received directly or indirectly through a trust or partnership. This exemption applies to shares classed as 'equity' (and not 'debt') under Australia's debt/equity rules.

Other dividends received by an Australian Corporate Shareholder from non-resident companies are taxable in Australia, with a credit allowed for any foreign tax paid.

Investment Manager regime. Australia has a modern and comprehensive regime for non-residents acquiring particular Australian investments. The objective of the Investment Manager Regime is to encourage certain kinds of investment made into or through Australia by non-resident funds that have wide membership, or which use Australian fund managers. This is achieved by providing non-Australian residents with an Australian income tax exemption for income and gains from their investments that would otherwise be sourced in Australia, and subject to Australian tax.

Cross-border taxation for corporations *continued*

ATO's New Investment Engagement Service. Commenced 1 July 2021, this is for foreign businesses coming through the Global Business and Talent Attraction Taskforce with plans to invest in the vicinity of $250 million or more in Australia. It provides an opportunity to engage with ATO specialists prior to the execution of significant commercial transactions.

Special incentives

R&D tax incentive. Eligible companies that conduct eligible "core R&D activities" or "supporting R&D activities are entitled to a tax offset. This is discussed in Chapter 7. The R&D incentives are generous but (appropriately) the rules are complex and much audit attention is given to significant claims.

Tax offset for film production. Companies have access to three refundable tax offsets for qualifying Australian production expenditure on films completed during the year. The offsets relate to Australian expenditure in making Australian films, for Australian production expenditure and for post, digital and visual effects production expenditure.

A company is only entitled to one of the three tax offsets in relation to a particular film. Where the company has chosen to claim one of the three tax offsets for an eligible film, neither of the other two tax offsets is available in relation to that film.

Offshore banking units. Offshore income (excluding capital gains) of an authorised offshore banking unit (OBU) operating in Australia is taxed at a concessional rate of 10 per cent. The other income and capital gains of the OBU are taxed at normal company rates. The 10 per cent rate has been abolished with effect from 1 July 2023, and no new entrants to the scheme will be admitted from 26 October 2018. An exemption from interest withholding will be repealed from 1 January 2024.

Australian Double-Taxation Agreements

Argentina
Austria
Belgium
Canada
Chile
China
Czech Republic
Denmark
Fiji
Finland
France
Germany
Greece (but only for air transport)
Hungary
India
Indonesia
Ireland
Isreal
Italy
Japan
Kiribati
Korea, Republic of
Malaysia
Malta
Mexico
Netherlands
New Zealand
Norway
Papua New Guinea
Philippines
Poland
Romania
Russia
Singapore
Slovakia
South Africa
Spain
Sri Lanka
Sweden
Switzerland
Taipei
Thailand
Turkey
United Kingdom
United States of America
Vietnam

The Governments intends to negotiate Double-Tax Agreements with Bulgaria, Colombia, Croatia, Cyprus, Estonia, Latvia, Lithuania, Iceland, Portugal, Slovenia, Greece and Luxembourg.

The plan will ensure Australia's tax treaty network will cover 80 per cent of foreign investment in Australia and about $6.3 trillion of Australia's two-way trade and investment.

Tax Information Exchange Agreements (TIEA)

Andorra	TIEA
Anguilla	TIEA
Antigua & Barbuda	TIEA
Aruba	TIEA and additional benefits agreement
The Bahamas	TIEA
Bahrain	TIEA
Belize	TIEA
Bermuda	TIEA
British Virgin Islands	TIEA and additional benefits agreement
Brunei	TIEA
Cayman Islands	TIEA
Cook Islands	TIEA and additional benefits agreement
Costa Rica	TIEA
Dominica	TIEA
Gibraltar	TIEA
Grenada	TIEA
Guatemala	TIEA
Guernsey	TIEA and additional benefits agreement
Isle of Man	TIEA and additional benefits agreement
Jersey	TIEA and additional benefits agreement
Liberia	TIEA
Liechtenstein	TIEA
Macao	TIEA
Marshall Islands	TIEA and additional benefits agreement
Mauritius	TIEA and additional benefits agreement
Monaco	TIEA
Montserrat	TIEA
Netherlands Antilles	TIEA
Samoa	TIEA and additional benefits agreement
San Marino	TIEA
St Kitts and Nevis	TIEA
St Lucia	TIEA
St Vincent & the Grenadines	TIEA
Turks and Caicos Islands	TIEA
Uruguay	TIEA
Vanuatu	TIEA

Accounting standards

Conceptual Framework

Framework for the Preparation and Presentation of Financial Statements

Statements of Accounting Concepts

SAC 1	Definition of the Reporting Entity
AASB 2019-1	Amendments to Australian Accounting Standards - References to the Conceptual Framework
AASB 2020-2	Amendments to Australian Accounting Standards – Removal of Special Purpose Financial Statements for Certain For-Profit Private Sector Entities

