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International Law Firm Alliance
COMPENDIUM 2013

"We shall make it together by walking"

Australia

Tax Law

The Australian income tax system is a federal system based on the Income Tax Act and other related acts. The income tax year is 12 months ending 30 June (unless substituted accounting period granted).

Income tax, which is by far the most significant tax levied in Australia, is imposed only by the Commonwealth Government. There are no separate State or Territory income taxes. Instead, the States and Territories raise some of their revenue through other taxes such as pay-roll tax, land tax, stamp duty and financial transactions tax. The balance of their revenue consists mainly of grants from the Commonwealth Government.

In addition to income tax, the Commonwealth Government also imposes a variety of other taxes including fringe benefits tax (on employee benefits), wholesale sales tax (on goods), customs and excise duties, superannuation guarantee surcharge and petroleum resource rent tax.

Local authorities also raise revenue from rates and taxes imposed on landholders living or carrying on business in the local authority area. Australia does not currently have a value added tax, and has neither wealth, death nor gift taxes.

INCOME TAX

Australia's income tax system is administered by the Australian Taxation Office (ATO), which is headed by the Commissioner of Taxation. Australian income tax is levied on both the income and the capital gains of all individuals and companies and certain other entities such as limited partnerships and certain trusts. Unlimited partnerships are taxed at the individual partner level. Broadly, residents of Australia are liable to income tax in respect of their worldwide income, while non-residents are liable to income tax in respect of their income from Australian sources. This broad principle is subject to the provisions of any bilateral double taxation treaty entered into between Australia and almost 40 other countries. Treaties generally follow the OECD Model Convention.

Taxable Income

Income tax is payable in respect of "taxable income," which is calculated by deducting from assessable income all allowable deductions. Taxable income is calculated on an annual basis, with the year of income being a fiscal year ending on 30 June, unless the Commissioner has given permission for the taxpayer to adopt a year of income ending on some other date, which is often the case for Australian subsidiaries of foreign-based entities.

Most expenditure incurred in deriving assessable income is deductible in calculating taxable income, either in the year in which it is incurred, or amortized over a period of years, or at the time of disposal of a capital asset in respect of which a capital gain arises.

State and local taxes are generally allowable deductions in calculating the taxable income upon which federal income tax is levied, unless they form part of the cost of a capital asset, such as stamp duty on the transfer of land.

Losses can be carried forward indefinitely but cannot be carried back. Losses incurred by companies and certain other entities are subject to satisfaction of the majority continuity of ownership rules or, failing that, the same (identical) business rules.

Income Tax Rates

Income tax is levied on both resident and non-resident individuals on a progressive basis, with the highest rate of 45%. Resident individuals also pay an additional 1.5% of taxable income by way of Medicare levy.

Resident Individuals

Resident individuals whose total taxable income for the year from all sources (regardless of whether it originates in or out of Australia) exceeds the tax-free threshold of AUD $18,200 are required to file an Income Tax Return. Individuals as well as all other taxpayers must have a Tax File Number.

The net tax payable is computed by deducting from the gross tax: any rebates (e.g. for dependents, sole parent, housekeeper, pensioner, zone allowance, low income earner, net medical expenses in excess of AUD $1,250, franking credits etc.) and any other credits (e.g. for foreign taxes).

For taxable incomes over AUD $84,001 for the 2012/13 year an amount for the Medicare Levy must be added. The rate starts at 1.0% of the taxpayer's taxable income (unless an exemption or reduction applies). The levy is collected in conjunction with, and in the same way as, income tax.

To arrive at the actual tax payable, the net tax payable will generally need to be adjusted by deducting prepaid tax (whether by tax installment deductions withheld from salary by an employer or by Pay As You Go installments paid).

Individual Tax Rates

The individual rates for Residents of Australia the 2012-2013 tax year are, and apply from 1 July 2012:

TAXABLE INCOME	TAX ON THIS INCOME
0 - $18,200	Nil
$18,201 - $37,000	19c for each $1 over $18,200
$37,001 - $80,000	$3,572 plus 32.5c for each $1 over $37,000
$80,001 - $180,000	$17,547 plus 37c for each $1 over $80,000
$180,001 and over	$54,547 plus 45c for each $1 over $180,000

The above rates do not include the Medicare levy.

Foreign Residents

If you are a foreign resident for the full year, the following rates apply for the 2012-13 tax year:

TAXABLE INCOME	TAX ON THIS INCOME
0 - $80,000	32.5c for each $1
$80,001 - $180,000	$26,000 plus 37c for each $1 over $80,000
$180,001 and over	$60,630 plus 45c for each $1 over $180,000

Foreign residents are not required to pay the Medicare levy.

Company Tax Rate

The taxable income of most companies (resident and non-resident) is taxed at a flat rate of 30%. There is no separate branch profits tax for non-resident companies.

Treatment Dividends

Australia no longer has a classical system for corporate taxation. An imputation system for the taxation of company dividends operates in Australia, with resident individual shareholders being entitled to a credit (but no refund) for Australian tax paid by a company. Dividends which attract the credit are called "franked dividends." Other dividends are called "unfranked dividends." Excess franking credit entitlements cannot be carried forward or carried back.

