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## INTRODUCING AUSTRALIA

Australia is the world's sixth largest country and has one of the world's best lifestyles. An industrialised continent, Australia is blessed with an abundance of mineral and agricultural resources. It is an increasingly diverse, multicultural nation with a legal system which is a mixture of common law and statute, similar to the legal system in the United Kingdom. The Australian Government recognises the need for a regulatory framework to keep pace with financial market developments and one of the most competitive, open and flexible economies in the world.

Over the past 15 years, the standard of living in Australia has risen significantly, surpassing that of Canada, France, Germany, Italy, Japan, Russia and the United Kingdom. It presents a compelling business case for a regional headquarters to target the dynamic Asia Pacific region. Australia also offers one of the best education systems in the world and with a 99 per cent literacy rate; a highly educated, skilled and computer literate labour force is available to investors.

## FOREIGN INVESTMENT

The Government welcomes and encourages foreign investment consistent with community interests. Australia's screening process for foreign investment is transparent and liberal. The Government has the power to block proposals that are required to be notified and which are determined contrary to the national interest. Under the *Foreign Acquisition and Takeovers Act 1975*, foreign individuals or foreign owned companies must seek approval from a non statutory body (Foreign Investment Review Board) before purchasing significant interests in urban real estate, certain shares of Australian owned private companies, or shares in foreign companies which own Australian assets. Restrictions apply in more sensitive industry sectors which reflect community concerns and matters which are contrary to the national interest.

The *Australia - United States Free Trade Agreement (AUSFTA)* came into force on 1 January 2005 and is seen as the most important bilateral agreement ever undertaken by Australia. This is in addition to the current *Australia - United States Double Tax Agreement*, which allows for significant tax benefits in respect of cross-border dealings.

## BUSINESS STRUCTURES

Where a foreign company intends to carry on a business through a company in Australia, it must either register as a Registered Foreign Company with the Australian Securities and Investment Commission (ASIC), incorporate a subsidiary in Australia or establish a branch office in Australia.

A summary and comparison of the various compliance obligations of a subsidiary company or registered foreign company is available upon request.

## AUSTRALIAN SECURITIES EXCHANGE

Australia's national stock exchange is the Australian Securities Exchange ("ASX") registered under the name ASX Limited.

Under the Foreign Exempt Entity provisions of the Listing Rules, a foreign entity that is listed on a reputable overseas exchange may apply to be listed on the ASX in the Foreign Exempt Entity category. The rationale behind this rule is to give Australian investors access to a wider range of securities.

## VISA AND IMMIGRATION FOR BUSINESS

Investors planning to enter Australia for a business visit are able to apply for the Business (Short Stay) Visa which usually allows a stay of up to three months in Australia on each visit through the Electronic Travel Authority (ETA).

An expatriate travelling to Australia for more than 3 months for business purposes must obtain employment authorisation (Temporary Business Entry Long Stay Visa, subclass 457). Individuals sponsored on these Visas are able to work in a specified position within the company. Sponsors in these cases must demonstrate that their business is reputable, that they are in good financial standing to meet the sponsorship obligations and that there will be benefits to Australia resulting from the sponsorships. Under the Business Skills program, business people can apply to come to Australia to start their own business, manage a new or existing business, or invest in Australia without the need for a sponsor, subject to meeting relevant criteria and the prerequisite business background and assets.

## CORPORATE TAX

The Australian Government recently announced a new Visa pathway for migrant investors coming to Australia. The Significant Investor Visa (new streams of subclass 188 and 888) was introduced on 24 November 2012 whereby Visa applicants nominated by an Australian state or territory can receive an expedited business Visa by making investments of at least five million Australian dollars into complying investments. The Visa stream features a residence requirement of 160 days spent in Australia over four years. Visa holders can extend their Visa term if they satisfy the extension requirements. They will be allowed to extend their provisional Visa by an additional two years, with a maximum of two extensions permitted.