Accounting Standards

AASB 1	First-time Adoption of Australian Accounting Standards
AASB 2	Share- based Payment
AASB 3	Business Combinations
AASB 4	Insurance Contracts
AASB 5	Non-current Assets Held for Sale and Discounted Operations
AASB 6	Exploration for and Evaluation of Mineral Resources
AASB 7	Financial Instruments: Disclosures
AASB 8	Operating Segments
AASB 9	Financial Instruments
AASB 10	Consolidated Financial Statements
AASB 11	Joint Arrangements
AASB 12	Disclosure of Interests in Other Entities
AASB 13	Fair Value Measurement
AASB 14	Regulatory Deferral Accounts
AASB 15	Revenue from Contracts with Customers
AASB 16	Leases
AASB 17	Insurance Contracts
AASB 101	Presentation of Financial Statements
AASB 102	Inventories
AASB 107	Statement of Cash Flows
AASB 108	Accounting Policies, Changes in Accounting Estimates and Errors
AASB 110	Events after the Reporting Period
AASB 112	Income Taxes
AASB 116	Property, Plant and Equipment
AASB 119	Employee Benefits
AASB 120	Accounting for Government Grants and Disclosure of Government Assistance
AASB 121	The Effects of Changes in Foreign Exchange Rates
AASB 123	Borrowing Costs
AASB 124	Related Party Disclosures
AASB 127	Separate Financial Statements
AASB 128	Investments in Associates and Joint Ventures

Accounting standards *continued*

AASB 129	Financial Reporting in Hyperinflationary Economies
AASB 132	Financial Instruments: Presentation
AASB 133	Earnings per Share
AASB 134	Interim Financial Reporting
AASB 136	Impairment of Assets
AASB 137	Provisions, Contingent Liabilities and Contingent Assets
AASB 138	Intangible Assets
AASB 139	Financial Instruments: Recognition and Measurement
AASB 140	Investment Property
AASB 141	Agriculture
AASB 1004	Contributions
AASB 1023	General Insurance Contracts
AASB 1038	Life Insurance Contracts
AASB 1039	Concise Financial Reports
AASB 1048	Interpretation of Standards
AASB 1049	Whole of Government and General Government Sector Financial Reporting
AASB 1050	Administered Items
AASB 1051	Land Under Roads
AASB 1052	Disaggregated Disclosures
AASB 1053	Application of Tiers of Australian Accounting Standards
AASB 1054	Australian Additional Disclosures
AASB 1055	Budgetary Reporting
AASB 1056	Superannuation Entities
AASB 1057	Application of Australian Accounting Standards
AASB 1058	Income of Not-for-Profit Entities
AASB 1059	Service Concession Arrangements: Grantors
AASB 1060	General Purpose Financial Statements – Simplified Disclosures for For-Profit and Not for-Profit Tier 2 Entities

Accounting standards *continued*

AASB Interpretations

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Interpretation 2	Members' Shares in Co-operative Entities and Similar Instruments
Interpretation 5	Rights to Interest arising from Decommissioning Restoration and Environmental Rehabilitation Funds
Interpretation 6	Liabilities arising from Participating in a Specific Market- Waste Electrical and Electronic Equipment
Interpretation 7	Applying the Restatement Approach under AASB 129
	Financial Reporting in Hyperinflationary Economics
Interpretation 9	Reassessment of Embedded Derivatives
Interpretation 10	Interim Financial Reporting and Impairment
Interpretation 12	Service Concession Arrangements
Interpretation 14	AASB 119 -The Limit on a Defined Benefit Asset, Minimum Funding Requirements and Their Interaction
Interpretation 16	Hedges of a Net Investment in a Foreign Operation
Interpretation 17	Distributions of Non-cash Assets to Owners
Interpretation 19	Extinguishing Financial Liabilities with Equity Instruments
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Interpretation 107	Introduction of the Euro
Interpretation 110	Government Assistance – No Specific Relation to Operating Activities
Interpretation 125	Income Taxes – Change in the Tax Status of an Entity or its Shareholders
Interpretation 129	Service Concession Arrangements: Disclosures
Interpretation 132	Intangible Assets – Website Costs
Interpretation 1003	Australian Petroleum Resource Rent Tax
Interpretation 1019	The Superannuation Contributions Surcharge
Interpretation 1030	Depreciation of Long-Lived Physical Assets: Condition-Based Depreciation and Related Methods
Interpretation 1031	Accounting for the Goods and Services Tax (GST)
Interpretation 1038	Contributions by Owners Made to Wholly-Owned Public Sector Entities
Interpretation 1047	Professional Indemnity Claims Liabilities in Medical Defence Organisations
Interpretation 1052	Tax Consolidation Accounting
Interpretation 1055	Accounting for Road Earthworks

Glossary of abbreviations

AASB	Australian Accounting Standards Board
ABF	Australian Border Force
ABN	Australian Business Number
ACCC	Australian Competition & Consumer Commission
ACN	Australian Company Number
AFS	Australian Financial Services (Licence)
AGM	Annual General Meeting
APRA	Australian Prudential Regulation Authority
ASIC	Australian Securities & Investments Commission
ASX	Australian Securities Exchange
ATO	Australian Taxation Office
AUSTRAC	Australian Transactions Reports & Analysis Centre
BAS	Business Activity Statement
BRE	Base Rate Entity
CFC	Controlled Foreign Company
CGT	Capital Gains Tax
DOCA	Deed of Company Arrangement
DPN	Director Penalty Notice
DTA	Double Tax Agreement
ESS	Employee Share Scheme
ETP	Employment Termination Payment
FBT	Fringe Benefits Tax
FIRB	Foreign Investment Review Board
GST	Goods & Services Tax
IFRS	International Financial Reporting Standards
IP	Intellectual property
OBU	Offshore Banking Unit
PAYG	Pay As You Go
PPSR	Personal Property Securities Register
RBA	Reserve Bank of Australia
R&D	Research & Development
RFBA	Reportable Fringe Benefits Amount
SBE	Small Business Entity
SGE	Significant Global Entity
SPT	Single Touch Payroll
TFN	Tax File Number
TIEA	Tax Information Exchange Agreement
TOFA	Taxation of Financial Arrangements
TPAR	Taxable Payments Annual Report
TSB	Total Superannuation Balance

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