Withholding Tax

Certain income (interest, dividends and royalties) paid to non-residents may be subject to Australian withholding tax, irrespective of source. Withholding tax is a first and final tax imposed on the payee but collected from the payer of the income to which it applies. The withholding tax is subject to treaty limitations but generally ranges between 10% (interest and royalties) and 30% for dividends (15% for treaty dividends). No withholding tax is payable in respect of fully franked dividends paid by a resident company to a non-resident shareholder.

Capital Gains and Losses

Capital gains derived on the disposal of assets acquired or deemed to have been acquired on or after 20 September 1985 are subject to tax in Australia. Subject to minor concessions for individual taxpayers, the capital gain is included in assessable income and taxed at the same rate as any other income derived by the taxpayer. In calculating the capital gain derived on the disposal of an asset, the cost of the asset is indexed for inflation over the period during which it has been held by the taxpayer.

Capital losses can only be offset against capital gains, either in the current year of income or in a future year of income. Capital losses cannot be carried back. For non-residents, there are special rules which limit the operation of the capital gains provisions to certain specified types of assets. Gains on other types of assets are generally not taxable. As usual, these provisions are subject to the terms of any relevant double taxation treaty.

Intra-Company Group Relief

Generally dividends paid by one resident company to another, although representing assessable income, are not taxable due to rebate provisions. Care must be exercised by the Australian dividend recipient to ensure otherwise allowable deductions are not offset against effectively tax-free dividend income. Resident companies which are 100% related may transfer losses if they elect to do so. There is no consolidated tax return as such. Roll-over relief is available for 100% related companies (including non-resident companies in certain circumstances) whereby tax on capital gains may be deferred.

Income Tax Issues for Foreign Investors

Australia has thin capitalization rules which disallow excess interest deductions where the debt to equity ratio of non-financial institutions owned by non-residents exceeds 2:1. For financial institutions, the permitted ratio is 6:1. Australia has transfer pricing rules which apply to international transactions. The rules apply not only to related parties but also to unrelated parties.

Australia has unusual rules that prevent a foreign investor replacing equity with debt in specific cases involving the sale of in-house assets. Payments to non-residents under hire-purchase agreements are treated as the payment of royalties subject to withholding tax, rather than as a sale and loan arrangement.

Other Important Taxes

According to the fringe benefits tax (FBT) legislation, a fringe benefit is a benefit provided in respect of employment. This effectively means a benefit is provided to somebody because they are an employee. The 'employee' may even be a former or future employee.

FBT is imposed on a range of benefits provided by an employer to their employees. The FBT year is 12 months from 1 April and ending 31 March in the succeeding year.

The rate may vary. As at 1 April, 2013 the rate is 46.5% of the grossed-up value of the benefit. Both the cost of the benefit and the fringe benefits tax are deductible in calculating taxable income. In 2006 the rate was 48.5%. A fringe benefit is a 'payment' to an employee, but in a different form to salary or wages.

An employee is a person who is entitled, or has been entitled, to receive salary or wages. Benefits provided in respect of someone who has died are not fringe benefits as a deceased person does not meet the definition of 'employee' in the FBT legislation.

The terms benefit and fringe benefit have broad meanings for FBT purposes. Benefits include rights, privileges or services. For example, a fringe benefit may be provided when an employer:

- allows an employee to use a work car for private purposes
- gives an employee a cheap loan
- pays an employee's gym membership
- provides entertainment by the way of free tickets to concerts
- reimburses an expense incurred by an employee, such as school fees
- business lunches and drinks, cocktail parties and staff social functions
- providing entertainment to employees and clients by providing access to sporting or theatrical events, sightseeing tours, holidays and so on

- accommodation and travel when it is provided in connection with, or to facilitate, activities such as entertaining clients and employees over a weekend at a tourist resort, or providing them with a holiday
- gives benefits under a salary sacrifice arrangement with an employee.

Sales tax is imposed on certain goods (but not services) which are either manufactured in Australia or imported into Australia. Where applicable, the rate ranges from 12% to 45%.

Pay-roll tax is imposed by the States and Territories on wages paid by employers to employees. The rate varies between the States and Territories, but ranges between 3.95% and 7%.

Stamp duty is also imposed by the States and Territories on a range of written instruments and also on some transactions. The rate varies between the States and Territories and also depends upon the type of transaction or the type of property transferred by the written instrument.

For example, in relation to transfers of land, duty of up to 5.5% of the value of the land may be imposed. Transfers of shares are taxed at lower rates (between 0.3% and 0.6%), except where the underlying assets consist primarily of land, where the land rate applies. Land tax is imposed on the unimproved capital value of land owned in the six States and the Australian Capital Territory.

Corporate Law

Regulations

The incorporation and regulation of corporations is governed by:

- The Corporations Act 2001 (Commonwealth);
- the common law; and
- legislation dealing with specific issues including restrictive trade practices, consumer protection, employment practices, occupational health and safety, taxation and foreign investment.