The corporate income tax rate is 30% in Australia. A tax consolidation regime applies for tax purposes for 100% owned group entities that are Australian tax residents. Australian subsidiaries that are wholly owned by a foreign company and that have no common Australian head company between the non-resident parent and the Australian resident subsidiaries are also allowed to consolidate. Groups that choose to consolidate must include all wholly-owned entities and the choice is irrevocable. Transactions between Australian group companies are then ignored for income tax purposes.

### Assessable income

A branch will include as assessable income all Australian source income attributable to the branch and capital gains from disposals of taxable Australian assets. An Australian subsidiary company will include as assessable income all worldwide income (a foreign tax credit system applies to residents where that same income was taxed overseas) and capital gains from disposal of all taxable capital assets.

### Repatriation of profits (i.e. payment of dividends)

If fully franked dividends (that is, dividends derived from profits on which Australian corporate tax has been paid) are paid by an Australian subsidiary to its foreign parent, no dividend withholding tax is payable. To the extent that dividends are unfranked, dividend withholding tax of 30% (often reduced under a relevant double tax treaty) is payable on the gross unfranked amount.

### Financing – Debt vs. Equity and Thin Capitalisation rules

Interest withholding tax of 10% is imposed on interest paid by an Australian company to a foreign non-resident lender entity (often reduced under a relevant double tax treaty). If however the beneficial owner of the non-resident lender has a permanent establishment in Australia and the interest is effectively connected with the permanent establishment, such interest is taxable by assessment in Australia.

When reviewing funding of the Australian operations, consideration should be given as to whether you wish to finance the entity with equity or debt. This decision is usually made in conjunction with the thin capitalisation rules which seek to limit the extent to which an Australian entity may be geared. Due to the complexity of this area we would recommend that detailed advice and discussions be held prior to finalisation of the capital structure of the Australian subsidiary.

### Royalties payable to a foreign company

If an Australian company pays royalties to a foreign resident, these will be subject to royalty withholding tax at a rate of 30% (often reduced under a relevant double tax treaty) and may give rise to transfer pricing issues.

### Capital Gains

Residents of Australia are generally liable for the tax on gains on the disposal of assets wherever situated, subject to relief from double taxation if the gain is derived and taxed in another country. One important exception to this rule is where an Australian company sells shares in a foreign company. Any capital gains (or capital losses) which result from the sale of foreign shares may be reduced in certain situations. Assessable capital gains are included in a company's taxable income and for companies are taxed at the same rate as ordinary income. Various exemptions are available under the Australian capital gains tax regime, available upon request.

### Transfer Pricing

Australian transfer pricing rules adopt the arm's length concept as promulgated by the *Organisation for Economic Co-operation and Development (OECD)*. Transfer pricing is seen as a major issue by the *Australian Taxation Office (ATO)*, which has recently revisited transfer pricing as a focus area for potential tax collection and enquiry and is actively pursuing multinationals in Australia. Legislation exists which seeks to ensure that Australian

businesses trade goods and services with international related parties under arm's length terms and conditions. These provisions apply to all Australian businesses, regardless of the type of entity used. It therefore applies equally to an Australian branch of an overseas company and an Australian subsidiary.

Where relevant we recommend a detailed transfer pricing study be undertaken at the outset to ensure inter-entity pricing is set in accordance with Australian law.

### Withholding Tax

Withholding tax is required to be deducted from the overseas payment of interest, unfranked dividends (i.e. dividends paid from profits not previously subject to tax in Australia) and royalties. The rate of withholding tax will be determined with reference to whether Australia has a Double Tax Agreement with the relevant country.

Depending on the nature and size of the investment project, the relevant Australian state governments may give rebates from payroll, stamp and land taxes on an ad hoc basis and for limited periods.

Accelerated deductions are available for capital expenditures on the exploration for petroleum and other minerals. Certain capital expenditures incurred after 16 August 1989 in respect of quarrying operations also qualify for concessional treatment.

Small business entities (those with turnover of less than \$2m) may be able to access a range of tax concessions. Mainly, favourable depreciation deductions are available whereby taxpayers can claim an accelerated deduction for motor vehicles and an immediate deduction for most assets costing less than \$6,500 each. Additionally there are simplified trading stock rules and immediate deductions available for prepaid expenses.

