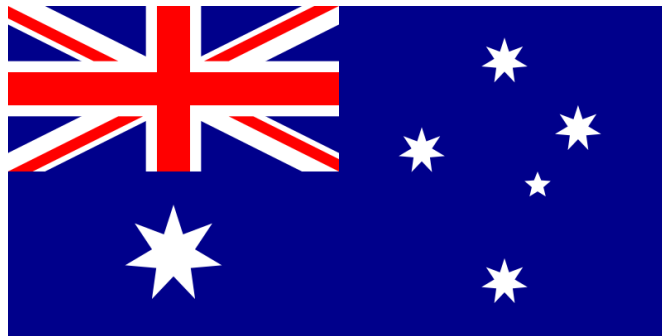


DOING BUSINESS

IN

AUSTRALIA



Provided by

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Doing Business in Australia

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1. Types of business structures

Company (Private, Public, Guarantee, Special Purpose)

An Australian company will be either a proprietary company or a public company. A public company may also be listed on the Australian Stock Exchange. A proprietary company is limited to 50 non-employee shareholders and cannot engage in fundraising activities in Australia.

An Australian company must have a registered office within Australia, have Australian resident directors (two for public companies, one for proprietary companies) and an Australian resident company secretary (optional for proprietary companies).

There are no residency restrictions on members and no general minimum capital requirements for an Australian company.

A company limited by guarantee is usually formed for charitable or not-for-profit organisations. These entities will generally be registered as public companies.

Limited by guarantee means the liability of the company's members is limited to the amount the members undertake to contribute to the property of the company if it is wound up.

Trust (Discretionary, Unit, Hybrid)

A trust is an arrangement for the holding and management of property by one party (the trustee) for the benefit of another (the beneficiary), or for a specific purpose.

The essence of a trust is the mixture of legal and equitable rights and obligations. The trustee has legal title to the property, but an equitable obligation to use the property on behalf of the beneficiary.

The beneficiaries' entitlements may be in a fixed proportion or variable at the discretion of the trustee. Trusts are governed by common law and contract law.

The trustee will be liable for the obligations of the trust, but will typically have rights of recourse against the trust property in respect of those obligations.

Partnership (Common law, Limited)

The statutory definition of a partnership is that of an arrangement between persons carrying on a business in common with a view to share profits.

Partnerships (other than certain professional partnerships) are limited in size to 20 partners.

This form of business organisation is particularly common in professional practices and small businesses involving only a few people. A partnership is sometimes used by individuals who want to minimise their tax liability by spreading business income between family members also commonly use it.

It is important to note that apart from legal restrictions on forming and running a partnership, the partnership is limited by the partnership agreement. The agreement may restrict the right to leave the partnership, introduce new partners or do anything else.

In some Australian States, a limited partnership may be established under which some (but not all) partners have liability limited to the extent of their capital contribution. Under tax laws a limited partnership is taxed as a company.

Joint Venture

A joint venture is often formed for a particular project or product, or where the contributions of the venturers are different in type, amount or timing.

A joint venture does not, as such, involve a continuous relationship between the joint venturers. A joint venture is the relationship which exists between parties carrying on a particular commercial undertaking in common for their individual gain as opposed to mutual gain as in the case of partnerships.

There are four major distinctions between a joint venture and a partnership:

- 1) The inability of the joint venturers to pledge credit or to bind their co-venturers.
- 2) Joint venturers are usually entitled to dispose of their interests in the joint venture subject to the terms of the arrangements between parties.
- 3) The absence of the concept of mutual trust or confidence that is shared between partners.
- 4) The distinction between an association of persons who engage in a common undertaking for profit and an association of those who do so in order to generate a product to be shared among the participants.

Association

An association is a body of persons who combine to advance a common purpose. Associations can be formed for a variety of purposes, but are usually used to promote such things as political, religious, charitable and social activities.

Associations may remain unincorporated or become incorporated. Unincorporated associations are governed largely by the common law and are not generally recognised as separate legal entities.

Incorporation of an association (under its particular State Act) results in a body with a separate legal identity, the same as that of a corporate entity.

An incorporated association is also a legal entity separate from its individual members that can hold property, sue and be sued.

There is no uniform legislation applicable to incorporated associations. Each State has passed legislation affecting incorporated associations.

2. Advantages and disadvantages of these business structures

Companies

Advantages	Disadvantages
<ul style="list-style-type: none"> • An Australian proprietary company may have a single member. • For members liability is limited. • The company can hold property and can sue and be sued. • Is simple to add new members. • The death, retirement or other withdrawal of a member will not terminate the company and may not even require any re-organisation of the company's operations. • Tax rate: Companies are taxed at a flat rate 30% which is lower than the upper ranges of the marginal tax rates applying to individuals. 	<ul style="list-style-type: none"> • There are a number of formalities involved in setting up, running and winding up a company. Companies must comply with requirements as to meetings, updating ASIC information and keeping registers. • Significant tax compliances required for loans to shareholders • Not able to access the Capital Gains Tax "CGT" 50% discount provisions for growth assets such as shares and property

Trust

Advantages	Disadvantages
<ul style="list-style-type: none"> • A trust generally involves fewer formalities than running a company. • It is a relatively simple matter to wind up a trust, generally it is more of a practical than a legal question. • The ability to admit new investors or participants will be determined by the trust deed. • A trust offers substantial tax advantages because of its flexibility. The trust can be used to split income, but retains broad control over the funds. • Ability to access 50% CGT discount provisions and pass these on to beneficiaries. 	<ul style="list-style-type: none"> • The trustee has control over the trust but has a fiduciary relationship to the beneficiaries. Beneficiaries have only limited rights to influence the trustee's discretion. • The trust does not have an independent existence, but the death of an individual beneficiary or trustee may not be a serious problem. E.g. life may be 80 years. • Losses are deductible only if the trust satisfies comprehensive tests which relate to ownership, control and trading in units and which restrict the practice of injecting income into loss trusts as a tax shelter.