Types of Companies

Of the common forms of trading corporations there are:

- Publicly listed corporations which are also regulated by the Australian Stock Exchange (ASX) listing rules;
- Public corporations that choose not to list on the ASX; and
- Proprietary limited corporations.

The difference between the corporations is summarized in the table below:

TYPE ISSUE	PUBLICLY LISTED	PUBLIC NOT LISTED	PROPRIETARY CORPORATION
Minimum Number of Directors	3	3	1
Minimum Number of Shareholders	1	1	1
Maximum Number of Shareholders	None	None	50
Minimum Number of Company Secretaries	1	1	Secretary Optional
Ability to raise capital from the public	Yes	Yes	No
Auditor	Must be appointed	Must be appointed	Optional
Must Comply with ASX Listing Rules	Yes (Requirement of ASX Listing Rules)	No	No
Independent Directors	Yes	Optional	Optional

Liability of Shareholders

The liability of shareholders of the above types of company is limited in each instance to the amount paid or agreed to be paid on the shares allotted to the shareholder.

Share Capital

Companies in Australia are not required to have a minimum amount of paid-up capital. The concept of par values for shares has been removed under the Corporations Act 2001.

Classes of Shares

Shares can be issued as order, preferred or bearer shares.

Corporate Governance

SHAREHOLDERS MEETINGS: Decisions reserved to the Shareholders

POWERS RESERVED TO SHAREHOLDERS	PUBLICLY LISTED	PUBLIC NOT LISTED	PROPRIETARY CORPORATION
Increasing Share capital	Yes	Generally Yes but depends on Constitution	Generally Yes but depends on Constitution and any Shareholders Agreement
Changing the Corporate purpose	No	No	No
Reducing share capital	Up to a point, No, but once the point is reached shareholder approval is required	Up to a point, No, but once the point is reached shareholder approval is required	Up to a point, No, but once the point is reached shareholder approval is required
Change of Name	Yes	Yes	Yes
Authority to Bind company	No	No	No
Authority to Bind or require directors to act in a particular manner or refrain from acting	No	No	No
Right to remove directors	Yes	Yes	Yes
Right to transfer shares to third parties	Yes	Yes	Only with approval of the board of directors and (also) usually the other shareholders
Change of Constitution	Yes	Yes	Yes

MINIMUM NUMBER OF SHAREHOLDERS MEETINGS/YEAR: Public companies must convene one shareholders meeting every year. Proprietary companies may have shareholders meetings as and when required; there is no minimum number to be held in any year. A Director may request convening a shareholders meeting. Shareholders may request the board to convene a shareholders meeting and if the minimum number of shareholders so request a meeting must be convened.

DIRECTORS: Directors are appointed by the votes of shareholders. Generally the power of day-to-day control of the company vests in the directors. The directors' power is absolute, save for the right of shareholders to remove directors who they think are not acting in the best interest of the company. The minimun requirement of independent Directors is at least one.

Term of appointment: No statutory term, depends on the Constitution of the Companies. Shareholders have reserved powers to seek to remove directors at any time provided certain requirements under the law are met.

Requirements concerning directors' fees: Listed Public Companies must disclose the remuneration paid to directors. Other companies do not have to disclose and generally never disclose the remuneration paid to directors.

Directors' liability: Directors can be personally liable for the debts of companies if they allow the company to incur a debt, the company is liquidated and the court determines that the directors knew or ought reasonably to have known that the company was insolvent at the time the debt was incurred. In serious situations directors can be jailed for this offence.

Annual Accounting Procedures

NECESSARY DOCUMENTS: The Corporations Act 2001 does not specify what documents or information if any a company must have. Directors are under a general duty to ensure that the financial accounts of the company are true and correct at all times.

DEADLINE FOR DELIVERY OF DOCUMENTS: Public companies must file annual returns with copies of accounts within 6 months of the end of the company's financial year. The financial year in Australia is from 1 July each year to the following 30th June. Most listed public companies have to file and hold shareholders meetings by 31 December each year. Some companies have different financial years, as subsidiaries of foreign corporations whose year-end is different than that in Australia. Permission to have a different year-end for a company's financial year must be give by the Australian Taxation Office.

STATUTORY AUDIT: Scope: Public companies must be audited each financial year. The Auditor must report to the shareholders and to the Australian Securities and Investment Commission if any accounting irregularities are uncovered.

COMPETENCE: Auditors must be registered. An Auditor once appointed cannot be removed by the company. An Auditor may resign but cannot be removed without the approval of shareholders and then only upon the appointment of a replacement auditor.

Other Investment Structures

Besides the use of corporations as investment vehicles overseas investors can choose from other forms of investment vehicles. Below is a table of the forms of alternate investment vehicles. The choice of investment vehicle will be dependent upon tax, control and risk return considerations.