Under the existing Research & Development (R&D) Tax Incentive, where an Australian company carries out eligible R&D activities, a 45% refundable tax offset may be available i.e. a cash benefit of 45c in the dollar may be achieved regardless of if the company is in a tax loss position, subject to certain conditions. Australia is currently seen as one of the most attractive jurisdictions in the world to conduct R&D activities.

## INDIRECT TAXES

### Goods and Services Tax

Australia has a 10% Goods and Services tax (GST). GST is an indirect broad based consumption tax. GST is payable on the tax exclusive price of most goods and services supplied within Australia. GST is also generally payable on the importation of goods. Registered suppliers will obtain a credit for GST paid on most inputs (purchases), subject to certain exemptions.

### Customs Duties

A customs duty is imposed by the Australian Customs Service on goods which are imported into Australia and is typically based on international customs agreements. This duty is generally imposed as an anti-dumping instrument and to provide protection for domestic manufacturers and wholesalers. Customs duty is imposed on most goods at the rate of 5%. An exemption may be provided for goods which are not subject to Australian competition.

### Stamp duty

The various States and Territories of Australia impose stamp duty at various rates on transactions including mortgages, securities, insurance policies, non-marketable share transfers, lease documents and contracts regarding the transfer of assets, businesses or real estate. In certain States and Territories, some of the above transactions are stamp duty exempt.

### Land tax

The government of each State of Australia and the Australian Capital Territory levies land tax (which is a tax levied on the owners of land, excluding a person's principal place of residence) based on the unimproved capital value of land. Varying rates of land tax apply across Australia and the rate payable generally increases according to the value of the property. Usually the land tax liability arises for land owned at a particular date, which in New South Wales, is at midnight on 31 December in each year.

## PERSONAL TAXATION

There are a number of mandatory compliance requirements in Australia that can significantly affect payroll costs. Residents are subject to tax on worldwide income and taxable capital gains (although a foreign tax credit is generally available within limits). The top marginal tax rate is 46.5 per cent and this applies to income over \$180,000. Medicare is Australia's universal health insurance scheme. Contributions to the health care system are generally made through the tax return via the Medicare Levy. The levy is 1.5 per cent of taxable income and reportable fringe benefits.

### Payroll Tax

Payroll tax is levied in all States and Territories on the employer's payroll above a threshold (currently \$750,000 in NSW), including non cash benefits. The effective rates are generally 6-7% depending on the level of payroll and the State or Territory.

### Fringe Benefits Tax (FBT)

The Federal Government taxes employers on the value of certain non-cash benefits provided to employees, such as provision of a motor vehicle, payment of private expenses, the provision of rent free accommodation, interest free loans etc.

### Workers' Compensation

Employers are required to carry workers' compensation insurance in order to protect its employees. The cost ranges from 1% to 10% depending on the nature of the business.

### Superannuation Guarantee Charge (SGC)

Employers are required to contribute a prescribed minimum level of superannuation (compulsory savings which a person may only access when retiring from the workforce and subject to other restrictions, such as age) support for their employees each year to provide for the employees' retirement. The minimum contribution is currently 9.25%.

## PERSONAL TAXATION (Cont.)

### Employment withholding tax collections

Employers are required to register with the Australian Taxation Office, withhold and subsequently remit periodically dependent on turnover to the Australian Taxation Office the income tax payable by employees on their salary.

### Changes to the taxation treatment of employee share schemes

A new tax regime applies to employee equity awards acquired on or after 1 July 2009. Under this new tax regime, employees can no longer elect to be taxed at grant of awards, but rather the tax treatment of awards will be solely driven by the structure of the relevant employee share scheme, timing and the discount at which benefits are provided.

### Taxation of Foreign Arrangements (TOFA)

These measures prescribe the way in which foreign exchange gains and losses are identified and calculated and provide strict timing rules for ascertaining when foreign exchange (forex) gains and losses are recognised for tax purposes. The TOFA legislation may apply to bank accounts and loans denominated in foreign currency if the accounts and loans were established, entered into, re-financed or varied on or after 1 July 2003. Certain exemptions may apply where specific conditions are met. Individuals who are considered temporary residents however, are not subject to these rules.

