Guide to setting up a business in Australia.
Introduction

When establishing your business in Australia there are a number of obligatory laws and regulations that are present to which you should familiarize yourself. In addition, you will also need to be aware of the rights and obligations your business will have in respect of its employees. The following document provides a brief outline of these requirements, regulations and obligations.
Company Structure

When setting up a business in Australia there are two options available to you. The first option is to establish an Australian company as a subsidiary of the parent company in the foreign jurisdiction; the second option is to register a branch of a foreign registered company with the Australian Securities and Investment Commission (‘ASIC’). Both options require completion of certain registration forms and payment of fees.

If you do not intend to carry on business initially, for example you are carrying out research of the Australian market with the view of starting up a business here or merely providing support for current customers, then it is not necessary to register with ASIC. This is usually termed “having a Representative Office”. You need to be very aware that this type of operation can easily become one that requires registration so care should be taken in monitoring the activities as well as proactively seeking professional tax advice.

Outlined below are the Australian registration and financial implications of both a branch and an incorporated Australian subsidiary. Please note: this information is a guide only and further legal and tax advice should be sought.

Registration of a Foreign Branch

By way of summary, when registering a foreign company with ASIC, the company is required to provide original or notarised copies of the Certificate of Incorporation and the Constitution (also known as Articles of Association or By-Laws) for the company. These will also need to include an English translation if they are not already in English.

Other statutory information is also required for the application such as details of directors (including proof of identity information) and registered office in the company’s place of origin. ASIC requires the company to have a registered office in Australia as well as local agent, who acts as a contact and for service of notices with this regulator. This can be an individual or a company. A resident individual Public Officer also needs to be appointed for tax office purposes. Prosperity is able to fulfil these roles if required. The company needs a minimum one shareholder with a minimum of $1 share capital. Consents to act from the proposed officeholders and shareholder(s) are required prior to incorporation.

Annual reporting

When a registration of a foreign branch is made, an annual filing of a Form 405, Statement Verifying Balance Sheet, Profit and Loss Account of a Foreign Company, is required to be lodged with ASIC together with a copy of the company’s latest Financial Statements including a cash flow statement (an English translation must also be included where these statements are not already in English). Please note that the financial statements must be for the company as a whole not just the Australian operations. The annual fee required by ASIC is currently $1,000.00.

Registration of an Australian Subsidiary (Pty Ltd)

The registration of an Australian subsidiary company (usually a proprietary limited company) is fairly straightforward in comparison to some other jurisdictions. This company must have at least one Director and Public Officer who ordinarily resides in Australia as well as a registered office in Australia. Prosperity is able to fulfill these roles if required. The company needs a minimum one shareholder with a minimum of $1 share capital. Consents to act from the proposed officeholders and shareholder(s) are required prior to incorporation.

Annual reporting

Each year on the anniversary of the date of the registration of the company, a Company Statement, being an extract of the company particulars as they are held with ASIC, is received. Upon this anniversary date, an Annual Review Fee becomes payable to ASIC within 2 months. This fee is currently $249.

All companies are also required to complete a director’s resolution regarding the solvency of the company each year.

An Australian company which is controlled by a foreign company is required to prepare and lodge audited financial statements with ASIC within 4 months of the end of each financial year. However, relief from this requirement is available under Class Order 98/98 when the company meets certain criteria, including remaining a “small” proprietary company.

A proprietary company that meets at least two of these criteria is considered “small”:

1. consolidated revenue for the financial year of the company and the entities it controls (if any) is less than $25 million;
2. the value of the consolidated gross assets at the end of the financial year of the company and the entities it controls (if any) is less than $12.5 million; and
3. the company and the entities it controls (if any) have less than 50 employees at the end of the financial year.

Once a company becomes “large” (i.e. it does not meet two of these thresholds), it is required to prepare and lodged audited financial statements with ASIC with 4 months of year end.
Alternative Structures
Sole traders, partnerships and trusts may also be used as the operating entities for business. In each case, the relevant income is attributed to the owner; however in the case of trusts, the trustee may be taxed on behalf of the beneficiary.

Taxation Implications on Company Structures
Australia has entered into Double Tax Agreements (‘DTA’) with a number of other jurisdictions. These agreements will have an impact on tax on and repatriation of profits so advice as to your company’s specific circumstances should be obtained.

Taxation Implications of an Australian Branch
Under these DTA and where a permanent establishment (‘PE’) exists in Australia, the Australian operation can be permitted to tax profits “attributable” to such a PE only. Broadly speaking, this requires an analysis of the economic contribution of the PE based on Australian transfer pricing principles.