Type of Entity	Nature	Governing Law	Legal Status	Features	Method of Control	Liability	Summary of Advantages	Summary of Disadvantages
Company	• Complex and expensive	• Corp Law common law • Memorandum and articles of association • Other statutes	• Separate continuing entity • Perpetual succession	• Various company structures	• Board of directors	• Members: usually limited to the amount unpaid and/or guaranteed on shares • Officers: statutory and common law	• Limited liability • Separate, continuing entity • Member rights • Company tax rates • Simplification bills	• Formalities • Expense • Statutory reporting requirements • Directors' duties (statute and common law)
Incorporated Association	• Relatively simple and inexpensive	• State Association Incorporation Acts • Rules of association	• Separate legal entity • Perpetual succession	• Non-profit	• Committee	• Limited	• Separate, continuing entity • Tax exemptions • Ability to convert into a company	• No profit distribution • Charitable and non-profit aims only • Annual reporting requirements
Co-operative	• Potentially complex but inexpensive	• State co-op legislation • Rules of the co-op	• Separate legal entity • Perpetual succession	• Co-operative principles	• Democratic control • Board of Directors	• Limited (subject to rules)	• Equitable division of surplus • Co-operative education etc. • Democratic rule • Voluntary, open membership	• Directors' duties • Formalities • Compulsory dealings • Record-keeping requirements

Type of Entity	Nature of Administration and Costs	Governing Law	Legal Status	Features To Consider	Method of Control	Liability for Losses	Summary of Advantages	Summary of Disadvantages
Sole Trader	• Simple but relatively inflexible	• Dependent upon nature of business	• No separate legal entity from individual owner • No perpetual succession	• Tax advantages disadvantage	• Sole control by trader	• Unlimited personal liability	• Simple, inexpensive • Absolute control	• Unlimited personal liability • Finance raising • No continuity
Partnership	• Simple and flexible	• State Partnership Acts • Common Law • Partnership agreement	• No separate legal entity (except under certain Acts) • No perpetual succession		• Partners own and control the business	• Unlimited personal liability	• Income-splitting tax advantages • Shared profits	• Transferring interests • Limited size
Joint Venture	• Simple	• Dependent upon nature of venture	• Non-separate legal entity • Perpetual succession if joint venture is formed by a company	• One-off activities • Share of product not profit	• Pursuant to joint venture agreement	• Joint and several liability	• Simple to expand • Non-fiduciary	• No sharing of profit • Separate sale of product • Finance raising
Trust	• Usually complex	• State Trustee Acts • Common law • Equity	• Equitable no legal recognition	• Rights enforced in equity not law • Rights non-contractual	• Trustee (subject to fiduciary obligation)	• Trustee personally liable (but usually right of indemnity exists)	• Tax advantages • Simple sale of assets • Flexibility	• Complex and technical • No continuity of existence at law

Foreign Investment

Registration with Government Authorities

Foreign investment activities in Australia are regulated at the Commonwealth level by the Treasurer, as advised by the Foreign Investment Review Board (FIRB) and the Department of Treasury, pursuant to the Foreign Acquisitions and Takeovers Act, 1975 and policy guidelines.

In general foreign investment is encouraged and while notification is required rarely is the power to refuse the investment made by the Treasurer.

The scheme of the Act is to require compulsory notification of certain proposed acquisitions of Australian assets, and to make other proposed or completed acquisitions and arrangements subject to prohibition or divestiture after they have been examined and found to be contrary to the National interest (without requiring notification).

The following acquisitions must be notified, irrespective of the value or the nationality of the investor:

- all vacant non-residential land;
- all residential real estate (some exemptions apply);
- all shares or units in Australian urban land corporations and trusts; and
- all direct investments by foreign governments and their related entities, and, proposals by them to establish new businesses in Australia or acquire interests in Australian urban land.

All other acquisitions (including shares or assets of an Australian business) should be notified if the target is valued at or above the applicable monetary threshold set by FIRB.

As at 1 September, 2012 the monetary thresholds are:

NON-US INVESTORS

AUD $ 5 million	Developed non-residential commercial real estate, where the property is heritage listed
AUD $ 50 million	Developed non-residential commercial real estate, where the property is not heritage listed
AUD $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 are valued above the threshold
AUD $244 million	An interest in a primary production business whose total assets are under the threshold do not require approval. (Note that on 165 June 2012 the Government announced that it was considering establishing a register of foreign entities that own agricultural land in Australia.)

Failure to notify the Treasurer before entering into an agreement to acquire these interests is an offense punishable by severe fines and, in the case of individuals, imprisonment.

Acquisitions and arrangements, whether compulsorily notifiable or not, can be prohibited by order of the Treasurer if they are considered contrary to the National interest. If they are completed they can be ordered to be unwound and divestiture to occur. For this reason many transactions which are not compulsorily notifiable are in fact submitted for prior approval.

The Treasurer is required to reach and notify his decision in the Commonwealth Gazette within 40 days of notification. There is a provision for interim prohibition orders to be made, to give the Treasurer a further 90 days to consider the position and obtain additional advice.

Note that the Foreign Investment Regulatory Scheme also covers the acquisition of shareholdings of 15% or more in Australian companies that have total assets valued at AUD 5 million or more (AUD 3 million or more if more than 40% of the assets are in form of rural land).

Section 19 of the Act provides that where an acquisition of assets would have the effect of giving a foreign person control of the business, the Treasurer may allow the acquisition, allow it only with conditions or prohibit it.