Partnerships

Advantages	Disadvantages
<ul style="list-style-type: none">• Flexible structure.• Governed by statute law, common law and private agreement (the partnership agreement). Less stringently regulated than companies or trusts.• Relatively simple and inexpensive• The partners, not the partnership, pay tax. This means that partnership losses can be offset against a partner's other income.• The perceived advantages of a limited liability partnership include:<ol style="list-style-type: none">1. Simpler to operate than a company.2. Limited liability without using a corporation.	<ul style="list-style-type: none">• Each partner is jointly and severally liable, without limit, for the debts of the firm.• A partner who retires from a firm does not thereby cease to be liable for partnership debts or obligations incurred before his retirement.• Under s 112 of the Corporations Law there is a general prohibition against more than 20 persons carrying on business in an association or partnership with a view to profit unless it is incorporated under the Corporations Law.• Taxed as a company.

Joint Ventures

Advantages	Disadvantages
<ul style="list-style-type: none">• It is a simple form of business organisation, but does not involve a general or ongoing relationship between the parties.• Establishment is generally simple, usually only involving the creation of a joint venture agreement.• A new participant can be admitted without restriction• The joint venture is not an individual legal entity and so does not pay tax. The joint venturers will be taxed on the joint venture income as they are on any other income they receive.	<ul style="list-style-type: none">• The complexity of the governing law will depend on the nature of the joint venturers and the nature of the business they are involved in.• The existence of a joint venture is usually tied to the business being carried on. If the business ceases then the joint venture has no further reason for existing.• Members of a joint venture are joint and severally liable for the debts of the venture (unless they have agreed otherwise).

Associations

Advantages	Disadvantages
<ul style="list-style-type: none">• A legal personality separate from its members.• Enables perpetual succession and is able to hold property in its own name and not as an agent for its members.• Generally the rules prohibit any distribution of the surplus to its members.• The explanation for this lies in what is usually referred to as the "principle of mutuality".• Generally tax exempt.	<ul style="list-style-type: none">• An unincorporated association lacks any legal identity and is unable to hold property in its own name and unable to contract in its own name.

3. Business compliance

A.C.N.

Every company in Australia is issued with a unique, nine-digit number, an Australian Company Number (ACN), which must be shown on a range of documents. The purpose of the ACN is to ensure adequate identification of companies when transacting business.

A.B.N.

The Australian Business Number (ABN) is a single identifier for use in business dealings with the Australian Taxation Office and with other government agencies.

Who is entitled to an ABN?

Companies registered under the Corporations Act 2001 and business entities carrying on an enterprise in Australia are entitled to an ABN if they apply.

What happens to your ACN?

Your ABN is based on your ACN but it has 2 additional leading digits and becomes an 11 digit number.

A.R.B.N.

A registrable Australian body is a body corporate which has been formed or incorporated in Australia. Registrable Australian bodies include bodies corporate that are not companies, recognised companies, exempt public authorities, corporations sole, foreign companies or financial institutions.

Business names

Each State and Territory has a Business Names Act. Registration of a business name does not confer any proprietary rights in the name.

This registration does not allow you to prevent others using similar names, nor provide immunity from actions of others in respect of the name. Business and company names are best protected from exploitation when they are registered trade marks.

Who must register?

Individuals

All people who carry on business in a State or Territory need to register their business name or names, unless those people trade under:

- 1) their own family name, together with their given names or initials or a combination of these;
- 2) words that show that the business is being carried on by successors of a former owner; or
- 3) if two or more people are involved in the enterprise, the business name is comprised of the names of each associate.

Corporations

A corporation using its corporate name, duly registered under the Corporations Law, need not register under the business names legislation. However, if the corporation trades under a different name then it must register that name under the legislation.

Trade marks

The registration of trade marks in Australia is governed by the provisions of the Trade Marks Act 1995.

A registered owner of a trade mark has exclusive rights to use the trade mark and to licence others to use it.

Registration of an Australian trade mark only provides protection in Australia.

4. Financial or ATO reporting requirements

Where the ACN must appear?

A company's ACN should appear on all of its 'public documents' and 'eligible negotiable instruments'

What companies have to lodge financial reports?

Section 292 of the Corporations Act 2001 (the Act) requires the following entities to prepare financial reports:

- a) Public Companies
- b) Disclosing entities
- c) Large Proprietary Companies
- d) Managed Investment Schemes
- e) Small Proprietary Companies (Foreign Controlled)
- f) Small Proprietary Companies (ASIC Directed)

Section 319 of the Act requires a disclosing entity or registered scheme to lodge the financial reports within three months of the end of the financial year. All other companies must lodge their financial reports within four months after the end of the financial year.

Item	Name of component	Legislation
1.	Statement of financial position as at the end of the year	295(2) & 296(1)
2.	Statement of comprehensive income (which may include a separate income statement) as at the end of the year	295(2) & 296(1)
3.	Statement of Cash Flows for the year	295(2) & 296(1)
4.	Statement of Changes in Equity	295(2) & 296(1)
5.	Consolidated financial statement, if required by accounting standards	295(2) & 296(1)
6.	Notes to Financial Statements (disclosure required by the regulations, notes required by the accounting standards, and any other information necessary to give a true and fair view)	295(3)
7.	Directors' declaration (that the financial statements comply with accounting standards, give a true and fair view, there are reasonable grounds to believe the company/scheme/entity will be able to pay its debts, the financial statements have been made in accordance with the Act)	295(4)
8.	Directors' report, including the auditor's independence declaration	298-300A
9.	Auditor's report	301 & 308

Are there any exemptions from having to lodge financial reports?

1. If the company has already lodged financial reports with the Stock Exchange.
2. If the company has been granted relief by ASIC from the requirement to lodge financial reports.
3. If the company is foreign controlled but the foreign company that is in charge is registered with ASIC as a foreign company and lodges consolidated financial reports that include the activities of the Australian company.
4. Small proprietary companies that are controlled by foreign companies but are not part of a large group are eligible for relief from (*refer to reference source below*):

- a) preparing and lodging a financial report and directors' report with ASIC; and
- b) the requirement to have the financial report audited: refer CO 98/98.

[http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/rg58.pdf/\\$file/rg58.pdf](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/rg58.pdf/$file/rg58.pdf)

Changes from 11 August 2009 were announced by ASIC to form-lodging arrangements for companies wishing to take advantage of relief under Class Order [CO 98/98] *Small proprietary companies which are controlled by a foreign company but which are not part of a large group* and Class Order [CO 98/1418].

