

HALLCHADWICK



“Doing Business in Australia”



CONTENTS

1. Introduction	03
2. About Australia	04
3. Foreign Investment Guidelines	07
4. Choice of Business Structure	09
5. Taxation Considerations	11
6. Other Issues Relating to Taxation	18
7. Migration	21
8. Financial Reporting and the Role of ASIC	23
9. Other	25
10. Appendix A - Section 5 Tables	26
11. Appendix B - Case Studies	29

Our experience is that businesses are investing in Australia for a number of reasons. Consistent and strong economic growth has been a feature of what has drawn international investment to Australia. Other reasons are due to stability of the banking system and independence of the judiciary.

Hall Chadwick Australia is a member of AGN, comprising of a group of independently owned firms of Chartered Accountants. Hall Chadwick is present in each major capital city of Australia.

Each Hall Chadwick practice has expertise in Accounting, Taxation, Business Migration, Audit, Insolvency and Reconstruction and provides other specialist services.

Businesses internationally cannot afford to ignore overseas markets. Australia provides opportunities for business development. The combination of a highly qualified work force, extensive infrastructure, natural resources and a familiar legal system to most parts of the world is the reason why international businesses, both small and large, are coming “down-under”.

Apart from our own services, Hall Chadwick is able to make introductions to other key service providers in various sectors including legal, banking, employment and real estate.

We believe we are able to perform an important role in maximising your clients' success in doing business in Australia.





ABOUT AUSTRALIA

2.1 GEOGRAPHY & DEMOGRAPHICS

Australia is the largest island in the world.

The numerous advantages of locating in Australia have made the country the location of choice for the regional headquarters of many multinational corporations. Located in the Asia Pacific, Australia's proximity to Asia is one major reason as well as an extensive well-educated and trained workforce boasting multi skilled and multi lingual personnel, a temperate climate and relatively low crime rate.

The national language is English. However, the country maintains an extremely cosmopolitan flavour enriched with a vast array of people from European, Asian and many other backgrounds as well as an indigenous population whose presence in the country can be traced back some 40,000 years.

The multicultural nature of Australia is reflected in the many religious denominations, specialised media and schools, and of course, the cuisines of the world that are an important part of the culture. People who migrate to Australia can be sure to find facilities to meet their needs.

Australia has a stable economy for investment and has enjoyed rapid growth. Australia's industrial and rural industries have adopted world best practices and our technology and communications development and uptake is amongst the leading countries in the world.

2.2 POLITICAL SYSTEM

The Australian political system is extremely stable. The country has three levels of government - Local, State and Federal. Australia has been a democratic country since its inception. Initially individual states operated as colonies.

On 1 January 1901, the states united to become The Commonwealth of Australia.

Australia is comprised of states and territories. The six states of Australia are: New South Wales, Queensland, Victoria, South Australia, Western Australia, and Tasmania. The two mainland territories of Australia are: Australian Capital Territory and Northern Territory.

The capital of Australia is Canberra which is situated in the Australian Capital Territory.

2.2.1 LOCAL GOVERNMENT

Local government is elected by the residents of each specific municipality. Their powers are rather limited and usually cover such issues as environmental, land development and other "local" concerns.

2.2.2 STATE GOVERNMENT

State Governments are more politically focused.

State Governments have responsibility for education, police, health facilities, energy and mining among other things. The State Governments across Australia have similar but not identical laws. Businesses operating in a particular State or Territory need to be aware of various taxes and other laws. The main taxes (including state taxes) are covered in chapter 5 of this publication. However, there are no state income tax laws.

2.2.3 FEDERAL GOVERNMENT

Federal Government derives its power under the Australian Constitution.

Its responsibilities include collection of income tax, defence, foreign affairs, immigration, social security, communications, trade practices, commerce and insurance law. The government is divided into an "upper" and "lower" house being the "Senate" and "House of Representatives" respectively. Both houses of federal parliament sit in Canberra. Bills introduced into federal parliament must be passed by both the upper and lower house to become law.

2.3 CLIMATE

Australia's climate ranges from tropical (monsoonal) in the north to temperate in the south. In the southern cities, temperatures are cool in winter and warm in summer.

Northern cities are warm in winter and hot in summer. The climate in the major cities and regional centres is generally moderate. The extreme temperatures are only found in sparsely inhabited areas.

Australia is a relatively dry continent, so while there might be rainfalls of 2500mm (100in) in parts of Northern Queensland, generally rainfall in the cities is lightly spread throughout the year.

It has been said that in Queensland the weather is beautiful one day, perfect the next. While a country as large as Australia is bound to have a number of different climates, this statement is an adequate description of Australia's climate in most regions.

2.4 BANKING & CURRENCY

Minimal exchange controls exist. The system of monitoring transactions with known tax havens has ceased. Rather, anti-avoidance tax rules have been increased. One requirement is for entities to advise movement of currency into or out of Australia exceeding \$10,000.



Hall Chadwick has very close relations with senior personnel in most Australian Banks. We are able to make necessary introductions to streamline the process of setting up your banking facilities.

2.5 LEGAL SYSTEM

The Australian legal system is a common law system and was initially based on the English legal system. However, over the years the Australian legal system has developed its own body of case law and the legal principles and procedures are now not necessarily similar to those practised in England.

Australia has different Court structures for the Commonwealth, State and Territories, each having different jurisdiction. For the Commonwealth, there is the High Court (highest Court in Australia), Federal Court, Family Court, Federal Magistrates Service, Industrial Relations Court of Australia, and a number of tribunals eg Administrative Appeals Tribunal etc,

In NSW, there is the Supreme Court (highest Court in NSW), District Court, Local Court, Land and Environment Court. There are also a number of tribunals such as Administrative Decisions Tribunal etc.

The legal profession is split into two groups of practitioners: solicitors and barristers. Normally if an individual wished to commence legal proceedings that person would first consult a solicitor and if the matter went to court this would then be dealt with by the barrister.

The independence of the judiciary from government is protected by the Australian Constitution.

2.6 IMPORT & EXPORT ISSUES

2.6.1 IMPORT ISSUES

All goods imported into Australia must be cleared by customs, whether they are imported by air, sea or post.

Customs duty and GST may apply to goods entering Australia. See Chapter 5 for a more detailed commentary on GST.

Customs duty rates vary and depend upon a number of factors including the type of goods and the country of origin. Goods regarded as being hazardous or dangerous are subject to import controls.

2.6.2 EXPORT ISSUES

Export of goods from Australia is regulated by various laws and Government policies.

The thrust of these laws is to prohibit the export of certain goods either absolutely or conditionally; and record Australia's international trade.

Where goods are "conditionally" exported a permit may be required.

As referred to in this Chapter, an Export Market Development Grant may be accessed in certain circumstances. The Export Finance and Insurance Commission assists Australian businesses that export goods or services with mainly Australian content. Finance for overseas customers purchasing Australian goods may be available. In addition, insurance for performance bonds and unfair calling on contracts may also be available.



2.7 RESEARCH AND DEVELOPMENT

Australia actively encourages development of technology and is credited with numerous inventions and innovative ideas.

One part of the Government's focus on rewarding businesses in Australia who engage in such pursuits are the Research and Development Concessions, which are two pronged.

2.7.1 TAX CONCESSIONS

Companies that incur expenditure on eligible Research and Development activities may claim a number of tax concessions.

On 12 May 2009 the Government announced it

will replace the existing R&D Tax Concessions with a new R&D Tax Credit. Legislation for the R&D Tax Credit was introduced into Parliament in May 2010 with the intention that the program would start from 1 July 2010.

The two core components of the package are:

- A 45% refundable tax credit (the equivalent to a 150% concession) for eligible entities with an aggregated turnover of less than \$20 million per annum
- a non-refundable 40% R&D tax credit (the equivalent of a 133% deduction) for all other eligible entities

2.7.2 COMPETITIVE GRANTS AND LOANS

Companies are also able to apply for "Start" Grants for worthwhile and viable projects.

Loans with very attractive terms are payable to companies which qualify. The selection criteria is on a relative merit system. Many of Hall Chadwick's clients have accessed these benefits and strategic advice can be provided upon request.

2.8 EXPORT MARKET DEVELOPMENT GRANTS

Each year approximately 3,000 exporters use an Export Market Development Grant (EMDG) to assist their export initiatives.

Sole Traders, Companies and Approved Joint Ventures are eligible to apply. However, a branch of a Foreign Company is not eligible.

The purpose of the EMDG is to encourage businesses to concentrate on export markets. Grants are made available to reimburse the cost of export promotion of products that are substantially Australian.