A "foreign person" under Section 19(1) is a foreign corporation in which a natural person (or two or more natural persons) not ordinarily resident in Australia hold a controlling interest (that is, 15% of the voting power of the corporation). Section 4(3) extends the scope of Section 19 so that it also applies to Australian corporations or trusts controlled by nonresidents.

Strictly, Section 19 only applies when the acquisition of assets would result in a foreign person gaining control of an Australian business carried on solely by a prescribed corporation. A prescribed corporation is defined in Section 13. However, Section 19 is extended by Sections 4(4) and 4(5) to cover an Australian business carried on by persons other than a prescribed corporation. The reason for these sections is a constitutional issue, which has not been tested. Therefore, on the face of it, in the purchase of any Australian business valued at over AUD 5 million (or AUD 3 million with land), Section 19 applies. Note that Section 13A provides for exempt corporations.

For the purposes of Section 19 an Australian business is taken to be controlled by foreign persons if the Treasurer is satisfied that the persons (with or without associates) are in a position to determine the policy of the business: Section 19(7)(a).

There is no requirement under the Act to notify the Treasurer of any acquisition of assets. However, the Act is predicated on the assumption that notification can take place, as Section 25 provides protection for notified transactions against later divestiture orders.

Approval of the sale of an asset may not be withheld unless the Treasurer is satisfied that:

(a) the person who is going to purchase the asset is foreign; and
(b) it would be against the National interests for that person to control the business concerned.

Positions of Interest in Australian Urban Land

Sections 21A and 21(6) apply to acquisitions of interests in Australian urban land by a foreign person. Australian urban land is land in Australia that is not used wholly or exclusively for carrying on business of primary production (see Section 5(1) and 12A).

Under Section 26A any such acquisitions are subject to compulsory notification and relate to the prohibition and divestiture powers in Section 21A. Note the threshold that under Section 13B the Act does not apply if the land value is less than AUD 3 million (about EUR 1.76 million); for the purposes of the thresholds, the consideration payable for the assets is taken to be the value of the assets.

Therefore, under Section 26A compulsory notification applies to a foreign person with the intention to enter into an agreement under which the person will acquire an interest in Australian urban land. It is an offense to fail to give 40 days' notice to the Treasurer of the proposal to enter into an agreement. Penalties are a fine up to AUD 250,000 (about EUR 147,059) for corporations and a fine of AUD 50,000 for individuals or imprisonment for up to 2 years or both.

Effect of Notification Under Section 25

When the Treasurer is given notification of an acquisition or a proposed acquisition, Section 25 imposes time limits within which the Treasurer must act. Where notification is given of a proposal, examination will normally be carried out in two stages:

1. Preliminary examination which must be completed within 30 days of receipt of notification: Section 25(2) and (3). Preliminary examination may result in the quick clearance of the proposal. Preliminary examination may also result in an interim order prohibiting implementation of the proposal for a period of up to 90 days.

2. Detailed examination will follow an interim order and must be completed within 90 days: Section 25(3). Detailed investigation will conclude with the clearance of the proposal (possibly subject to conditions) or with a prohibition order being made under the relevant provision.

3. Conditions must be notified to the person within 10 days of the Treasurer's decision. If the Treasurer raises no objections to a proposal or if he allows it subject to conditions, the proposal can then go ahead without the potential of a later order for divestiture: Section 25(2) and (3).

Repatriation

Australia does not restrict the flow of Australian or foreign currency in or out of the country. However, certain reporting obligations must be met for amounts over AUD $10,000 or foreign currency equivalent.

Regulatory requirements for financial services

In addition to the reporting obligations of movements for amounts over AUD $10,000 or the foreign currency equivalent, money laundering is a criminal offence in Australia under the Ant-Money Laundering and Counter Terrorism Finance Act 2006 (Cth) (AMLCTFA).

Money laundering is where a person attempts to evade taxation obligations or attempts to smuggle funds for the purpose of funding acts of crime and/or terrorism. The heightened sense of awareness in recent years of terrorist activity and the use by criminal organizations of sophisticated financing techniques led to the enactment of the AMLCTFA in December 2006.

The AMLCTFA is intended to help reduce the risk of Australian businesses being misused for the purposes of money laundering, terrorism financing and/or tax evasion. The Act classifies entities that perform one or more of a so called 'Designated Service' as Reporting Entities.

A Designated Service can be the opening of a bank account, accepting deposits, making loans, supplying goods through a finance lease, issuing travelers' cheques, providing certain superannuation related services, issuing or accepting liability under life insurance policies, exchanging currency, placing or receiving bets and etc.

Amongst other obligations, the AMLCTFA requires a Reporting Entity to have in place an Anti-Money Laundering and Counter Terrorism Financing (AML/CTF) Program and implement processes that allow it to effectively monitor, review and update its AML/CTF Program.

Foreign Personnel

To work in Australia as opposed to invest without working, a person requires a visa. There are various forms of visa's that may be granted.

The Australian government's view is that "Working in Australia is a privilege, not a right. Most temporary visa holders have work rights, although some classes of visas only allow limited work rights."