The changes meant that the directors of the company must resolve to apply the relief available under the class order at any time during a 19-month period commencing 3 months before the commencement of the relevant financial year and ending 4 months after the end of the relevant financial year. A notice of this resolution must be lodged, using Form 384.

As a result of the changes, companies will now be able to lodge both Forms 384 and 394 at any time during a 19-month period commencing three months before the start of the financial year in question and ending four months after the end of the financial year.

Companies do not longer need to rely on CO 98/98 and it is now able to lodge Form 394 at anytime within the relevant period. Form 394 is an opt-out notice and is lodged when a company is no longer able to apply the relief provided by CO 98/98.

As the last date for lodging Form 384 under the new arrangements coincides with the deadline for lodging a financial report there is therefore no scope for a further extension to the period to lodge the notice. ASIC's discretion to extend the period for lodging Form 384 has been removed from the class order.

Companies which fail to lodge Form 384 on time and therefore cannot rely on CO 98/98 will have an obligation to prepare and lodge a financial report for the relevant financial year.

Where a company lodges a financial report after the due date, normal late lodgement fees will apply. However, late lodgement of the financial report will not prevent a company taking advantage of relief in CO 98/98 for the next financial year, provided the conditions of the class order are met.

CO 98/1418 provides relief to certain wholly-owned companies from the financial report preparation and lodgement requirements contained in the Corporations Act 2001, subject to certain conditions being met.

Form 389 is an opt-in notice and is lodged when a company wishes to apply the relief provided by CO 98/1418 for the first year. Form 399 is an opt-out notice and is lodged when a company is no longer able to apply the relief provided by CO 98/1418.

As the last date for lodging Form 389 coincides with the deadline for lodging a financial report for the first year an entity intends to rely on CO 98/1418 relief, there is no scope for a further extension to the period to lodge the notice. ASIC's discretion to extend the period for lodging Form 389 has been removed from the class order.

Entities which fail to lodge Form 389 on time and therefore cannot rely on CO 98/1418, and will therefore have an obligation to prepare and lodge a financial report for the first financial year they intended to rely on the relief.

Where a company lodges a financial report after the due date, normal late lodgement fees will apply. However, late lodgement of the financial report will not prevent a company taking advantage of relief in CO 98/1418 for the next financial year, provided the conditions of the class order are met.

Lodgement arrangements for opt-out notice Form 399 have not changed.

1. It should not be presumed that your company would qualify for any exemption. Generally, it is the minority of cases that qualify for some form of relief.
2. In most cases, relief is not granted for financial reports that were due in the past.

Small proprietary companies that are controlled by foreign companies are also eligible for relief from having their financial statements audited. Relief is available under Class Order (CO 98/1417).

One condition of audit relief is that shareholders and directors must unanimously resolve to take advantage of Class Order (CO 98/1417) within:

- 1) 3 months immediately before the start of the financial year; or
- 2) 1 month immediately after the start of the financial year.

The company must notify ASIC of this resolution, using Form 382, within the same time frame.

A group is a 'large group' when, on a combined basis, the group satisfies at least two of the following criteria for the financial year of the company in question:

- 1) the combined revenue of the group for the financial year is \$25 million or more;
- 2) the combined value of gross assets of the group at the end of the financial year is \$12.5 million or more;
- 3) the group has 50 or more employees at the end of the financial year.

Combining the financial information of the group is a process similar to consolidation. Exceptions as to what can be combined are:

- 1) foreign parent companies that do not carry on business in Australia
- 2) unless they are controlled by an entity operating or incorporated in Australia, controlled entities of a foreign controlling company that do not carry on business in Australia and are not incorporated or formed in Australia

Registration Comparison

Australia	New Zealand
<ul style="list-style-type: none">• Depending on your circumstances you may need to register for:<ul style="list-style-type: none">➤ an Australian business number (ABN)➤ goods and services tax (GST)➤ a tax file number, and➤ pay as you go (PAYG) withholding.	<ul style="list-style-type: none">• Depending on your circumstances you may need to register for an IRD number.• When you apply for an IRD Number you will be registered for income tax.• If you would like to register for other tax types (e.g. GST) you will need to register for these separately.• If you operate a company in New Zealand you may need to register with the New Zealand Companies Office.

Reduced lodgement requirements

From 1 September 2007, New Zealand companies that are registered as foreign companies in Australia are exempt (under s601CDA and s601CTA of the Act) from the requirements to lodge certain basic company information and financial statements with ASIC.

Post registration lodgement requirements for New Zealand companies with ASIC have been reduced where ASIC is able to source the identical information or document (that satisfies Corporations Act requirements) from the New Zealand Companies Office (NZCO).

ASIC has established data transfer arrangements with the NZCO that enables electronic transfer and receipt of information and documents for these companies. ASIC will record lodgements from the NZCO against the relevant New Zealand company's ARBN record and, where possible, update its public registers accordingly.

Restrictions on foreign ownership

Australia's foreign investment legislation applies to investment proposals by foreign interests. A foreign interest means:

- 1) an individual who is not ordinarily resident in Australia and any corporation or trust in which there is a substantial (15 percent or more) foreign interest (even if it is not actually foreign controlled) or
- 2) where several foreigners have a 40 percent or more interest in aggregate.

A foreign company wishing to carry on business in Australia must be registered under Part 5B.2 of the *Corporations Act 2001* (the Act).

A foreign company is an incorporated or an unincorporated body that is formed in an external territory of Australia or outside Australia. It may sue and be sued or may hold property in the name of its secretary or other officer.

The following transactions require prior approval from the Australian Treasury:

- 1) Acquisition threshold: the acquisition of shares in a corporation or the purchase of a business where the total assets exceed A\$231 million from 1 January 2010 (indexed annually) (reducing to A\$5 million where the assets are non-residential commercial real estate, subject to a heritage listing and A\$50 million if it is not subject to heritage listing).

- 2) Offshore takeover threshold: the takeover of offshore companies whose downstream Australian assets have a value exceeding A\$231 million from 1 January 2010 (indexed annually) or account for 50 percent or more of the target company's global assets.
- 3) Generally, all acquisitions of interests in urban real estate are required to be notified, unless the acquisition falls within an exempt class.