Eligible expenditure would include costs of:

- Overseas representatives
- Marketing visits
- Communications
- Samples
- Trade fairs, literature and advertising.

Recipients of the grants are reimbursed 50% of their expenditure on eligible costs up to a maximum benefit of \$250,000 per annum. There is a sliding scale, depending upon which type of industry participants are involved in.

Foreign Investment Guidelines

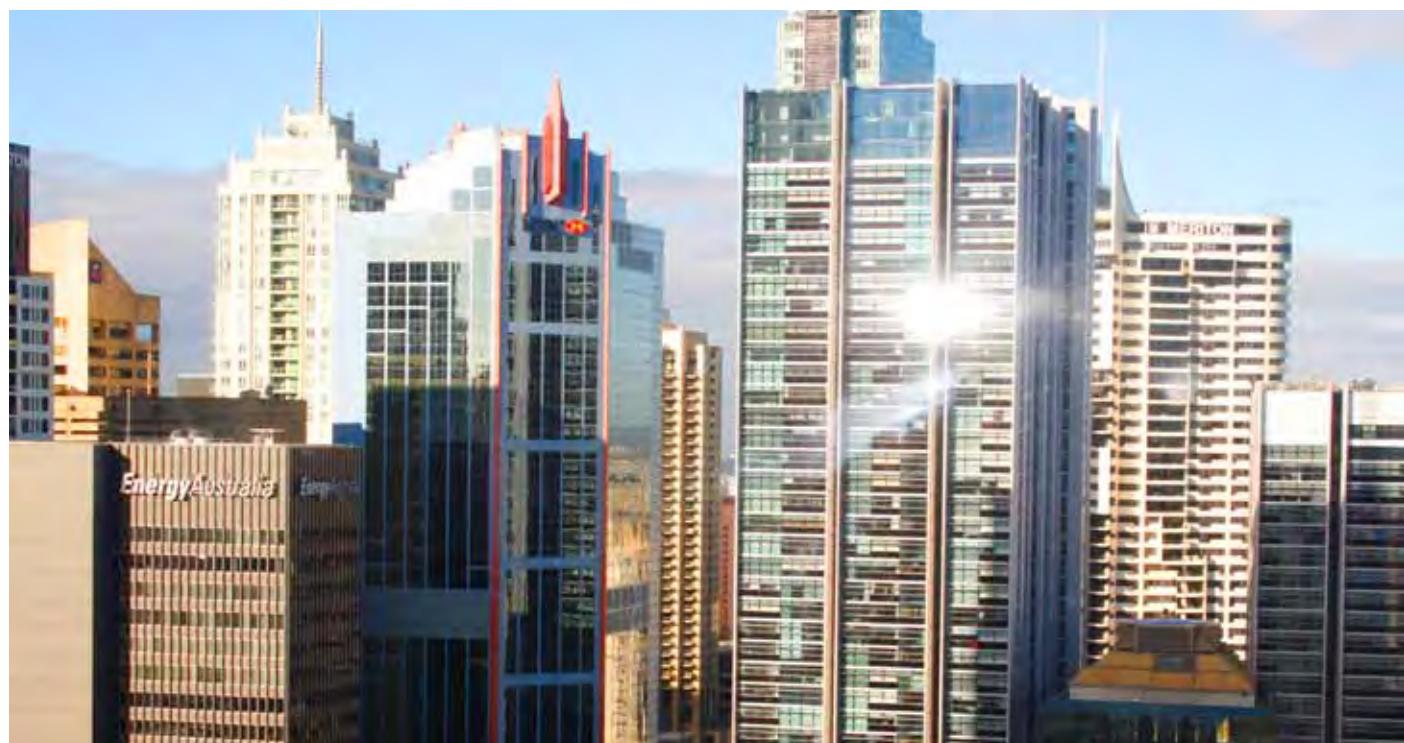
Australia welcomes foreign investment because it provides scope for higher rates of economic activity and employment than could be achieved from domestic levels of savings.

Foreign investment policy provides for Government scrutiny of many proposed foreign purchases of Australian businesses and properties. The approval process is dealt with by the Foreign Investment Review Board ("FIRB").

In the majority of industry sectors, smaller proposals are exempt from notification and larger proposals are approved unless judged contrary to the national interest. The Government determines what is 'contrary to the national interest' by considering the widely held community concerns of Australians.

Proposals by foreign interests to invest in Australia, which require prior approval from FIRB include acquisitions at or above the following threshold limits:

NON US INVESTORS AS AT 1 JANUARY 2010	
\$ 5 million	Developed non residential commercial real estate where the property is subject to heritage listing.
\$ 50 million	Developed non residential commercial real estate where the property is not subject to heritage listing.
\$ 231 million	An interest in an Australian business; or An interest in an offshore company that holds Australian assets or conducts a business in Australia, and the Australian assets or businesses of the target company are valued at/above the threshold.



US INVESTORS AS AT 1 JANUARY 2010

\$ 231 million	Involving Australia-United States Free Trade Agreement ("AUSFTA") prescribed sensitive sectors: <ul style="list-style-type: none"> • An Interest in an Australian business; or • An Interest in an offshore company that holds Australian assets or conducts a business in Australia, and the Australian assets of businesses of the target company are valued at/above the threshold.
\$ 1004 million	Not Involving AUSFTA prescribed sensitive sectors: <ul style="list-style-type: none"> • An Interest in an Australian business; or • An Interest in an offshore company that holds Australian assets or conducts a business in Australia, and the Australian assets of businesses of the target company are valued at/above the threshold.



A foreign person is defined as:

- a natural person not ordinarily resident in Australia;
- a corporation in which a natural person not ordinarily resident in Australia or a foreign corporation holds a controlling interest;
- a corporation in which 2 or more persons, each of whom is either a natural person not ordinarily resident in Australia or a foreign corporation, hold an aggregate controlling interest;
- the trustee of a trust estate in which a natural person not ordinarily resident in Australia or a foreign corporation holds a substantial interest; or
- the trustee of a trust estate in which 2 or more persons, each of whom is either a natural person not ordinarily resident in Australia or a foreign corporation, hold an aggregate substantial interest.

A substantial foreign interest occurs when a single foreigner (and any associates) has 15 per cent or more of the ownership or several foreigners (and any associates) have 40 per cent or more in aggregate of the ownership of any corporation, business or trust.

Proposed acquisitions of residential real estate are exempt from examination in the case of:

- Australian citizens living abroad purchasing either in their own name or through an Australian corporation or trust;
- foreign nationals purchasing (as joint tenants) with their Australian citizen spouse; and
- foreign nationals who are the holders of permanent resident visas or are holders, or are entitled to hold, a 'special category visa' purchasing either in their own name or through an Australian corporation or trust.

FIRB application process

The application form and process to FIRB will depend on who is applying. Electronic lodgement (via email or fax) is preferred for all applications. Forms for applications vary depending on the type of acquisition and the purchaser. We can provide the required forms and guidelines upon request.

The application process normally takes 30 days from date of receipt of application. In some cases FIRB may issue the applicant with a statutory notice to extend the decision date by an additional 10 days. In certain circumstance FIRB may extend the process by a further 90 days if necessary.

Choice of Business Structure

When considering a business operation in Australia it is essential, at the outset, to identify the best business structure for your use.

In essence the choice is to run the business through one of the following seven alternatives:

1. SOLE TRADER
2. PARTNERSHIP
3. DISCRETIONARY TRUST
4. UNIT TRUST
5. PRIVATE COMPANY
6. JOINT VENTURE, INCORPORATED OR UNINCORPORATED
7. FOREIGN COMPANY OR SUBSIDIARY

4.1 SIMPLE SOLE PERSON SITUATION

Where a single individual is involved in the conduct of a business, that individual can set up and conduct the business through a private company.

However, rules effective from 1 July 2000 may preclude the use of such private companies where they are nothing more than vehicles to avoid the derivation of personal services income by the individual. In any event, there are many benefits to be gained from utilising the sole trader structure particularly because it is inexpensive to set up (i.e. the main requirement would be to obtain an Australian Business Number (ABN)) and there are capital gains tax advantages in keeping the business in the name of an individual should there be a disposal of the business (as discussed below).

MORE COMPLEX SITUATIONS

When more than one person is involved, the complexities are greater and the need to consider alternative structures is more critical.

4.2 PARTNERSHIP

The most formidable obstacle to utilising a conventional partnership arises from the fact that the partners become jointly and severally liable for each other's debts, thereby exposing each partner to substantial unknown liabilities, in certain circumstances.