An example of the types of visa's that can be sought are:

- Employer sponsored employees
- Professional and other skilled migrants

- Business people
- Specialist Entry
- Regional employment

The rules for visa entry are in a constant state of flux. Once a visa is granted certainty is assured. However the rules for obtaining a visa change often. Further information should be sought at the relevant time.

→ Labor Law

For the most part from 1 January, 2010 the Labor laws in Australia rather than being State and Federal became solely Federal.

Employers and employees other than in Western Australia that were previously covered by state industrial relations systems because the employer is not a constitutional corporation, are now covered by the national industrial relations system established by the Fair Work Act 2009 (Cth).

Employers and employees in the national system have the same workplace rights and obligations, regardless of the state they work in. Features of the national industrial relations system include:

- a set of 10 minimum National Employment Standards (NES)
- modern awards that apply nationally for specific industries and occupations
- a national minimum wage order (where it applies)
- enterprise bargaining, and
- protection from unfair dismissal.

Modern awards, together with the NES and the national minimum wage order, make up a new safety net for employees covered by the national workplace relations system. In summary, the NES involve the following minimum entitlements:

MAXIMUM WEEKLY HOURS OF WORK - 38 hours per week, plus reasonable additional hours.

REQUESTS FOR FLEXIBLE WORKING ARRANGEMENTS - allows parents or carers of a child under school age or of a child under 18 with a disability, to request a change in working arrangements to assist with the child's care.

PARENTAL LEAVE AND RELATED ENTITLEMENTS - up to 12 months unpaid leave for every employee, plus a right to request an additional 12 months unpaid leave, and other forms of maternity, paternity and adoption related leave.

ANNUAL LEAVE - 4 weeks paid leave per year, plus an additional week for certain shift workers.

PERSONAL / CARER'S LEAVE AND COMPASSIONATE LEAVE - 10 days paid personal / carer's leave, two days unpaid carer's leave as required, and two days compassionate leave (unpaid for casuals) as required.

COMMUNITY SERVICE LEAVE - unpaid leave for voluntary emergency activities and leave for jury service, with an entitlement to be paid for up to 10 days for jury service.

LONG SERVICE LEAVE - a transitional entitlement for employees who had certain LSL entitlements before 1/1/10 pending the development of a uniform national long service leave standard.

PUBLIC HOLIDAYS - a paid day off on a public holiday, except where reasonably requested to work.

NOTICE OF TERMINATION AND REDUNDANCY PAY - up to 4 weeks notice of termination (5 weeks if the employee is over 45 and has at least 2 years of continuous service) and up to 16 weeks redundancy pay, both based on length of service.

PROVISION OF A FAIR WORK INFORMATION STATEMENT - employers must provide this statement to all new employees. It contains information about the NES, modern awards, agreement-making, the right to freedom of association, termination of employment, individual flexibility arrangements, right of entry, transfer of business, and the respective roles of Fair Work Australia and the Fair Work Ombudsman.

The laws in Australia have some unusual protections, for instance concerning holiday pay. In many States, employees are paid a bonus ("loading") while on leave to compensate them for the additional costs incurred while being on holidays!

When considering establishing a business in Australia, it is essential to obtain detailed advice on the employment practices in the particular industry and location in which the business is to operate.

Employment Contracts

CLASSES: Employees under employed under individual contracts although there are State and Federal Awards which specify that employees in particular industries are entitled to and MUST receive minimum standards of pay, hours of employment, health care, and periods of leave.

COST OF DISMISSAL AND WRONGFUL DISMISSAL: Fair Work Australia deals with two main types of dismissal applications:

- unfair dismissal
- dismissal where there has been a breach of the 'general protections'.

In general, an employee cannot pursue more than one type of dismissal application at the same time.

An unfair dismissal occurs where an employee makes an unfair dismissal remedy application and Fair Work Australia finds that:

- the employee was dismissed, and
- the dismissal was harsh, unjust or unreasonable, and
- the dismissal was not a case of genuine redundancy, and
- the dismissal was not consistent with the Small Business Fair Dismissal Code, where the employee was employed by a small business. (A small business is a business that employs fewer than 15 employees.)

To make an unfair dismissal remedy application an employee must be:

- covered by the national unfair dismissal laws, and
- eligible to make an application.

The application must be lodged within 14 days of the dismissal coming into effect. To be eligible to apply an employee must, amongst other things, have:

- completed a minimum employment period of at least six months (one year in the case of a small business employee), and
- be covered by an award or agreement if they earn more than $118,100 a year.

EMPLOYMENT CONTRACTS FOR DIRECTORS: There is no special regime for directors to be employed by the companies of which they are directors.

Employee's Representatives and Union Representation

Historically there has be:

- Brief idea of the influence of these groups in Labor Contracts
- When a Labor Union representation becomes binding?
- Rights and Privileges of a Labor Union Representation inside a Company.