The Australian Government is keen to promote and deepen foreign investment in Australia. Invest Australia is the Australian Government's inward investment agency and is the first point of contact for all your investment enquiries.

A registered foreign company must always have a local agent. A local agent of a registered foreign company:

- 1) is answerable for the doing of all acts, matters and things that the foreign company is required by or under the Act to do, and
- 2) is personally liable to a penalty imposed on the foreign company for a contravention of the Act if a court or tribunal hearing the matter is satisfied that the local agent should be so liable.

5. Capital Gains Tax “CGT”

Australia	New Zealand
<ul style="list-style-type: none"> • Capital gains tax applies in relation to assets acquired on or after 20 September 1985. • Examples of CGT assets are: <ol style="list-style-type: none"> a) Land and Buildings b) Debts c) Right to a contract d) Shares, Units e) Options f) Foreign Currency • Residents of Australia are liable for CGT on assets worldwide. • A capital gain arises if a taxpayer receives amounts from the CGT event which exceed the taxpayer's cost. 	<ul style="list-style-type: none"> • New Zealand does not have capital gains tax. <i>In connection with Australia</i> • If a capital gains tax event occurs on or after 12 December 2006, a foreign resident or a temporary resident is not liable to capital gains tax (nor is treated as having made a capital loss) unless the asset is 'taxable Australian property'.

Capital gains tax and how it works

A non-resident makes a capital gain or loss only if a CGT event happens to a CGT asset that has the necessary connection with Australia. Broadly, the term includes:

- 1) Land or interests in land situated in Australia
- 2) Partnerships and trusts
- 3) Shares in Australian private companies
- 4) Shareholdings of > 10% of Australian public companies

Consider taking advantage of the 10% rule with your status as a Non Resident and the result is that no CGT is payable in either Australia or New Zealand.

An individual, complying superannuation entity or trust that acquires a CGT asset and makes a capital gain from a CGT event receives a discount on the capital gain, provided the asset was held for at least 12 months. Max effective rate is 23.25% p.a.

Capital losses realised will be available to be offset against capital gains realised.

Capital losses may be applied in the order chosen by the taxpayer. If the taxpayer chooses the CGT discount method of recognising capital gains, capital losses are applied against capital gains before applying the CGT discount.

There are four CGT concessions for small business available under Division 152. These are:

- 1) The 15 year asset exemption
- 2) The 50% active asset reduction
- 3) The retirement exemption
- 4) The roll-over

To qualify for the concessions, taxpayers must satisfy a number of basic conditions.

6. Rules around capital versus loan funding

Australia	New Zealand
<ul style="list-style-type: none">• With effect from 1 July 2001 Australia has specific rules that determine what constitutes equity in a company and debt in an entity for certain tax purposes.• The debt and equity tests determine whether a return on an interest in an entity may be frankable and non-deductible (like a dividend) or may be deductible to the entity and not frankable (like interest).• The categorisation is based on the economic substance of a financing arrangement rather than its legal form. For example a loan at call.	<ul style="list-style-type: none">• New Zealand does not have debt and equity rules.

How are at call loans treated?

The debt and equity provisions introduce the concept of connected entities.

A **connected entity** of an entity is either an associate of the entity or another member of the same wholly owned group if the entity is a company and is a member of that group.

Generally, a 'connected entity at call loan' will be an equity interest, unless it satisfies the debt test – because the right to, or amount of, the return of principal or interest under the loan will be at the discretion of the borrowing company or a connected entity of the company.

This means a connected entity at call loan will be treated as debt interests for that income year where the small business carve out rules apply.

Do the debt/equity rules apply to all entities?

There are some carve out rules applying to small business. These rules basically prevent the application of the laws applying to companies with an annual turnover of less than \$20 million.

Thin Capitalisation rules

A thinly capitalised entity is one whose assets are funded by a high level of debt and relatively little equity. An entity's debt to equity funding is sometimes expressed as a ratio. For example, a ratio of 3:1 means that for every \$3 of debt, the company is funded by \$1 of equity. This is also known as 'gearing'. An entity that is highly geared funds its assets with proportionately more debt than equity.

What is the purpose?

The rules seek to limit the amount of debt used to fund those Australian operations or investments. All types of entities (companies, trusts and partnerships) are covered.

What entities are not affected?

The new rules do not apply to an entity whose debt deductions, together with those of its associate entities, are \$250, 000 or less for an income year. They also do not apply where the foreign assets of an entity and its associates represent 10 per cent or less of their combined Australian and foreign assets.

7. Trans Tasman Imputation Rules

The Australian and New Zealand governments have extended their imputation systems to include companies resident in the other country.

The reforms are aimed at what is known as the "triangular tax" problem, where Australian shareholders in a NZ company operating in Australia were unable to access Australian sourced franking credits, with the same problem applying in reverse for NZ shareholders in Australian companies operating in New Zealand.

NZ companies are able to elect (i.e. make a "NZ franking choice") to maintain an Australian franking account reflecting Australian tax paid (including income tax payments, franking credits attached to dividends received and Australian withholding tax on dividends, interest and royalties).