The actual amount of income that would reasonably be attributable to such a PE is not a question that can be easily answered.

If a PE exists, there will be an obligation to lodge a tax return in Australia. The first income tax return will be for the first income tax year in which the PE was in existence.

A branch is taxed as though it is a company. The tax rate is currently a flat 30%. The branch does not maintain a franking account (this is a record of all taxes paid and refunded). As the branch is not a company (it is simply taxed as a company) it does not pay dividends. Once it has paid its tax it is free to repatriate the profits back overseas without any further tax being payable.

Taxation Implications of an Australian Subsidiary
As a separate legal entity from its overseas parent, the Australian subsidiary company would be taxable in Australia on the income it derives. As per the branch above the tax rate is a flat 30%. The company will maintain a franking account. When it wants to repatriate profits back to the parent entity’s country of origin declaration of a dividend is required. If the dividend is fully franked (i.e. the dividend is paid out of after tax profits) then no withholding tax is payable. If the dividends are unfranked then withholding tax at the rate of 10% is payable (dependant on DTA with parent entity country).

Regardless of the structure chosen taxation advice should be sought in relation to thin capitalisation and transfer pricing.

Thin Capitalisation
A thinly capitalised entity is one whose assets are funded by a high level of debt and relatively little equity. An entity that is highly geared funds its assets with more debt than equity.

The thin capitalisation legislation can apply to Australian entities investing overseas, their associate entities, foreign controlled Australian entities and foreign entities investing directly into Australia. The rules seek to limit the amount of debt used to fund those Australian operations or investments. They do so by disallowing the debt deductions an entity can claim against Australian assessable income when the entity’s debt used to fund Australian assets exceeds certain limits.

Transfer Pricing
Pricing for international dealings between related parties should reflect a fair return for the activities carried out in Australia, the Australian assets used (whether sold, lent or licensed), and the risks assumed in carrying out these activities.

You should carefully consider the terms and conditions of any international dealings with related parties to ensure your business properly allocates income and expenses between Australia and other countries for tax purposes.

Business Names
A business name is the name under which an entity carries on business and is known by in the market place. If you are operating a business using any name other than your own, you must register that name. At present, registration must be completed in every state and territory from which a business operates, and must be completed before the business commences trading.
Company Taxation Generally

Australian Taxation

In Australia taxes are applied at both the Federal and State level. The Australian Taxation Office (‘ATO’) administers the Federal taxes that apply to all Australian States. In New South Wales the Office of State Revenue (‘OSR’) administers State taxes. The following information covers general taxation.

State Taxes

Each of the states and territories of Australia imposes taxes such as stamp duty, payroll tax and land tax.

Federal Taxes

The Federal Government levies a range of taxes. The main taxes affecting businesses include Goods and Services Tax (‘GST’) and Income Tax.

Tax Registrations

Companies carrying on a business in Australia will normally be required to register with the ATO for:

1. Tax File Number (‘TFN’) - Any company carrying on business is required to have its own TFN and use it when lodging its annual income tax return.
2. Australian Business Number (‘ABN’) - this is not compulsory, however it is necessary to be able to register for GST and other business tax registrations, as well as deal with other businesses and avoid having tax withheld from receipts of the company.

A company carrying on business in Australia may also apply to the ATO for:

1. Goods and Services Tax (‘GST’) - this is required if:
   • you are carrying on a business; and
   • your projected annual turnover is $75,000 or more.
2. Pay as you go (‘PAYG’) withholding - this is required if you are employing people or dealing with businesses who do not quote their ABN; and
3. Fringe Benefits Tax (‘FBT’) - if you provide fringe benefits to employees.

A local Australian ‘Public Officer’ is required to be appointed for all tax paying entities.

Australian GST

GST was introduced in Australia in July 2000. It is similar to the European Union’s VAT system, requiring re-calculation and payments to the tax authorities at each transaction point in the onward sale chain. The Australian GST rate is currently 10%.

Requirement to register for GST

For foreign companies providing goods or services “connected with Australia”, there may be a statutory obligation to register for GST. This includes the ongoing compliance requirements to file periodic tax returns and pay any GST due to the Australian tax office. Typical situations requiring an Australian GST registration include:

- Where goods are delivered within Australia
- If the foreign trader imports, installs or assembles goods in Australia
- Where goods are exported from Australia
- Supplies of services carried out in Australia – i.e. consulting services, sport and entertainment events. Note, from 1 July 2017 supplies of services to Australian consumers who are not registered for GST will also potentially attract GST.

GST registration threshold

There is an annual GST registration threshold of $75,000 based on both the current and projected turnover. It is not compulsory to register if the annual sales turnover is below this amount.