Enterprise Bargaining Under the Fair Work Act

From the introduction of the Fair Work Act, there are two ways in which an employer can contract with the employees. The first is by way of common law contracts of employment. The other way is by way of collective bargaining. Whilst the Fair Work Act makes it much easier for employees to call upon union assistance in the process of collective bargaining, there is no requirement for union involvement. It is not compulsory. An employer can collectively bargain with its workforce and arrive at an outcome supported by its non-unionised workforce provided the Fair Work Authority (established by the new legislation) approves the collective agreement. Australian Workplace Agreements (AWAs) were made unlawful after 27 March 2008. AWAs with terms of up to five years made and lodged before March 2008 will continue to operate. Those AWAs could continue indefinitely in circumstances where they were not replaced or terminated after its normal expiry date – i.e. on or before March 2013. Parties to the AWAs would, however, not be able to re-negotiate the terms of employment with a new or varied AWA. The ITEAs have a nominal expiry date of not later than 31 December 2009.

Under the Fair Work Act, the vast majority of work agreements will come into existence by way of collective agreements. These will be made between employers and employees. Unions can be named as a party to the agreement. If a union is a named party to an agreement, then that organisation has rights and obligations under the agreement. The union can enforce the agreement in its own name without an effective member.

There are four types of collective agreements. The first is single business collective agreements.

a) SINGLE BUSINESS COLLECTIVE AGREEMENTS

These will form the most common type of collective agreement whereby employees who fall within the scope of the agreement are covered by it and must be made only for a single business or part of a business. A 'single business' is defined to mean a 'business, project or undertaking' carried on by an employer.

For example, where two or more unrelated employers carry on a 'joint venture' they are to be treated as having a single business. It is also possible for two or more corporations that re 'related' within the meaning of the Corporations Act 2001 to be treated as a single business however it is not mandatory. Such corporations have the choice as to whether to make separate agreements or join together and make a single agreement.

Moreover, such agreements can include geographically distinct part of the 'single business' or 'a distinct operational or organisational unit within the single business'. Thus it is possible for an employer to have different agreements at different locations or indeed for different divisions at the same locations.

Such agreements face potential oversight by Fair Work Australia for the majority of orders. Protected action is available during the bargaining process by the parties to it. Noticeably, the Fair Work Act does not alter the concept of "protected action" vis a vis "unprotected action", three days notice of industrial action to be given by a party, and an application for a secret strike ballot to approve industrial action.

This can be formed as part of a union collective agreement as long as the relevant union (s) has one or more members at the company. It is open to an employer as to whom to choose to bargain with.

Conversely, an employee collective agreement can be made and be drawn up by employers and employees and as with union collective agreements must also be approved by a majority of employees to be registered. Nevertheless, such an agreement must be approved by a 'valid majority' of all the workers who are covered by it.

b) SINGLE INTEREST EMPLOYER REGISTERED COLLECTIVE AGREEMENTS
Collective agreements are also available for employers who have franchisees involved and or integrated into their service. Protected action is also available in these types of agreements. For instance, employers under the direction of a single entity like a franchisor can be covered by a single agreement.

c) LOW PAID MULTI-BUSINESS COLLECTIVE AGREEMENTS
This is an agreement that covers one or more single businesses. Employees who fall within the scope of the agreement are covered by it, they facilitate multi-employer bargaining including an order from the independent umpire that a relevant third party such as a contractor can be brought to the bargaining table and workplace determination in the event of a stalemate can occur where the parties consent. Note, there is no legislative provision for protected action to be taken by employees in such instances.

d) GREENFIELDS COLLECTIVE AGREEMENTS
This is an agreement where it can be made where an employer is in the process of setting up a new business. It may cover any category of employee provided that no employee has been engaged before the agreement is made. The advantage in doing such an agreement is that it will set the terms and conditions of employment which will cover employees who are subsequently hired. There are two types of greenfields agreements. First, a union agreement can be made with one or more unions who are entitled to represent the industrial interest of the workers likely to be covered by the agreement. Secondly, an employer greenfields agreement is essentially an agreement made by one part, that being the employer.

Following the enactment of the Fair Work Act new requirements regarding enterprise bargaining came into effect. Employers are required to issue a written notice to employees as soon as practical, but not later than 14 days after the employer initiates bargaining or agrees to bargain. This written notice is known as a 'Notice of Employee Representational Rights'. Amongst the mandatory content, this notice must contain information about the right of an employee to appoint a bargaining representative.

Extent of employer obligations

The extent of employer obligations under the Enterprise Bargaining requirements of the Fair Work Act are:

- An employer is not obliged to bargain for an enterprise agreement in response to a union or other employee bargaining representative proposing an enterprise agreement.

- An employer can refuse to bargain for an enterprise agreement or can make its agreement to bargain subject to a condition precedent as to the scope of any agreement. For instance, the employer can make it a condition that it will only bargain if the scope of the agreement is limited to a particular category or categories of employees.

- If the union or other bargaining representative does not accept this condition, the employer is entitled to refrain from bargaining.

- At this point, employees' bargaining representative may approach Fair Work Australia. The Fair Work Act allows for Fair Work Australia to order an employer to bargain with its employees subject to several conditions. Most importantly, Fair Work Australia must be satisfied that a majority of employees wish to bargain with the employer.