8. Goods & Services Tax “GST”

Australia	New Zealand																
<ul style="list-style-type: none"> The GST rate is set at 10%. Registration where turnover exceeds \$75,000 p.a. GST exemptions : where the transaction has no connection with Australia or is "GST-free". GST-free supplies can include certain: <table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td style="padding: 2px;">Exports</td> <td style="padding: 2px;">Health</td> <td style="padding: 2px;">Int. Travel</td> </tr> <tr> <td style="padding: 2px;">Food</td> <td style="padding: 2px;">Education</td> <td style="padding: 2px;">Charitable</td> </tr> </table> <p>which means there is no GST liability on the supply but the supplier <i>can</i> claim GST credits for GST on purchases it has made</p> Others are 'input taxed' supplies, which mean that there is no GST liability on the supply. However, the supplier cannot claim GST credits for GST on purchases it made. Input taxed supplies include: <ol style="list-style-type: none"> Financial Residential rent Residential premises Fund raising 	Exports	Health	Int. Travel	Food	Education	Charitable	<ul style="list-style-type: none"> The GST rate is set at 15% (12.5% prior to 1 October 2010). Registration where turnover exceeds \$60,000 p.a. GST exemptions : either because they are zero-rated or exempt from GST. Zero rated include: <table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td style="padding: 2px;">Sale going concern</td> <td style="padding: 2px;">Exported vessels</td> </tr> <tr> <td style="padding: 2px;">Exports</td> <td style="padding: 2px;">Services performed outside NZ</td> </tr> <tr> <td style="padding: 2px;">Goods not in NZ</td> <td style="padding: 2px;">Imported Services</td> </tr> <tr> <td style="padding: 2px;">Duty Free</td> <td style="padding: 2px;">Transport to NZ</td> </tr> </table> Exempt supplies include supplies of residential accommodation and many financial services such as paying and collecting interest. <table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td style="padding: 2px;">Residential accommodation</td> </tr> <tr> <td style="padding: 2px;">Financial services such as paying interest</td> </tr> </table> 	Sale going concern	Exported vessels	Exports	Services performed outside NZ	Goods not in NZ	Imported Services	Duty Free	Transport to NZ	Residential accommodation	Financial services such as paying interest
Exports	Health	Int. Travel															
Food	Education	Charitable															
Sale going concern	Exported vessels																
Exports	Services performed outside NZ																
Goods not in NZ	Imported Services																
Duty Free	Transport to NZ																
Residential accommodation																	
Financial services such as paying interest																	

GST and customs duties for the importation of goods

Where goods are imported into Australia, the GST is payable by the importer, not by the overseas supplier.

The GST is calculated as 10% of the value of the importation. The value is the CIF (customs, insurance, freight) value. The GST is paid to Customs, in the same way as customs duty.

GST does not apply where the importation is of goods that would have been GST-free or input taxed if supplied in Australia. An importation will also not be taxable if the goods qualify for specified exemptions under customs law, e.g. goods of insubstantial value, or goods imported under the Tradex scheme.

Deferred GST Scheme enables approved importers to defer the GST until the first Business Activity Statement is submitted after the goods are entered for home consumption. In most cases, this deferral will mean that the GST is cancelled out, as a corresponding input tax credit will be claimed in the same return. This will overcome the cash flow disadvantage for importers of having to pay GST ``up front".

9. Companies Limited by Guarantee

The Corporations Amendment (Corporate Reporting Reform) Act 2010 received royal assent on 28 June 2010. This significant reforms include amendments to the provisions of the Act with respect to financial reporting obligations of companies limited by guarantee and parent entities at 30 June 2010, the mechanisms by which a financial year end date can be changed and the distribution of dividends.

Companies limited by guarantee, which are primarily charitable or not-for-profit (NFP) entities, were all required in the past to prepare and lodge an audited financial report with ASIC under the Corporations Act 2001 (the Act).

The new legislation introduces a three tiered differential reporting framework for these companies structured as follows:

- Under the First Tier, companies limited by guarantee with annual revenue less than \$250,000 which do not have deductible gift recipient status are exempt from preparing a financial report and directors' report under the Act, unless directed to do so by ASIC or by at least 5 per cent of members. As a result, Tier 1 companies are not required to have the annual report audited, or be required to appoint an auditor.
- Under the Second Tier, companies limited by guarantee are those with either annual revenue of less than \$250,000 that are a deductible gift recipient, or have annual revenue of between \$250,000 and \$1 million, irrespective of whether the company is a deductible gift recipient. These Tier 2 companies are required to prepare a financial report, which they can elect to have reviewed rather than audited.
- Under the Third Tier, companies limited by guarantee are those with annual revenue of \$1 million or more, irrespective of whether the company is a deductible gift recipient. These Tier 3 companies will continue to prepare and lodge an audited financial report.

For both Tier 2 and 3 companies the directors' report is streamlined, as is the process for distributing the annual report to members.

10. Requirements for paying dividends

The old section 254T rules of the Act required that a dividend may only be paid out of company profits. This is referred to the 'profits test'.

For many years, concerns were raised with the profit test that the Act does not particularly provide guidance about, or a definition of, the term 'profits'. The reforms replace the profits test with a new solvency-based test.

Under the new law, a company is allowed to declare (and/or) pay dividends on or after 28 June 2010 if:

- The company's assets exceed its liabilities immediately before the dividend is declared and the excess is sufficient for the payment of the dividend (note this limb of the new test is similar to the balance sheet tests currently in operation in New Zealand);
- It is fair and reasonable to the company's shareholders as a whole; and
- It does not materially prejudice the company's ability to pay its creditors.

The requirement for the dividend to be fair and reasonable to the company's shareholders aligns with the requirements under Part 2J of the Act for share capital reductions and buybacks.

Companies may be subject to additional regulatory requirements under the new law. The new law requires all companies prior to declaration and payment of a dividend to comply with regulatory requirements governing the payment of a dividend or reduction of capital.

In other words assets and liabilities will be required to be calculated by the companies in accordance with accounting standards in force at the time to determine solvency based on a net asset test.

If the company is not required to prepare an audited financial report (for example, where the company is a small proprietary company), then its solvency can be determined by reference to the accounting records which are required to be kept under section 286 of the Corporation Act.

11.Changes to rules for Division 7A

Division 7A is intended to prevent private companies from making tax-free distributions of profits to shareholders (and/or their associates). In particular, any advances, loans and other payments or credits to shareholders (and/or their associates) are treated as unfranked dividends (in another word “assessable dividends”) in their hands – unless they are repaid or placed on an arms length terms.

Debt forgivenesses by private companies on debts owed by shareholders (and/or their associates) can also give rise to assessable income under Division 7A.

In the May 2009 Budget the Government made some important announcements about amendments to Division 7A. These amendments passed into legislation under the Taxation Laws Amendment (2010 Measures No.2) Bill 2010. The Bill will apply to loans, payments and debts forgiven on or after 1 July 2009.

Correspondingly, a payment will now also arise where a private company makes an asset available for the exclusive use of its shareholders (and/or their associates).

The value of such payment is determined as the amount that would have been paid for the use or the right to use the asset between the arm’s length parties reduced by the consideration/contribution provided.