4.3 DISCRETIONARY TRUST / UNIT TRUST

The discretionary trust structure is usually not appropriate where the individuals concerned are arm's length entities that wish to have their respective rights and interests protected in every way from the outset. In such a situation it is preferable to have firmly allocated units in a unit trust or shares in a private company to ensure continuity in the allocation of income and capital from the entity concerned.

4.5 PRIVATE COMPANY

The private company is the most easily recognisable entity and well understood by both Australians and foreigners alike. However, set up and maintenance costs are usually higher than for other entities.

A major disadvantage of companies is the potential loss of tax benefits when the company passes its profits to shareholders as dividends. More disadvantageous is the fact that companies do not obtain the benefit of the 50% capital gains tax exemption available to individuals on the disposal of the assets of a business held for greater than one year.

There are also potential problems in relation to distributions from private companies in the form of payments, loans and the forgiveness of debts by private companies to shareholders or associates of shareholders as these may, in certain circumstances, be treated as unfranked dividends thereby triggering a potentially significant tax liability.

Despite these facts, companies remain a popular form of business structure because of their ready acceptance within the community, limited liability in many situations and corporate tax rate of 30% which is 15% lower than the top individual rate.

4.6 JOINT VENTURE

A joint venture in Australia is generally understood as an association of two or more persons acting together for a specific commercial purpose but not in partnership. Such joint ventures are commonly used in the mining industry for the purpose of operating a mine and processing the output.

A key advantage of using a company is limited liability although this may, in certain circumstances, be illusory since directors are often personally liable for company debts and may be required to provide personal guarantees.

Essentially participants in joint ventures share costs but do not share profits. They share in the product or the output of the business activity. Hence, if the joint venture participants use a separate company to manage the sale of the product, the company will distribute the proceeds of sale of the product separately to each joint venturer.

Liability does not extend to all parties involved in the joint venture; unlike partnerships the liabilities of the joint venture are not shared. Joint venture participants who incur liabilities in relation to the project do so on their own account and at their own risk. Other parties involved cannot be held liable. In a partnership, the partners are jointly and severally responsible for all the partnership liabilities.

Parties involved in the joint venture may have different purposes for participating in a project. This has taxation implications and can create different tax outcomes under income tax laws. For example, two parties, one a residential property developer and the other a landowner may undertake a joint venture to develop land. The property developer is carrying on a business whereas the landowner is not. The landowner wants to sell the land for a gain. Each party could have a predetermined number of houses on completion.

Finally, joint venturers can assign their interests in the arrangement without triggering a dissolution and reformation of the joint venture. By way of contrast partners who do this are effectively dissolving the partnership and creating a new one thereby resulting in CGT implications for all partners.

It is important when structuring a joint venture to ensure that the documentation is drafted in such a manner as to ensure that it is not a partnership. You should consult Hall Chadwick for further details.

4.7 FOREIGN COMPANY OR SUBSIDIARY

An overseas company wishing to carry on a business in Australia may elect to register a subsidiary or branch of a foreign company. A foreign company operating through a branch must register with ASIC.

OBLIGATIONS	FOREIGN COMPANY (BRANCH)	SUBSIDIARY
Tax Rate	30%	30%
Tax Return	YES	YES
Financial Supplements	YES	YES
ASIC Registration	YES	YES
Separate Legal Entity	NO	YES

From a taxation point of view where a subsidiary is chosen certain establishment expenses will not be deductible from a company's assessable income and other establishment expenses will not be of use until the subsidiary is earning sufficient assessable income.

Also, the use of a foreign company operating through a branch could result in a financial institution choosing not to provide finance where no audited financial statements have been prepared by the branch.

Taxation Considerations

5.1 INTRODUCTION

The Australian taxation issues that arise in the context of doing business in Australia are created under the jurisdictions of both Federal and State/Territory laws. The key taxes which are levied by each level of government are outlined in Table 5.1 (refer to Appendix A).

All of these taxes create their own potential problems in doing business in Australia.

However, with appropriate advice and careful planning the taxation issues can be made manageable, and in certain circumstances your tax can be minimised in a legitimate manner. Where appropriate these planning techniques are outlined in this document. When necessary further development of these techniques can be discussed by contacting Hall Chadwick.

5.2 INCOME TAX

Income tax has been levied at the Federal Government level in Australia for over seventy years. The Federal Government places substantial reliance on income tax as a revenue raising measure.

Essentially, income tax is a tax levied on companies, individuals and certain trusts, on the difference between the relevant entity's assessable income and the allowable deductions, for a particular tax year ending on 30 June. This net amount is called "taxable income".

The rates of tax applicable to the taxable income of individuals is set out in Table 5.2 (refer to Appendix A). The rate of tax applicable to companies since 1 July 2001 is 30%.

5.2.1 TAX YEAR

The income tax year, by reference to which assessable income and allowable deductions are determined, is normally the year from 1 July to the following 30 June.

In the case of companies and trusts a substituted tax year can be allowed in certain circumstances and by following certain administrative procedures. One of the main examples where a

substituted accounting period can be obtained is in relation to companies which are subsidiaries of offshore entities which have different tax years to the Australian 30 June financial year end. In that instance it is possible to seek, and obtain permission, to use a different tax year.

5.2.2 SPECIAL RULES FOR NON-RESIDENTS

Interest, certain types of dividends and royalties received by non-residents from Australian entities are subject to withholding tax, which in essence is a special form of income tax.

The interest withholding tax rate is 10% of the gross interest paid (i.e. without allowing for any deductions that might otherwise be applicable).

The royalty withholding tax rate is normally 30% of the gross royalty paid, however, where there is a Double Tax Agreement (DTA) between Australia and the country of residence of the entity concerned, the rate of withholding tax is usually reduced to 15% (although in recent DTAs the rate has been as low as 5% or 0%).

In the case of dividends, where they are paid out of a pool of profits that has not been subjected to Australian income tax, these dividends will be called unfranked dividends and are subject to the normal withholding tax rate of 30% of the gross dividend paid. However, if there is a DTA between Australia and the country of residence of the entity concerned, the rate of withholding tax is normally reduced to 15% (although in recent DTAs the rate has been as low as 5%).

In relation to dividends paid out of a pool of profits that is subject to Australian income tax, there is to be no further Australian withholding tax on those dividends.

Source of income is not generally defined in the Tax Act though there are specific rules for certain types of income. Where there is no statutory source rule, source is determined according to principles developed by the Courts.

Statutory source rules apply to outgoing royalties, interest payments on loans secured by mortgage of any property in Australia, and certain types of business income. Statutory source rules can operate in relation to foreign manufacturers who sell goods in Australia that have been manufactured outside Australia and to importers who are instrumental in bringing about certain sales.

Non-statutory source rules, developed by case law, relate to income from the following sources, as indicated:

- **Personal services:** the place where the services are performed; business income & the place of contracting, the place of performance and the place of payment are all relevant;
- **Sales income:** no one factor appears to be relevant unless real estate is involved in which case the place where the land is situated is determinative;
- **Dividend income:** the place where the fund of profits enabling the payment of the dividend arises is determinative; and
- **Interest:** the place where the contract for the loan was made and the place where the money was lent are significant.

To determine the source of income, a weighing of various factors is taken into account to establish where the critical elements for the production of income occurred. You should refer to Hall Chadwick for clarification.

In relation to all other income derived by non-residents, only Australian sourced income is subject to tax in Australia. Thus, if a non-resident derives business profits from activities conducted in Australia, but which activities did not give rise to an Australian source under ordinary source principles, the income from that business activity is not subject to tax in Australia. Again, this conclusion could be altered if there is a DTA in place (refer to section 6.2).

5.2.3 RESIDENTS

Residents of Australia are generally taxed on their worldwide income.

The position in relation to trusts is more complex—in essence any accumulated income is taxed either in the trustee's hands at the rate of 45%; distributed income, or income to which a beneficiary is “presently entitled” at year end, is taxed to the beneficiary at the marginal tax rate applicable to that beneficiary and is not taxed in the hands of the trustee.

In relation to superannuation funds, the normal rate of income tax is 15% if the superannuation fund is a complying superannuation fund. If the fund is a non-complying fund its earnings are taxed at the rate of 45%.

The position in relation to partnerships in Australia is, with one qualification, that all the assessable income and deductions of a partnership are treated as the assessable income and deductions of the partners in the partnership and taxed in the partner's hands. In other words, the partnership, in essence, is treated as a look-through entity for tax purposes.