- The employer is not required to make concessions during bargaining for the agreement nor is the employer required to reach agreement on particular terms that are to be included in the agreement.

Social Security

EMPLOYER CONTRIBUTIONS: Employers must make superannuation contributions to the employees' to a designated superannuation fund at least every three months. The superannuation contributions are invested over the period of the employees' working life and the sum of compulsory and voluntary contributions, plus earnings, less taxes and fees is paid to the person when they choose to retire. The sum most people receive is predominantly made up of compulsory employer contributions. As at 1 July, 2011 the rate of contribution is 9% of an employees ordinary salary.

Special rules apply in relation to employers providing defined benefit arrangements. There are less common traditional employer funds where benefits are determined by a formula usually based on final average salary and length of service. Essentially, instead of minimum contributions, employers need to provide a minimum level of benefit. Superannuation Guarantee law applies to all working Australians, except those earning less than $450 per month, or aged under 18 or over 70. Individuals can choose to make extra voluntary contributions to their superannuation and receive tax benefits for doing so.

Health and Safety

The various State health and safety laws are being harmonized on a national basis. Under the Workplace Health & Safety Act employers "officers" have a positive duty to ensure that the employer (company) is complying with its health and safety obligations. In addition, people that essentially act as shadow or de facto directors of the employer, will also be considered to be "officers. Accordingly, individuals within any businesses at a managerial level will be exposed to an increased risk becoming personally liable if they fail to exercise all due diligence in respect of the health and safety in their employers company or business.

The Workplace Health & Safety Act will also introduce significant changes to the management of safety in Australia, including:

- Duty of Care - an expanded duty of care on all businesses and undertakings
- Consultation - a broader requirement to consult and co-ordinate on safety with workers, contractors and others affected by the business or undertaking
- Reputation – an approach to enforcement through greater use of adverse publicity orders
- Intervention at the business – greater avenues for intervention by unions and the regulator at your business
- Shift in attitude – by the regulators and courts in adopting a "uniform" approach to investigation and enforcement

A summary of the more significant areas of intervention are as follows:

Activity	Section
Failure to negotiate work groups	54, 56
Issue resolution	80-82
Direction to cease unsafe work	89
Review of Provisional Improvement Notice	100
Dispute about WHS right of entry	141
Creation of Health & Safety Committees	76
Regulations	Coming soon

Union Involvement

Activity	Section
Entry to inquire into suspected contraventions	117
Entry to consult and advise workers	121
Right of workers to be represented by union in negotiating work groups	52 (4)
Right for a HSR to request the assistance of any person (including a union official)	68 (2) (g)
Right of entry for resolution of Health and Safety issues	81 (3)

Contracting and Outsourcing of Work or Services

Contracting and outsourcing is a function of business operations in Australia. Outsourcing must be genuine. The courts look at the substance of the outsourcing contract not its form. If an agreement is really one of employment though clothed as an outsourcing contract, the courts will look through the form of the contract and impose the requirements of the employment laws.

Real Estate Law

Types of Ownership

Land may be held by individuals or companies. Provided notification is made, foreign individuals and companies can also purchase land in Australia. Land acquired is held in fee simple. Subject to Government's having reserved the right to acquire land, land once purchased is the sole and absolute property of the purchaser. Ownership of land by foreigners is permitted. See the section on Foreign Investment.

Land Register

Generally ownership of land in Australia is recorded by the Torrens registration system. All land has a specific lot and plan number and the name of the owner is disclosed in the register. The register is authoritative as to who the owner of land is at a given time.

Transfer Formalities

Land is transferred by sale, gift or transfer upon death. For the transfer to be valid at law, it must be noted in the appropriate State or Territory Department of Lands registry. A tax on the transfer of land from one person to another current applies in most States and Territories of Australia. The rate of Stamp Duty as this tax is called varies between the States and Territories. Anti-avoidance provisions exist to prevent people from seeking to avoid the payment of Stamp Duty using corporate and trust vehicles. As at 1 July, 2012 there is no estate or death duties payable upon the transfer of land from a deceased to his or her beneficiaries.

Mortgages

Mortgages are created and also recorded In the register pertaining to the land. Mortgages can also arise without being registered although the level of security in such cases can be affected by the failure of the mortgagee to register the security interest in the land. In some cases, the mortgagee's security interest could be lost due to the failure to register the mortgage.

Restrictions on Acquisitions

There are notification procedures to follow but in general there are no restrictions on foreign individuals or companies purchasing or holding land in Australia.

Construction and Use Restrictions

The permitted use of land is controlled by the third tier of government in Australia, the Local Council. When looking to purchase land, purchasers are advised to obtain the latest zoning certificate to ensure that the land can be used for the desired purpose of the purchaser. Development cannot take place on land until the Local Council gives development consent to the proposal. The length of time it takes to obtain Development Consent following the lodging of a Development Application depends upon each State and Territory and each Local Council.

Leases

Land in Australia can be leased. The usual types of leases are leases for a term, leases at will and periodic leases. Leases for a term greater than 5 years (inclusive of any option to renew) should be placed upon the register of the land. No government permission is required for a land owner to grant a lease to a lessee.