In accordance to the explanatory memorandum to the Bill, some examples of the kind of (deemed) payments that will now arise under Division 7A are: the rent-free use by the shareholders (and/or their associates) of a private company of the holiday house owned by that company; and the exclusive right to use available to a shareholder of a company on a luxury yacht owned by that company.

There are a number of exceptions which can be applied to the treatment of such payment arising from a “right to use” are as follows:-

- 1) Minor Benefits
- 2) Otherwise Deductible Rule
- 3) Provision of a Dwelling in Connection with a Business
- 4) Main Residence

Other changes to Division 7A that should be considered include:

- 1) Amendments to prevent corporate limited partnerships being used to circumvent the non-commercial loan rules;
- 2) A company or trust withholding an amount from an employee’s salary or bonus and offsetting these amounts against the loan can be a repayment by an entity, in relation to a loan;
- 3) Removing multi trust structures that avoided the operation of Division 7A where a reasonable person would conclude that the trustee made the payment or loan as part of an arrangement involving the target entity;
- 4) An amendment to the distributable surplus formula to include the value of Division 7A ‘payments’;
- 5) Rules to ensure that any re-borrowings taken out after or before a loan is repaid will cancel out the effect of the repayment; and
- 6) Rules to clarify that non-resident private companies fall within Division 7A.

12.Trust Distributions and the Bamford Decision

The recent *Bamford Decision* has provided some clarity in relation to the trust income and the interaction between the trust law concepts and the income tax rules. The Australian Taxation Office has issued a [Decision Impact Statement](#) on 2 June 2010 in respect of the *Bamford Decision*.

The two main issues considered and concluded by the High Court in the *Bamford case* are as follows:

- 1) What is 'income of the trust estate' for the purposes of section 97 of Income Tax Assessment Act 1936 (ITAA 1936)?

It was concluded by the High Court that 'income of the trust estate' referred to distributable income that was ascertained by the trustee in accordance to the accounting principles and the trust deed. This should exclude statutory income (including capital gains), the capital gain made by the trust, which the trustee had resolved (according to the trust deed) to distribute as income, was 'income of the trust estate'.

- 2) How is the beneficiary's share of the 'net income' of the trust estate calculated for the purposes of section 97?

It was also concluded by the High Court that a number of earlier decisions that the 'proportionate view' (rather than the quantum approach/fixed quantum) was the correct approach to determine the beneficiary's share of net income where the net income of a trust for tax purposes exceeds its accounting income.

Under the 'proportionate view', the beneficiary is assessable on a share or proportion of the trust's net income equivalent to the proportion of the trust income to which the beneficiary is presently entitled to at the end of the year.

Trustees of the trust should consider the following to make the most of any benefits that may flow from the *Bamford Decision*:-

- Amending trust deeds to allow trustees the greatest flexibility in determining what constitutes a particular trust's income under its deed. The trust deed should allow the trustee to decide that the trust's income is the net income as defined in section 95 of the ITAA 1936, excluding notional tax amounts such as imputation credit gross-up and foreign tax offset gross-up.
- Amending trust deeds to allow trustees the flexibility in determining what constitutes a particular trust's income under its deed. The trust deed should allow the trustee to decide whether amounts are to be treated on revenue or capital account.
- Revisit the wording of distribution minutes. Exact clarity is required to ensure the most tax effective outcome is achieved.

There are risks to be contemplated prior to making any amendment to the trust deeds:

- Risk of resettlement
The risk of resettlement occurring and triggering a taxable CGT event or a dutiable transaction is an issue that requires to be carefully measured whenever an amendment to trust deeds is considered.
- Risk of triggering a Part IVA assessment

Generally, Part IVA will only apply to an arrangement that: (a) a person obtains a tax benefit from entering into a scheme; or (b) the sole or dominant purpose of a person entering into or carrying out a scheme is to obtain a tax benefit.

This is not likely to be a concern where all or most trustees of a family trust would consider amending their trust deeds following the Bamford Decision, but this could be an issue in the future when an one-off amendment coincides with a significant immediate tax advantage for a client or a group of clients.

13. Employee Share Schemes (ESS)

The old employee share scheme (ESS) rules in Division 13A of ITAA 1936 that applied to shares or rights acquired before 1 July 2009 have been repealed effective from 14 December 2009. The new Division 83A of the ITAA 1997 contains the new ESS rules applied to shares or rights acquired on or after 1 July 2009.

The Division 83A applies where the employee acquired ESS interests at a discount to the market value of interests in shares or rights under an ESS, the discount is taxed upfront (i.e. on acquisition) and the market value of the discount must be included in the employee's assessable income for that income year.

Where the employee did not acquire the ESS interests at a discount, the ESS rules do not apply. However the benefits given in relation to these ESS interests may be taxed under other provisions of the tax law such as the CGT regime.

Three Exemptions to this Rule

The first exemption is a \$1,000 tax exemption which is available to employee participating in an ESS under the taxed-upfront scheme, provided that the taxable income (after adjustment) of that employee is less than \$180,000, and that employee and the scheme meet certain conditions.

The second and third exemption to this rule is that the discount can be deferred to a future date until the deferred taxing point occurs where:

- Tax deferred scheme – real risk of forfeiture
Where the employee acquires the ESS interests that are at a real risk of forfeiture and the scheme meets certain other conditions, the tax on the discount will be deferred until the deferred taxing point.
- Tax deferred scheme – salary sacrifice
Where the employee acquires the ESS interests under certain salary sacrifice arrangements and the employee must receive no more than \$5,000 worth of shares or stapled securities (not rights) for no consideration.

The deferred taxing point is the earliest of when:

- seven years after the employee acquired the share;
- when the employee ceases the employment in respect of which the employee acquired the share; or
- when there is no real risk of forfeiture that the employee will forfeit the share, or lose the share other than disposing of it; and the scheme no longer genuinely restricts the disposal of the share.

Obligations as an Employer

Employer is required to inform its employee: (a) if the employee is eligible to participate in an ESS; (b) if the ESS offered meets the criteria for taxed-upfront or tax-deferred scheme; and (c) if the ESS offered meets the criteria to access the \$1,000 concession.

Employer is also required to provide the employee with an ESS statement detailing the ESS interests the employee acquired throughout the financial year.