The one qualification applies in relation to limited partnerships, which are effectively taxed as companies.

Once the tax payable is calculated by applying the rate of tax to the taxable income, there are further possible tax offsets which are designed to reduce the amount of tax payable.

Examples of such tax offsets available to individuals include:

- Medical Expenses Rebate
- Low Income Taxpayers Rebate
- Dependant Rebate
- Pensioners Rebate
- Overseas Forces Rebate
- Franking Rebate (in relation to the receipt of franked dividends)

5.3 TAX ON CAPITAL GAINS (ALSO KNOWN AS CAPITAL GAINS TAX OR CGT)

Interestingly, in the context of Australian taxation, the name Capital Gains Tax (CGT) is a complete misnomer. What is not readily understood is that Australia does not formally impose a separate capital gains tax. Rather, under the Federal income tax laws (which have been described above), capital gains are treated as assessable income and subject to tax as such, with certain qualifications.

A key qualification that has been in place since 20 September 1999 is that, in the case of individuals or trusts, only 50% of any capital gain is included in assessable income provided the asset has been held for at least 12 months. This discount, however, does not apply in relation to gains derived by companies.

There are also other concessions, particularly in relation to small business, that have been introduced in recent years. Where these concessions apply, substantial capital gains can be obtained tax-free. Further information on these is available from Hall Chadwick.

5.3.1 SPECIAL CONSIDERATIONS FOR NON-RESIDENTS

The Government implemented significant changes to the application of CGT to non residents from 12 December 2006, by effectively reducing the categories of assets on which non residents will be subject to Australian tax. The only type of assets on which non-residents will be subject to Australian CGT will be taxable Australian property (TAP). TAP is exhaustively defined as the following:

- taxable Australian real property, being real property situated in Australia (including mining, quarrying and prospecting rights to the extent that the underlying materials are situated in Australia);
- indirect real property interests;
- business assets used at any time in an Australian branch;
- an option to acquire any of the above mentioned assets; and
- a CGT asset elected by an individual to continue to be subject to the Australian CGT rules after ceasing to be an Australian resident.

The purpose of limiting Australian CGT to these particular assets in respect of non-resident investors is to encourage offshore investment into Australia (into non-TAP assets such as shares) by more closely aligning our rules with international practice. Significantly, where a taxpayer who is a non-resident makes a disposal of an asset which is not a TAP, that disposal is not subject to CGT.

5.4 CONDUIT FOREIGN INCOME (“CFI”)

These new CFI rules have made Australia very attractive from an investment point of view as a regional headquarters for countries situated in the Asia Pacific region.

Exemption from Withholding Tax

In broad terms, the CFI rules were introduced as part of the Government's review of international tax arrangements, applying from the first income year commencing after 1 July 2005.

Under the new rules, conduit foreign income can be distributed from an Australian corporate tax entity (“CTE”) to a non-resident in the form of unfranked dividends without attracting any Australian tax.

Conduit foreign income is basically foreign income that is not assessable in Australia when derived by an Australian CTE. It includes nonportfolio dividends, foreign branch income, tax-exempt gains from the sale of a foreign company with an underlying active business, foreign income to which a foreign tax credit has been claimed, and off-shore banking income.

For CFI purposes, an Australian CTE is:

- An Australian resident company
- An Australian resident corporate limited partnership
- A corporate unit trust that is a resident unit trust
- A public trading trust that is a resident unit trust

Accordingly, where a Foreign Company is held through an interposed Australian company the CFI would become relevant for dividends paid to a non resident of Australia. The outcome is that Foreign Company income would be foreign income on which foreign tax has been paid and

therefore the actual dividend payments to non residents would not suffer additional withholding tax.

5.5 GOODS AND SERVICES TAX (GST)

Australian GST came into effect from 1 July 2000, replacing a more narrowly based wholesale sales tax.

5.5.1 SPECIAL RULES FOR NON-RESIDENTS

One of the requirements for there to be a taxable supply is that the supply must have a connection with Australia.

The supply of goods is connected with Australia if either:

- the goods are delivered or made available in Australia;
- the goods are removed from Australia;
- the goods are imported into or brought from overseas and installed or assembled in Australia.

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



All supplies of things other than goods and real property are evaluated by the same test to determine whether or not that supply is connected with Australia in the relevant sense.

A supply of anything other than goods and real property is connected with Australia if it is done in Australia, or if the supplier makes the supply through an enterprise that the supplier carries on in Australia.

GST is imposed on all taxable supplies made on or after 1 July 2000 at the rate of 10%. It is calculated on the value of the taxable supply which is 10/11ths of the GST inclusive price received by the supplier as consideration for the supply. Generally, registered entities can claim an input tax credit for GST paid on supplies, therefore, it is the end user who effectively bears the tax.

Non-taxable supplies are not subject to GST. Included in non-taxable supplies are GST-free supplies that cover a range of items, most notably basic food, healthcare, education and exported goods and services.

A sale of a business which meets all the conditions of transfer of a going concern will also not be subject to GST.

Also, included in non-taxable supplies are input taxed supplies. The most significant category of input taxed supplies is financial supplies.

There are differences between a GST-free supply and an input taxed supply. Where the supplier makes a GST free supply, any GST that it has paid in relation to acquisitions that relate to GST free supplies may be claimed as input tax credits. These input tax credits can be refunded to the taxpayer. By contrast, in relation to input taxed supplies, where the supplier makes such a supply and there is an associated GST expense in relation to acquisitions made that relate to those supplies, normally no input tax credit can be obtained.

The full list of GST-free and input taxed supplies is provided in Table 5.3 (refer to Appendix A).

Imports are treated separately. In essence, imports become taxable as taxable imports for GST purposes only where they relate to the import of goods. Thus, in broad terms if goods are imported into Australia, where they would not be GST-free or input taxed supplies if they were supplied locally, the GST liability is imposed on the importer for an amount equal to 10% of the value of the taxable

import. The value of the taxable import includes the customs value, associated costs of transport and insurance and any customs duty payable in respect of the import of the goods. If used entirely in the conduct of a business the importer would also be entitled to an input tax credit equal to the GST liability.

Essentially, a GST liability, in relation to the import of goods, arises only if the goods are used wholly or partly for essentially private purposes. Finally, it should also be noted that exports are GST-free. However, to satisfy the requirements of the definition of being an export for this purpose, there are strict technical rules that must be complied with. Further information on this issue can be obtained from Hall Chadwick.



PLANNING POINT

The supply of goods to an Australian, who is temporarily situated outside Australia, does not give rise to a GST liability provided the goods are delivered or made available to the recipient outside Australia.

Further, a non-resident supplier of intangible property has no GST liability if all relevant aspects of the supply are made outside Australia and the supplier does not make the supply through an enterprise that the supplier carries on in Australia. In essence, this means that the supplier must not have a permanent establishment in Australia.

The final comment above is subject to one important caveat - the recipient of the supply (as opposed to the supplier) can, in certain circumstances, be subject to GST on the supply of intangible property. Refer to Hall Chadwick for further details.

5.6 FRINGE BENEFITS TAX (FBT)

FBT was introduced with effect from 1 July 1986 to impose a tax upon employers in relation to all non-cash components of benefits provided to employees.

FBT covers a wide range of benefits listed in Table 5.4 (Refer Appendix A). Each category referred to in Table 5.4 has its own designated valuation rules which means that some categories are inevitably dealt with more favourably than others. For example, it is still possible in the Australian context to extract an advantage from salary packaging a motor vehicle, since the valuation rules for motor vehicles are slightly more generous than those applicable to other categories. However, it must be conceded that the relative advantage here has been diminished in recent years.

There are still some minor items exempt from FBT that can be salary packaged to good effect. These include in particular:

- Laptops (but limited to one per year per employee);
- Payments made to complying superannuation funds;
- Car parking provided by small businesses on their premises;
- Mobile phones;
- Certain childcare fringe benefits.

5.7 MEDICARE LEVY

The Medicare levy applies only to resident individuals. It has no application to non-residents or to companies.

The current Medicare levy is imposed at a flat rate of 1.5% on the taxpayer's entire taxable income unless taxable income is less than certain concessionary amounts in which case lower rates may apply. Thus, a taxpayer on the maximum marginal income tax rate of 45% will pay a total tax of 46.5%, inclusive of the Medicare levy. An additional Medicare levy surcharge of 1% of taxable income can apply to high-income earners in certain situations.