## EXPATRIATE EMPLOYEES

### Income Tax

For Australian tax purposes, expatriates living and working in Australia will be categorised as either “resident” or “non-resident”. The most fundamental distinction is that a resident will be subject to Australian income tax on worldwide income (including capital gains and interests in foreign investment funds), whilst a non-resident is subject to Australian income tax on Australian sourced income only.

It is therefore essential to review personal investments and other related matters prior to becoming a resident of Australia.

### Private Health Insurance

Expatriate employees may not be eligible for medical cover under the National Medicare scheme while working in Australia. It is therefore necessary for temporary residents on working business visas to consider taking out private health insurance.

## TERMS OF EMPLOYMENT

Australia’s industrial and workplace relations law have undergone significant change in recent times through government initiatives designed to make the labour market more flexible and efficient.

Broadly speaking, Australian employment law is derived from common law (notably the employment contract and implied duties imposed on employers and employees), the statutory and regulatory framework and industrial instruments, such as modern awards and enterprise agreements.

## INTELLECTUAL PROPERTY

Australia's legislation protects intellectual property such as trademarks, copyright, patents and designs. Remedies are also available under Australia's common law for goods or services that are "passed off" as those of another and under the *Trade Practices Act 1974 (Cth)* (Trade Practices Act) for conduct of a corporation which is misleading or deceptive or likely to mislead or deceive. Australian common law will also protect confidential information and trade secrets in certain circumstances.

## CONSUMERS

The *Trade Practices Act* is a Federal Act which contains a multitude of rights and remedies for consumers who buy goods or services that are defective, have been misled as to the quality of such goods or services protects consumers from being exploited by companies.

The *Trade Practices Act* also regulates and prohibits anti-competitive behaviour in Australia and prohibits the misuse of market power.

## ENVIRONMENTAL LAWS

The Australian Constitution gives the Commonwealth discrete powers to regulate environment and planning issues, but most of the responsibility for such issues remains with the States.

## COMPLIANCE & REPORTING REQUIREMENTS

Both registered foreign companies and subsidiaries have statutory compliance requirements. The reporting requirements of proprietary companies and registered foreign companies depend on whether the company is defined as large or small under the Corporations Act.

Most notably, under certain conditions audit relief may be granted for "small" companies from having to prepare and lodge audited financial statements with ASIC.

## CHARTERNET

CharterNet is a Chartered Accounting, tax and business advisory firm based in Sydney, Australia. CharterNet collectively represents an experienced Board of Advisers encompassing professionals with expertise in various corporate disciplines.

CharterNet represents a fresh approach to the provision of consulting services, developed in direct response to the needs of our clients and a competitive corporate environment. We are well placed to meet the needs of inbound businesses or investors, providing assistance on local or cross-border tax and legal issues with a multi-disciplinary approach to the delivery of professional services to clients. This context of service delivery gives us a unique perspective into our clients' wider business issues and enables us to ensure that our clients receive commercial and timely advice.

Our suite of services available to inbound investors or businesses include assistance with:

- Structuring advice;
- Outsourced accounting, payroll and Virtual CFO services;
- Taxation compliance and consulting including international tax, transfer pricing, employee share schemes and tax structuring;
- Government Grant eligibility and assistance;
- Statutory audit services;
- Corporate Advisory services including mergers and acquisitions, divestments, joint ventures, debt/equity financing, management consulting and corporate governance; and
- Resident directorship services.

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This document is intended to provide you with a brief outline of the key considerations that need to be resolved in establishing an Australian presence. You should seek advice before acting on any of the issues raised in this document.

When considering establishing a presence in Australia please ensure that you plan your entry with enough time to ensure all of the various commercial, tax and accounting registrations can be put in place prior to the company commencing to trade.

If you would like assistance with establishing a presence in Australia or have any queries regarding the contents of this document, please contact us.

This document has been prepared as at 27th August 2013.