14. Transition to Retirement Pension

Under the old rules, a person could only access their super once they turned 65 or permanently retired. From 1 July 2005, the Transition to Retirement Pension (TTR Pension) rules allow a person who has reached preservation age (currently aged 55 and above) to draw on superannuation savings while still working.

The main features of TTR Pension are:

- the pension account cannot be added to by contributions or benefit rollovers or transfers once the pension is commenced,
- the pension can be reversionary
- there must be at least one pension payment in each financial year (except for where the pension commences on or after 1 June, the pension payment is not required for that financial year in which the pension commences;
- the pension payments in each financial year cannot exceed more than 10% of the pension account balance;
- the pension payments in a financial year must not be less than a minimum amount which is determined at the commencement of the pension and then at the start of each financial year by multiplying the account balance by a prescribed percentage which is determined by your then age
- the current prescribed percentages are as follows:

Age at commencement or 1 July	Prescribed Percentage (note that a 50% reduction applies for 2009-10 2010-11 financial years)
Under age 65	4%
65 – 74	5%
75 – 79	6%
80 – 84	7%
85 – 89	9%
90 – 94	11%
95 or more	14%

The cashing restrictions on the amount of pension payments in a financial year and the restriction on converting the pension to a lump sum cease to apply once the person satisfies the unrestricted release condition such as attaining age 65 or retiring for super purposes before age 65. In this situation, the transition to retirement pension effectively becomes an ordinary account-based pension.

The tax treatment on receipt of the pension payments depends on the age at the time when the pension payment is received.

- For aged 60 or more – each pension payment received is tax free.
- For aged 59 or less but more than the preservation age – each pension payment will consist of two components and taxed as follows:
 - 1) tax free component – tax free
 - 2) taxable component – fully taxable at individual marginal tax rates but will be entitled to a tax offset (rebate) of 15% of the amount of the taxable component.

The tax treatment of lump sums you receive from your pension account depends on your age at the time you receive the lump sum.

- For aged 60 or more – the lump sum is tax free.
- For aged 59 or less but more than the preservation age – the lump sum will consist of two components and taxed as follows:
 - 3) tax free component – tax free
 - 4) taxable component – first \$150,000 will be tax free and the balance will be taxed at a maximum rate of 15% (plus medicare levy).

15. Taxes that are present in Australia and the Australian State tax structure

Federal	State Taxes
<ul style="list-style-type: none">• Income Tax• Capital Gains Tax• Fringe Benefits Tax• Goods & Services Tax• Excise Duty• Wine Equalisation Tax	<ul style="list-style-type: none">• Land Tax• Payroll Tax• Stamp Duty• Betting Tax• Gaming Machine Tax

16.2011 Tax Rates

	Australia		New Zealand	
Company		30%		30%
S/Fund		15% generally		33%
Trusts		0% generally		33%
Individual - Residents	Up to \$6,000	Nil	Up to \$14,000	11.5%
	\$6,001 - \$37,000	15%	\$14,001 - \$48,000	19.25%
	\$37,001 - \$80,000	30% + \$4,650	\$48,001 - \$70,000	31.5%
	\$80,001 - \$180,000	37% + \$17,550	\$70,001 and over	35.5%
	\$180,001 and over	45% + \$54,550		
Non-Residents Individual	\$0 - \$37,000	29%	Up to \$14,000	11.5%
	\$37,001 - \$80,000	30% + \$10,730	\$14,001 - \$48,000	19.25%
	\$80,001 - \$180,000	37% + \$23,630	\$48,001 - \$70,000	31.5%
	\$180,001 and over	45% + \$60,630	\$70,001 and over	35.5%

17. References used

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- Moores Legal – Amending the Definition of Income in Family Trust Deeds
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- Townsends Business & Corporate Lawyers
- The Corporations Amendment (Corporate Reporting Reform) Act 2010
- Dept of Innovation, Industry, Science and Research www.investaustralia.gov.au
- Office of Fair Trading – New South Wales www.fairtrading.nsw.gov.au/business/associations.html
- Office of Fair Trading – Queensland www.consumer.qld.gov.au
- Office of Consumer & Business Affairs – South Australia www.ocba.sa.gov.au
- Office of Consumer Affairs & Fair Trading – Tasmania www.consumer.tas.gov.au
- Consumer Affairs – Victoria www.consumer.vic.gov.au
- Consumer and Employment Protection – Western Australia www.docep.wa.gov.au
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18.Disclaimer

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19. Doing Business In Australia – Example

Providing Services in Australia

This scenario explores the Australian tax obligations you face if you are a New Zealand resident entity that provides services in Australia.

- 1) Do I need to apply for an ABN?
- 2) Do I need to register for GST? How is GST recorded in the price?
- 3) Are any of the services provided subject to Australian foreign resident withholding?
- 4) Do I have a permanent establishment? or if I am here more than 180 days am I liable for Australian Income Tax?
- 5) Will I be liable for CGT?
- 6) If I employ individuals or contractors what are my obligations?

1) Do I need to apply for an ABN?

Companies registered under the Corporations Law and business entities carrying on an enterprise in Australia are entitled to an ABN. Most businesses carrying on an enterprise in Australia will apply for an ABN.

An ABN facilitates participation in the GST system. It is the number you and your suppliers and buyers need to quote when invoicing and accounting for GST.

You cannot claim the GST credit if the invoice you hold does not quote an ABN.

Where you do not quote your ABN on an invoice in relation to a supply you make, the payer may have to withhold from their payment to you for that supply equal to 46.5% of the amount of the payment.

You do not withhold an amount from a payment if you are satisfied that the supplier is not entitled to an ABN as they are not carrying on a business or enterprise in Australia.

2) Do I need to register for GST? How is GST recorded in the price?

What are the Australian goods and services tax (GST) obligations of a New Zealand company that supplies services (by means of its employees in New Zealand or a branch in Australia) to a recipient in Australia?

Example 1

The supply of consulting services by a New Zealand company to an Australian company where the consulting services are performed solely in Australia by an employee of the New Zealand company.

Facts: Consideration paid is \$80,000 for a 2 month contract.

NZ Co does not carry on an enterprise in Australia through a permanent place or through a agent at a permanent place.