The Medicare levy can best be described as an extra charge or levy for medical care imposed by reference to the taxable income of a taxpayer in addition to the tax otherwise payable by the taxpayer.



5.8 HIGHER EDUCATION CONTRIBUTIONS SCHEME CHARGE (HECS) & HIGHER EDUCATION LOAN PROGRAMME (HELP)

HECS applies to studying award courses undertaken in Australian Higher Education Institutions and is applicable only to residents of Australia.

The fee charged varies depending on the nature of the discipline. By way of example a law student pays HECS of approximately \$9000 equivalent full time student load per annum, with the method of payment being determined by a selection from a series of options.

The HECS payment is normally deferred until an individual commences fulltime employment and exceeds a certain level of income. It is possible for a student to pay HECS upfront and claim a discount on the course fees.

On 1 January 2005, the Higher Education Loan Program (HELP) was introduced. HELP comprises the following three schemes:

- HECS-HELP – for eligible students enrolled in Commonwealth supported places. A HECS-HELP loan will cover all or part of their student contribution.
- FEE-HELP – for eligible fee-paying students enrolled at an eligible higher education provider or Open Universities Australia. FEE-HELP provides students with a loan to cover up to the full amount of their tuition fees to a maximum of \$85,062 or \$106,328 for certain medicine courses (2010 indexed figure) over their lifetime.
- OS-HELP – for eligible Commonwealth supported students who wish to study overseas. OSHELP provides students with a cash loan to cover expenses such as accommodation and travel.

5.9 SUPERANNUATION GUARANTEE CHARGE (SGC)

The superannuation guarantee legislation is designed to encourage employers to provide a minimum level of superannuation support for employees. The current minimum prescribed rate is 9%.

Where employers provide less than the required minimum level of support, they are liable to pay a non-deductible charge called the Superannuation Guarantee Charge (SGC).

The SGC equals the superannuation guarantee shortfall, which is made up of:

- The total of the individual superannuation guarantee shortfalls for all employees for the year;
- An interest component; and
- The employer's administration component for the year.

5.10 PAYROLL TAX

Payroll Tax is levied by each of the six Australian States and two Territories regarding assessable wages paid or payable in respect of services performed wholly or mainly within a particular jurisdiction. In every case, there is a threshold below which Payroll Tax is not payable.

Thus, for example, in New South Wales the first \$658,000 of Payroll is not subject to Payroll Tax. In Victoria the figure is the first \$550,000 and Queensland the first \$1,000,000. Other States and Territories have similar thresholds. Beyond that threshold amount, a flat rate is normally charged although there is a complicated sliding formula in Western Australia. From 1 January 2011, the flat rate in New South Wales is currently 5.45%, Victoria 4.90% and Queensland 4.75%.

The residence of the employer is not normally relevant to Payroll Tax - the critical issue is where the service is performed.

If services are performed within one of the relevant jurisdictions, payroll tax will apply subject to the threshold tests in the state where the services are performed. If services are performed by an employee in more than one jurisdiction in a particular month, then the wages are subject to payroll tax in the state in which the employee has his principal place of residence in Australia. The only instance in which the employer's residence is applicable in determining liability for payroll tax is where services are performed in more than one state during a month and the employee does not have a principal place of residence in Australia, or where it cannot be identified, in which case the employer's ABN registered address will be

used to determine where payroll tax is liable to be paid. Certain planning opportunities exist and you should contact Hall Chadwick for further details.

5.11 LAND TAX

Land tax applies equally to residents and non-residents who own land in the particular State or Territory jurisdiction in question.

Land tax is a State or Territory tax that is currently imposed by all six states of Australia and by the Australian Capital Territory. It is not imposed by the Northern Territory. In each case it is imposed on the value of the land, only the methods for determining value in this context vary from state to state.

With the exception of the ACT, liability for land tax rests with the owner on a particular date or at a particular point in time. In the ACT, where all land is owned by the Commonwealth, land tax is imposed on lessees.

In NSW and Victoria the relevant moment to judge the ownership of the asset is midnight on 31 December in any given year. The dates for all other states but not the ACT is midnight on 30 June in any given year.

In the six States and in the ACT the owner's principal place of residence is generally exempt, although there are certain differing qualifying criteria which vary between jurisdictions.

In all States but Queensland there is a threshold below which there is no land tax and above which the imposition of land tax can be quite significant. By way of example, in New South Wales the land tax is nil up to \$376,000 and thereafter becomes 1.6% of the excess above \$376,000 to \$2,299,000 after which the land tax threshold increases to 2%.

Each State imposes its own land tax and accordingly it is imposed in relation to land owned by the taxpayer in that State.

Thus, from a land tax perspective alone, it is preferable to own land in a variety of States, all of which are under the threshold in each State, without triggering a land tax liability. Alternatively, the use of separate entities to own different pieces of land can achieve the same result.



5.12 STAMP DUTY

The rate of Stamp Duty varies from State to State and in respect of different types of documents relating to different types of transactions.

Most commonly, Stamp Duty is applied in respect of conveyances of real property and the total amount of Stamp Duty payable on this basis can be substantial.

For example, in New South Wales, where a property is transferred for an amount of \$1,000,000, the referable Stamp Duty payable is AUD \$40,490. Similar amounts are usually payable in other States.

The residence of transacting parties is not the critical feature which gives rise to Stamp Duty. Rather, the essential connecting factors that give rise to a liability to Stamp Duty in any State or Territory include:

- Whether a document is executed within the jurisdiction;
- Whether the transaction relates to property located within the jurisdiction; and
- Whether the transaction relates to "any matters or things done or to be done" within the jurisdiction.

Thus, residents conducting business operations in Australia are subject to tax in a State or Territory if, for example, the transaction relates to property located within the particular State or Territory.

Stamp Duty is imposed by each of the six Australian States and two Territories in respect of documents that have been created in relation to a transaction. Stamp Duty used to be a tax on documents and the person liable to pay the duty would arrange for the documents to be stamped. However, the stamp duties legislation now effectively taxes a range of transactions which means that stamp duty can still arise even where there is no actual document.

Other Issues Relating to Taxation

6.1 RESIDENCE

There is a critical distinction between an Australian resident and non-resident. The distinction is crucial as a resident is taxed on worldwide income whereas a non-resident is taxed only on Australian sourced income.

In particular, in the context of companies, to achieve and maintain non-resident status the relevant company should ensure that three things occur:

- It is incorporated outside Australia;
- Its central management and control is outside Australia; and
- Its power is controlled by non-Australian resident shareholders.

The first test is essentially a factual matter which can be satisfied with ease.

The second test is more complex. There is an authority to suggest that the place where the directors of the company meet to conduct the business of the company is the sole determinant of the place of central management and control. However, the authority for this proposition is old and may no longer reflect the complete picture. It is advisable to ensure that directors meetings occur outside Australia and that these meetings determine both policy and key operational matters relating to the company. Further, it is advisable that for tax purposes that at least the majority of the directors of the company are not Australian residents and practical day to day management of the company should, where possible, be outside Australia.

The third test is again more clear cut and simply requires that those who control the voting power of the company be resident outside Australia.

6.2 DOUBLE TAXATION AGREEMENTS

Australia has entered into over forty comprehensive Double Taxation Agreements (DTAs) with countries such as the UK, the USA, France, Germany, Japan, New Zealand and China (PRC).

These Double Tax Agreements (DTA) may have consequences in relation to a number of the taxes considered in Chapter 5 above.

6.2.1 INCOME TAX

Clearly, the broadest impact is in relation to income tax where the treaties operate to achieve a number of results, particularly as follows:

- Business profits are not taxed in Australia if they are derived by a taxpayer who is resident in a DTA country in circumstances where that DTA resident does not have a permanent establishment in Australia;
- Interest, royalty and dividend income which flows from Australia to a person resident in a DTA country is taxed at reduced withholding tax rates;
- Certain personal services income, which is ordinarily subject to tax in Australia, may be excluded from Australian tax by the DTA.

Details of this can be obtained from Hall Chadwick.

6.2.2 FRINGE BENEFITS TAX

There is some debate as to whether DTAs can have any effect upon Fringe Benefits Tax (FBT) (5.6 above). The only point that is absolutely clear on this issue is that the DTA entered into with the United Kingdom and New Zealand specifically deals with FBT and confers taxing rights upon that country which has the primary right to tax the remuneration to which the fringe benefit relates.

In respect of all other DTAs that do not make specific reference to FBT, the position is unclear but the preferred view is that they have no application to FBT.

6.2.3 CAPITAL GAINS TAX

Even more complex issues arise in relation to whether or not the DTAs can apply so as to limit the taxing capacity of treaty partners in relation to Capital Gains Tax (CGT). The view adopted by the Australian Taxation Office (ATO) in Taxation Ruling TR 2001/12 is that the DTAs entered into before Australia's CGT commenced to operate (i.e. before 20 September 1985) have no impact to limit Australia's taxing capacity since the tax was not specifically contemplated within the terms of those DTAs.



This Australian Taxation Office proposition is arguable, especially having regard to the fact that even those DTAs are expressed to apply to taxes which are identical or substantially similar to those which existed at the date of entry into the DTA. The contrary proposition is that CGT is a tax that is substantially similar to income tax, especially as it is structured as part of the income tax (refer to 5.3 above).

In relation to the other DTAs, there is a provision which seeks to preserve Australia's taxing rights in relation to capital gains thereby excluding the benefit of the DTA.

A note of caution - the DTAs are similar in structure but different in a number of points of detail. You should not assume that one DTA is identical to another. Each needs to be independently checked.

6.3 TRANSFER PRICING

When related parties, such as a non-resident parent and an Australian subsidiary, transact with one another in relation to either goods and/or services (including for example making a loan to each other), the Australian Taxation Authorities are keen to ensure that this is done on such a basis so as not to deliberately or inadvertently reduce Australian tax that would be payable if the parties were not so related.

The bottom line, in relation to the complex issues raised by the concept of transfer pricing, is that parties who are not operating at arm's length when dealing with each other, should ensure that they have properly thought through and documented the reasoning to determine the price charged between themselves.

In particular, they should talk through and clearly document the process by which they have reached the related party price and that documentation should include reference to all functions, assets and risks which have been picked up by the respective parties in determining the arm's length pricing amounts. The documents should reveal both the pricing methodology adopted and why other perhaps more conventional methodologies were not used.

In that way, upon any subsequent transfer-pricing audit, the parties would have clear, tangible and contemporaneous documentation to present in defence of the pricing that has been arrived at.

For transactions which have taken place in the past, it would be advisable to:

- Review the pricing policies; If none exist, develop documentation having regard to the relevant transfer pricing principles mentioned above and in the various administrative rulings;
- Where discrepancies are found, or inadequate documentation or inappropriate pricing is discovered, consider requesting an amended assessment to avoid penalties that can arise under audit;
- For future transactions, in addition to the processes referred to above, consider approaching both the Australian and Foreign Revenue Authorities for an "Advanced Pricing Agreement (APA)". This is an agreement between the Australian Taxation Office, the relevant Foreign Tax Office and the relevant taxpayers under which for a given period of time the pricing methodology is agreed to by all parties.
- The Advanced Pricing Agreement is both time consuming and potentially costly in terms of legal and accounting fees, but in the long term cost savings and certainty can be achieved. In recent times it has become apparent that the Australian Taxation Office has become prepared to issue APAs.

Tax returns for companies, trusts, partnerships and superannuation funds have a special associated schedule, schedule 25A, titled "Overseas Transactions Information". Entities operating in Australia that engage in international transactions with related overseas entities are required to provide information about those transactions on this form.

For further information in relation to all these matters, including the completion of Schedule 25A, applications for and conclusion of Advanced Pricing Agreements and general advice and documentation in relation to transfer pricing issues, you should contact Hall Chadwick.

6.4 FUNDING THE AUSTRALIAN VENTURE

Funding of the Australian venture can be arranged either in the form of debt, equity, or a combination of the two. In this regard a number of factors are relevant as follows:

- a) In relation to inward investment into Australia, a series of complex rules, which apply with effect from 1 July 2001, restrict deductions for interest and related expenses to the extent debt funding exceeds 75% of the value of the Australian assets of the venture. This is simply expressed but the formula to give effect to this result is complex and further advice is required in relation to this point. Nonetheless, some transactions need to be arranged having regard to this constraint; otherwise a denial of interest deductions could arise.
- b) Interest normally payable on loans is fully deductible subject to the above and the borrowing entity in Australia is required to withhold 10% when paid to a non-resident.
- c) The difference between debt and equity is complex; in essence if there is an effective non-contingent obligation on the part of the borrower to repay an amount that has been lent at some future time, it is debt. Otherwise it is equity.
- d) Dividends paid on equity investments are not deductible to the Australian tax payer and are subject to a withholding tax of 30% if they are paid out of a pool of profits which have not been subject to tax in Australia (i.e. they are unfranked dividends). This rate of 30% is, however, reduced by virtue of a DTA, where applicable. The reduced rate can be 15% and in some instances as low as 5% or 0%.
- e) Where the dividends are franked, i.e. they are paid out of a pool of profits which has already been subject to Australian corporate tax, there is no further withholding tax.

6.5 PULLING IT ALL TOGETHER - PRACTICAL CONSIDERATIONS

From the above analysis it is evident that in setting up a business structure in Australia, a number of considerations need to be taken into account.

These include the following three critical aspects:

1. Determine the most appropriate business structure to adopt, having regard to the nature of the business involved and the nature of the participants in the ownership of the business. In particular, consider all alternatives and identify which structure is most appropriate to your needs.
2. Consider the most appropriate method of funding of the business venture having regard to factors such as how repatriation of profits can be achieved with minimal local and foreign taxes.
3. Give careful consideration to how you arrive at pricing in relation to transactions between related parties. In particular, consider whether the pricing arrived at is justifiable having regard to comparable arm's length transactions, and how you document the methodology that has been used in such a manner so as to satisfy a future audit.





Migration

Australia is one of the most ethnically diverse countries on earth. Since 1945 over seven million people have come to Australia as new settlers from more than 150 countries.

In the year 2009 alone, Australia's preliminary net overseas migration estimate was that over 277,000 settled here with most coming under the skilled migration program. This influx has given the country a productive diversity and hence a competitive advantage in doing business with the rest of the world since 20% of the population now fluently speak a language other than English at home.

If you are not an Australian citizen, you will need a visa/Electronic Travel Authority (ETA) eVisitor visa to enter and spend time in Australia. The type of visa you need will depend on which country you come from, how long you wish to stay in Australia and what you want to do during your stay.

Short stay visas for up to 3 months can be obtained in electronic form from participating travel agencies when making travel arrangements, or through participating airlines, as well as at Australian visa offices overseas. ETAs are available to holders of the following passports from Brunei, Canada, Hong Kong SAR, Japan, Malaysia, Singapore, South Korea and USA, whilst eVisitor application is available to holders of European passports. If you do not hold a passport from one of the above countries then you should apply for a 'label' visa. There is a wide range of visas relevant to business people and hence it is best to seek professional advice from a registered migration agent. Hall Chadwick is registered to provide this service. There are short stay visas (up to three months), longer stay visas (up to four years), as well as permanent visas available to business people who meet the statutory criteria.

The processing of visa applications (other than the ETAs) and eVisitor can often take a considerable amount of time. In part, this depends on the demands being placed on particular Australian embassies but it also relates to the need to find out whether the applicant is of good character, not a risk to national security or not involved in any activity prejudicial to Australia's interests. Many applicants are also required to undergo health checks particularly with regards to active tuberculosis. In addition to these standard public interest issues there is a business points test aimed at securing a good fit between the needs of the applicant and the needs of the country. Every business 'label' visa has some points test associated with it. While there are a large number of items included in the various tests, the usual ones are the gross assets in the main business, labour costs in the business, net assets available to the individual and partner, age, language ability and any sponsorship by a regional authority.

It is for these reasons that the government's preferred path is for business people to seek a temporary visa and convert this to permanent after a period of time since not only is business planning and company structuring required but also family issues need to be taken into account. Obviously the checks for temporary visas are less onerous than those for permanent ones. Businesses can also be involved in facilitating the process. For example, businesses can apply for a labour agreement with the government or can seek to become a sponsor even if they are an overseas business. An interesting section of such agreements that facilitate companies bringing in their own staff is the Invest Australia Support Skills Program (IASS) where companies gain access to streamlined immigration arrangements needed to support an international operation.

Visas granted under IASS agreements are to enable the transfer of key expatriate executive and specialist personnel of the company group in and out of Australia according to the needs of the company.

Australia's approach to multiculturalism is to accept and respect the right of all its citizens to express and share their individual cultural heritage within a commitment to Australia and the values of our democracy. Because of this cultural diversity, Australia is becoming the place of choice for many overseas companies seeking to set up an Asia Pacific regional headquarter. Likewise, education has become a major export as increasing numbers of overseas students undertake degrees in Australia's world quality, but relatively low cost education institutions.