No work is undertaken in New Zealand in relation to the supply of consulting services to Oz Pty Ltd. Aust Co is registered for GST.

The Australian GST issues

Question:

Is GST payable by NZ Co on the consulting services supplied to Oz Pty Ltd in Australia?

GST is payable on taxable supplies. The supply of consulting services by NZ Co to Oz Pty Ltd is a taxable supply if the following five requirements are met:

1.	NZ Co makes the supply for consideration
2.	The supply is made in the course or furtherance of an enterprise that NZ Co carries on
3.	The supply is connected with Australia
4.	NZ Co is registered, or required to be registered, for GST, and
5.	The supply is not GST-free or input taxed.

1.	Supply is made for consideration of \$80,000
2.	Supply is made in furtherance of an enterprise that NZ Co carries on.
3.	The supply is connected with Australia as the service is provided here.
4.	NZ Co is required to be registered for GST as turnover is > \$75,000 and NZ Co carries on an enterprise.
5.	The supply is not GST-free or input taxed.

The value of the supply (excluding any GST) is AUS \$80,000. NZ Co is required to pay GST of AUS \$8,000 (that is, 10% x AUS \$80,000) to the Australian Taxation Office. The GST inclusive price of the consulting services is therefore AUS \$88,000.

To claim a GST credit for the GST included in the price of the consulting services, Oz Pty Ltd must hold a tax invoice (as the price of the supply including GST is greater than \$82.50). If NZ Co does not automatically provide Oz Pty Ltd with a tax invoice, it is required to provide Oz Pty Ltd with a tax invoice within 28 days of being requested to do so.

3) Reverse Charge

Under the Australian GST system, the GST payable on a taxable supply made by a non-resident can, with the agreement of the recipient of the supply, be 'reverse charged' to the recipient. 'Reverse charged' means that the GST payable on the supply is payable by the recipient rather than the supplier.

In working out whether NZ Co must register for GST in Australia, it does not need to include supplies that are reverse-charged. This means that NZ Co is not required to register for GST in Australia.

NZ Co is not required to issue Oz Pty Ltd with a tax invoice and Oz Pty Ltd is not required to hold a tax invoice to claim a GST credit if the purchase is a creditable acquisition, as the supply of the consulting services to Oz Pty Ltd is reverse charged.

4) Permanent Establishment

Example 2

Considering the facts in Example 1 above, would it make any difference to the GST consequences if NZ Co has an Australian branch (that is, a permanent establishment), NZ Branch, and NZ Branch provides the consulting services to Oz Pty Ltd instead of employees of the Head Office in New Zealand?

1.	NZ Co makes the supply for consideration
2.	The supply is made in the course or furtherance of an enterprise that NZ Co carries on
3.	The supply is connected with Australia
4.	NZ Co is registered, or required to be registered, for GST, and
5.	The supply is not GST-free or input taxed.

1.	Supply is made for consideration of \$80,000
2.	Supply is made in furtherance of an enterprise that NZ Co carries on.
3.	The supply is connected with Australia as the service is provided here or is provided through an Australian branch.
4.	NZ Co is required to be registered for GST as turnover is > \$75,000 and NZ Co carries on an enterprise.
5.	The supply is not GST-free or input taxed.

The value of the supply (excluding any GST) is AUS \$80,000. NZ Co is required to pay GST of AUS \$8,000 (that is, 10% x AUS \$80,000) to the ATO. The GST inclusive price of the consulting services is therefore AUS \$88,000.

To claim a GST credit, Oz Pty Ltd must hold a tax invoice (as the price of the supply (i.e. including GST) is greater than \$82.50).

The reverse charge provision, which was explained in Example 1 above, does not apply. NZ Co makes the supply through NZ Branch, an enterprise that it carries on in Australia.

Will I be liable for Income Tax?

Generally, the business profits of New Zealand residents cannot be taxed in Australia unless they carry on business through a permanent establishment in Australia.

A 'permanent establishment' is a fixed place of business through which the enterprise wholly or partly operates. It includes a sales outlet, branch, place of management, factory, workshop, an office or a dependent agent who has authority to enter into contracts on behalf of the enterprise and habitually exercises that authority.

Generally, having a website which is hosted by an independent internet service provider is not regarded as having a permanent establishment in Australia.

Where you provide services as an individual – for example, as an independent contractor – the income you derive from the services will be liable to Australian income tax if the income is attributable to your fixed base or if you were present in Australia for more than 183 days.

5) Will I be liable for CGT?

Assuming you meet the permanent establishment definition if you carry on business as a sole trader or through a company, trust or partnership, you will need to obtain a separate Tax File Number.

For instance, if you have a 'permanent establishment' in Australia, the assets you own as part of that permanent establishment will be regarded as having the 'necessary connection with Australia' and as being 'taxable Australian property'. If the assets were acquired after 19 September 1985, the assets of

the permanent establishment will generally be subject to capital gains tax when you sell or otherwise dispose of those assets.

6) If I employ individuals or contractors what are my obligations?

Under the PAYG withholding system, payers (generally businesses and other enterprises) are required to withhold an amount from certain payments made to others (such as workers) and send these amounts to the Australian Tax Office. If you are required to withhold an amount from a payment, you must be registered for PAYG withholding.

These payments include:

1. payments to employees, company directors and office holders
2. payments made to workers under labour hire arrangements
3. payments under voluntary agreements, and
4. payments where an Australian business number (ABN) has not been quoted in relation to a supply.

If I employ individuals or contractors what are my obligations?

1.	Superannuation guarantee legislation requires employers to contribute a minimum of 9% of each eligible employee's earnings base.
2.	Employers must make their superannuation contributions at least every quarter.
3.	For superannuation guarantee purposes, a person working for you may be considered your employee if you have a contract with the person that is wholly or principally for labour.

References used for examples

- Australian Taxation Office : www.ato.gov.au

If you choose to use the search engine you can find relevant topics and examples dealing with the following items:-

- Providing services in Australia
- Selling goods from New Zealand only
- Selling goods through Australian agents
- Selling your goods through your establishment in Australia
- Trading over the internet
- New Zealand Inland Revenue Department
- Wine equalisation tax – producer wine rebate for New Zealand wine producers