Hall Chadwick is the one-stop shop for doing business in Australia. We can help you export to and import from Australia, establish a branch office of your current business, establish a new business in Australia, move senior executives back and forth, travel to Australia to undertake business activities and live in Australia to conduct business. Like accounting and taxation, it can all look too daunting unless you have professional advice to ease the way.

457 TEMPORARY VISAS

In August 1996, the federal government introduced a new temporary entry business visa . The 457 visa allowed employers to sponsor skilled workers on a temporary basis—between three months and four years. The 457 visa is most commonly used by employers to sponsor overseas workers to work in Australia on a temporary basis.

The 457 visa is available to employers wanting to sponsor and employ overseas workers who have recognised qualifications and skills in particular occupations. These workers may bring any eligible secondary applicants (family members) with them to Australia. Secondary applicants can work or study while they are here. After entering Australia, 457 visa holders have no limit on the number of times they may travel in and out of Australia while the visa is valid.

There are health, character and skill level requirements for this category of visa that must be met. From 14 September 2009, any employee wishing to change employer after they have arrived is no longer required to apply for a new visa. The skill requirements for 457 visas must correspond to specific requirements.

For employers there are minimum salary requirements designed to prevent the undercutting of Australian wages and the exploitation of overseas workers and to ensure that the visa holders can adequately provide for themselves whilst in Australia. The standard minimum salary level is currently \$47,480 although other rates of pay are required for employees in certain sectors.

The minimum salary level, the minimum skill level and requirements for employers to cover certain costs (such as visa and transport and medical insurance costs) are designed to ensure that employers are not sponsoring people where they could employ an Australian citizen or resident. Sponsors are also required to have a satisfactory record of training Australian workers and to indicate how the overseas workers will 'benefit Australia', for example, by creating employment for Australian citizens and residents or expanding trade and overseas business links.

Working with Hall Chadwick will ensure that your migration visa needs are handled appropriately and you can do what you do best – attend to your business needs.



Financial Reporting and the role of the ASIC

Australian Corporations Law requires that financial statements be prepared for companies operating in Australia. Financial statements must be prepared in compliance with accounting standards, except in limited circumstances for small and non reporting proprietary companies.

If disclosure and secrecy is paramount, utilisation of Trusts or Limited Partnerships may alleviate these concerns.

The Australian Accounting Standards are broadly in accordance with International Accounting Standards. However, there are a number of exceptions. There are a number of different types of companies, each having their merit and differing reporting requirements.

A "Limited" company as opposed to a "Proprietary Limited" company must prepare and lodge financial statements with the ASIC annually.

Companies which seek to raise public funds must adhere to the Corporations Law rules. Broadly, such companies can be grouped into entities known as "disclosing" entities which are subject to continuous disclosure and reporting requirements. Such entities include:

- Entities listed on a stock market
- Entities raising funds under a prospectus document
- Entities which are the subject of a take-over
- "Borrowing Corporations"

Reports for such entities would include half yearly reports. Listed companies are also subject to the Australian Stock Exchange rules – "Listing" and "Business rules."

A more common vehicle is the "Proprietary Limited" – "Pty Ltd" company.

Depending upon the size of a Pty Ltd company, financial accounts may be required to be submitted to the ASIC and also audited.

Subject to obtaining relief from the ASIC as noted below, a company must lodge audited financial statements with the ASIC.

A "large" company is one which satisfies at least 2 of the following conditions:

- 50 full time employees or more
- Consolidated gross revenue of \$25 million AUD or more
- Consolidated gross assets of \$12.5 million AUD or more

If a company is the subsidiary of a foreign company, it is automatically required to prepare and lodge audited financial statements. However, the ASIC can grant relief from this requirement if certain tests are met. Please contact a Hall Chadwick Partner for details.

Financial statements do not need to be lodged with the ASIC if an Australian company, which is a subsidiary of a foreign corporation:

- Is not deemed to be a "large" company; and
- Is not part of a "large" group in Australia; and
- The Directors resolve that the company meets the above tests; and
- The relevant form is lodged with the ASIC (within the prescribed time limits) to seek the Commissioner's approval that the lodgement and audit concessions be granted.

The financial statements would also not be required to be audited.

8.1 BRANCH OF OVERSEAS COMPANY

A branch of a foreign company is required to lodge with the ASIC at least once every calendar year (including the year of registration):

- A copy of its balance sheet, cash flow and profit and loss statement and;
- Such other documentation as the company is required to prepare by the law applicable to the foreign country in its place of origin.

However, a similar relief from reporting may be applied for in certain circumstances. The ASIC provides a concession from preparation and submission of audited financial statements such that the compliance burden placed on a branch is no more than that on a similar sized business incorporated as a proprietary limited company in Australia.

The conditions for relief from lodging audited financial statements of the foreign company must continually be monitored each year. Otherwise, audited financial statements of the foreign company (incorporating the Australian branch's activities) must be submitted on an annual basis.

Both subsidiaries and branches of foreign companies must lodge an annual report. However, the amount of detail provided can be kept to a minimum if concessions are available and applied for.

8.2 ROLE OF AUSTRALIAN SECURITIES & INVESTMENTS COMMISSION – ASIC

The ASIC's role is to protect users of financial accounts, regulate and enforce laws that are applicable to Australian Companies and to maintain a public database to provide certainty in commercial dealings.

The ASIC is responsible for the registration of Australian and Foreign Companies operating in Australia. The ASIC administers futures brokers', dealers' and investment advisers' licences. Registration with the ASIC allows a company to operate throughout Australia, without the need to register in individual States.

The Commissioner of the ASIC exercises power under the following laws:

- Corporations Act 2001
- ASIC Act
- Insurance (Agents and Brokers) Act
- Insurance Contracts Act
- Superannuation (Resolution of Complaints) Act
- Superannuation Industry (Supervision) Act
- Retirement Savings Act
- Life Insurance Act
- Insurance Act

The ASIC has responsibility to issue regulations in respect of the laws of Parliament. It administers annual returns with audited financial statements that are lodged (unless a concession is available) with the ASIC on an annual basis as well as the submission to the ASIC of Dealers, Brokers and Advisers reports on a six monthly basis.



Other

9.1 TRADEMARKS

Australia has laws which provide for the exclusive use and enjoyment of a Trademark registered in Australia.

Australia has become a member of the Madrid protocol from 11th July 2001. This will allow the filing of International Trademark Applications.

An International Trademark application can now be lodged as a single document which covers up to 50 member countries.

The Australian Trademarks Office accepts applications. Countries for which coverage is required must be nominated in the application.

9.2 PATENTS

A patent is legally enforceable in Australia. Once registered, the owner of the patent is allowed the exclusive use and enjoyment of the intellectual property.

9.3 COPYRIGHT

Another form of protection in Australia is contained in the Copyright Act 1968.

Protection is automatic without the need to register. As a result of international treaties, such as the Berne Convention, most foreign copyright owners are protected in Australia.

9.4 TRADE PRACTICES LAW

The Trade Practices Law that operates in Australia governs Competition Law, the liability of companies for product failure as well as enforcing a regime of proper practice by corporations in the conduct of trade.

The legislation prohibits various business practices, such as primary and secondary boycotting, third line forcing, resale price maintenance and misuse of market power. Certain exemptions can be claimed from the Australian Competition and Consumer Commission (ACCC) to allow various business practices to operate notwithstanding their prohibitions. However, permission needs to be granted first by the ACCC who have to be satisfied as to the utility of the conduct sought to be approved.

The Trade Practices Law that operates in Australia governs Competition Law, the liability of companies for product failure as well as enforcing a regime of proper practice by corporations in the conduct of trade. Australian Trade Practices Law also prohibits misleading and deceptive actions by individuals or by corporations in the conduct of business. Damages can be awarded against companies that engage in such practices and prosecutions can also be invoked.

Finally, manufacturers will be responsible for any liability of their product under the Trade Practices Laws. Care needs to be taken by manufacturers to ensure that products are safe and capable of operating as intended.

Hall Chadwick works with businesses to obtain any necessary advice for our clients and can make necessary introductions to specialist legal practitioners in this area if required.

9.5 INDUSTRIAL LAW IN AUSTRALIA

Australia has a number of legal instruments that govern employment relationships in Australia. First and foremost, and establishing a foundation in the employment context, is the common law, which has developed over the centuries and is sourced from the law of England. The basic principles of Contract Law and Commercial Law affect employment relations between employers and employees.

There are a number of unique features to Australian Employment and Industrial Law. These include the system of Awards which are essentially Court orders emanating from various industrial tribunals around the Commonwealth. These Awards regulate the work practices and conditions of many Australian employees.

In addition there is legislation sourced from a number of Acts including the various State Industrial Relations Acts, the Federal Workplace Relations Act as well as Work Safety legislation found in the various jurisdictions.

Again, Hall Chadwick can provide practical and valuable advice on most employment matters and make any necessary introductions to lawyers who specialise in Industrial Relations in Australia.

Appendix A - Section 5 Tables

5.1 KEY TAXES		HIGHER EDUCATION LOAN PROGRAMME	(5.6)
INCOME TAX	(5.2)	SUPERANNUATION GUARANTEE CONTRIBUTION	(5.7)
GOODS & SERVICES TAX	(5.3)	PAYROLL TAX	(5.8)
FRINGE BENEFITS TAX	(5.3)	LAND TAX (NSW)	(5.9)
MEDICARE LEVY	(5.5)	STAMP DUTY (NSW)	(5.10)

INCOME TAX

TABLE 5.2A - INDIVIDUAL RESIDENT INCOME TAX RATES 2010 - 2011

TAXABLE INCOME (AUD)	TAX ON THIS INCOME (AUD)
\$0 - \$6,000	NIL
\$6,001 - \$37,000	NIL + 15% of excess over \$6,000
\$37,001 - \$80,000	\$4,650 + 30% of excess over \$37,000
\$80,001 - \$180,000	\$17,550 + 37% of excess over \$80,000
\$180,001 and over	\$54,550 + 45% of excess over \$180,000

TABLE 5.2B - INDIVIDUAL NON-RESIDENT INCOME TAX RATES 2010 - 2011

TAXABLE INCOME (AUD)	TAX ON THIS INCOME (AUD)
\$0 - \$37,000	29% of excess over \$0
\$37,001 - \$80,000	\$10,730 + 30% of excess over \$37,000
\$80,001 - \$180,000	\$23,630 + 37% of excess over \$80,000
\$180,001 and over	\$60,630 + 45% of excess over \$180,000



GOODS & SERVICES TAX

TABLE 5.3 - SUPPLIES NOT SUBJECT TO GST

GST-FREE SUPPLIES	INPUT TAX SUPPLIES
Basic Food	Financial Supplies
Health	Residential rent
Education	Residential premises
Child care	Precious metals
Exports	School tuckshops and canteens
Religious Services	Fund-raising events - charitable institutions
Non-commercial activities - charitable institutions	
Raffles - charitable institutions	
Water and sewerage	
Supplies of going concern	
International Trade: Certain Transport Services	
Precious Metals	
Supplies made by inwards duty free shops	
Grants of freehold land by Governments	
Farm land	
Cars for use by disabled persons	
International mail	

FRINGE BENEFITS TAX

TABLE 5.4 - BENEFITS SUBJECT TO FRINGE BENEFITS TAX

Cars
Debt wavers
Loans
Expense payments
Housing
Living away from home allowances
Airline transport
Board meals
Meal entertainment
Entertainment provided by tax exempt bodies
Car parking
Property benefits (if not otherwise covered by the above)
Residual benefits (if not otherwise covered by the above)

MEDICARE

TABLE 5.5A - MEDICARE LEVY

Medicare is the scheme that gives Australian residents access to the health care system. The Medicare levy is 1.5% subject to exclusions and reduced according to income levels and spouse/dependant numbers.

TABLE 5.5B - MEDICARE LEVY SURCHARGE

High income earners without adequate private health insurance are liable for additional 1% Medicare levy surcharge where the taxable income in excess of relevant income thresholds is exceeded as follows.

STATUS	SURCHARGE ADJUSTED TAXABLE INCOME THRESHOLD AND REPORTABLE FRINGE BENEFITS
Single (no children)	\$77,000
Couple (no children)	\$153,000 + \$1,500 (per child after first)

TABLE 5.6 - HIGHER EDUCATION LOAN PROGRAMME (“HELP”)

The following table is a list of repayment thresholds and rates for compulsory repayment of HELP and HECS debts.

HELP REPAYMENT INCOME (HRI)	REPAYMENT RATE
Below \$44,912	NIL
\$44,912 - \$50,028	4% of HRI
\$50,029 - \$55,143	4.5% of HRI
\$55,144 - \$58,041	5% of HRI
\$58,042 - \$62,390	5.5% of HRI
\$62,391 - \$67,570	6% of HRI
\$67,571 - \$71,126	6.5% of HRI
\$71,127 - \$78,273	7% of HRI
\$78,274 - \$83,407	7.5% of HRI
\$83,408 and above	8% of HRI



TABLE 5.7 - SUPERANNUATION GUARANTEE CONTRIBUTION

YEAR	PRESCRIBED SUPPORT
2010 - 2011	9%

TABLE 5.8 - PAYROLL TAX

JURISDICTION	RATE	THRESHOLD
New South Wales	5.45%	\$658,000
Victoria	4.90%	\$550,000
Queensland	4.75%	\$1,000,000
Western Australia	5.5%	\$750,000
South Australia	4.95%	\$600,000
Tasmania	6.1%	\$1,010,000
Northern Territory	5.9%	\$1,500,000
Australian Capital Territory	6.85%	\$1,500,000

TABLE 5.9 - LAND TAX (NSW)

TAX YEAR	RATE	THRESHOLD
31/12/2009	\$100 + 1.6%	\$376,000

Land tax is a tax levied on the owners of land in NSW as at midnight on 31 December each year. In general, your principal place of residence (your home) or land used for primary production (a farm) is exempt from land tax.

TABLE 5.10 - STAMP DUTY (NSW)

LAND VALUE	PROPERTY TRANSFER RATES
\$0 - \$14,000	\$1.25 for every \$100 or part of dutiable value
\$14,001 - \$30,000	\$175 plus \$1.50 for every \$100 or part, by which the dutiable value exceeds \$14,000
\$30,001 - \$80,000	\$415 plus \$1.75 for every \$100 or part, by which the dutiable value exceeds \$30,000
\$80,001 - \$300,000	\$1,290 plus \$3.50 for every \$100 or part, by which the dutiable value exceeds \$80,000
\$300,001 - \$1m	\$8,990 plus \$4.50 for every \$100 or part, by which the dutiable value exceeds \$300,000
Over \$1 million	\$40,490 plus \$5.50 for every \$100 or part, by which the dutiable value exceeds \$1,000,000

Appendix B - Case Studies

CASE STUDY 1

FACTS:

On 1 November 2009, a US investor buys an office block in Melbourne, Australia, for \$12 million. The investor intends to purchase the property through an Australian private company, which will be directly and wholly owned by the investor's US corporation.

The overseas investor plans to arrange a loan of \$11 million to be provided by an Australian bank at 6.25% interest only. The balance of the purchase cost will be financed by equity.

During the year ending 30 June 2010, the projected rental income is expected to be \$800,000. The interest expense will be \$990,000 and there should be other incidental expenses of \$100,000.

The overseas investor plans to sell the Australian property in August 2012 at its projected market value of \$15 million. It plans to repatriate the funds to the home country.

Question:
What Australian tax and related issues should the investor be aware of?

Considerations:

- FIRB
- Location of the entity to own the shares in the Australian company
- Unit trust rather than company
- GST
- Legal fees
- Land Tax
- Thin capitalisation
- Debt / equity
- Loan from an Australian bank vs. loan from an offshore bank
- Depreciation and other deductions
- Losses
- Capital gain on sale
- Repatriation of funds
- Return on investment
- Tax treaty issues
- Withholding tax, especially on interest



CASE STUDY 2

FACTS:

A Hong Kong investor wishes to purchase a hotel in Sydney as a joint venture with a European investor. Their long-term intention is to acquire more hotels in other Australian locations and sell or float the Australian business. They have substantial funds for the purchase of the first hotel.

As a separate venture, they are also considering franchising the hotel name, so they will receive commissions / royalties from new hotels, whereby they will own the real estate but will not operate the hotel business, i.e. they would be landlords.

Question:
The investors have asked for advice on all the issues they should consider before proceeding with the investment.

Considerations:

- Structuring each investment - unincorporated or incorporated joint venture, partnership or joint venture?
- Tax treaty issues
- Funding, including thin capitalisation
- GST
- Losses
- Depreciation / balancing adjustments
- Capital gain on sale
- Repatriation of funds
- Return on investment
- Withholding tax on royalties



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