Many companies below this level do elect for a voluntary GST registration. This enables them to claim back any Australian GST incurred during the supply of the goods or services. For example, GST on the import of goods, or local sub-contractor invoices.

Registering for GST

A foreign, non-resident trader is required to appoint an Australian resident tax agent. The agent is responsible for all communications between the company and the Australian tax authorities. In addition, in certain circumstances, the Australian tax authorities will also require a local bank account for payments of tax credits or similar refunds.

GST compliance

Once registered, companies are required to file periodic GST returns, known as a Business Activity Statement (‘BAS’). The frequency of these depends on the trader’s turnover and is determined at the time of registration.

The BAS lists all of the company’s transactions related to the supply of the relevant goods or services.
Any GST due should be paid simultaneously with the filing of the BAS return.

In the case of a tax credit (where the GST incurred by the company exceeds the GST charged on its sales in the reporting period), documentary proof related to the transactions is often requested by the tax office.

GST recovery
There is no provision in Australia for GST reclaims, along the lines of the European Union's 8th & 13th VAT Directives. Instead, non-resident companies must register for GST along the lines outlined above.

Income tax
The corporate tax rate in Australia is a flat 30%, with the Australian tax year ending on 30 June. The ATO make provisions by application for corporate entities to change their year-end date so it is in alignment with their overseas parent entity. This is referred to as an application for a “Substituted accounting period” or SAP.

Holding companies
Australian tax law provides 100% participation exemption for companies with interests greater than 10% in active foreign corporate entities. It also provides relief from taxation for foreign income passed on to foreign shareholders.

Employing Staff in Australia
Australia has a complicated structure of laws regulating employment and in recent years these have been subject to major changes. The basic principles of Common Law are modified by both Federal and State legislation. Most employees are employed under Federal Legislation.

A system of industrial awards has been established which dictates the minimum terms and conditions of employment for most workers.

PAYG Withholding
Registration for PAYG Withholding is required for all employees. The rates of requisite withholding is issued each year and is dependent on the circumstances of the employee.

Superannuation Guarantee
The superannuation guarantee affects all employers and most employees. As an employer you must provide sufficient superannuation support for your eligible employees. Most employees, whether full-time, part-time or casual, are covered by the superannuation guarantee legislation which is currently 9.5% of an employee’s salary or wage. Employers do not have to provide superannuation support for certain categories of employees, including:

- when an employee is paid less than $450 in any calendar month;
- employees aged 70 years and over;
- non-resident employees who are paid solely for work undertaken outside Australia;
- resident employees paid by non-resident employers for work done outside Australia;
- employees under 18 years of age and working 30 hours or less per week;
- employees paid to work on a domestic or private nature for not more than 30 hours per week (e.g. a part-time nanny or housekeeper);
- employees who receive payments under the Community Development Employment Program (“CDEP”); and
- employees who made a choice, prior to the abolition of reasonable benefit limits to not receive employer super contributions because their accumulated super benefits exceeded the pension reasonable benefit limit.

Fringe Benefit Tax ("FBT")
Fringe benefits tax ("FBT") is a tax paid on certain benefits employers provide to their employees or their employees’ associates in place of, or in addition to, salary and wages.

Benefits can be provided by an employer, an associate of the employer, or by a third party under an arrangement with the employer. An employee can be a current, future or former employee. Fringe benefits include rights, privileges or services. Examples of fringe benefits are:

- allowing an employee to use a work car for private purposes
- giving an employee a discounted money loan, or
- paying an employee’s private health insurance costs

Some benefits such as laptop computers and mobile phones that are primarily used for work are exempt from FBT. An employer is required to pay FBT even if the benefit is provided by arrangement by an associate or by a third party, for example, as an employer you may deal with a supplier who, in turn, provides free goods to your employees.
There are particular concessions for employees living away from home, such as relocation, accommodation and food that may also apply.

**Payroll Tax**

Payroll tax is levied on a state basis, however the total wages paid Australian wide is included when calculating the payroll threshold. Currently in New South Wales payroll tax is levied on wages (and other employment-related payments) paid by an employer or a group of related businesses for services performed wholly within the State.

As at 1 July 2016, the current threshold in NSW when payroll tax becomes payable is $750,000 per year and is payable on amounts exceeding the threshold at 5.45%.

**Overseas Employees**

Where you intend to transfer overseas employees to carry out work in Australia, you will need to check with your local Australian High Commission, Consulate or registered immigration agent to determine what visas, if any, are required for those people to be employed in Australia.

**Living Away From Home Allowance (LAFHA)**

An employee is regarded as living away from their usual place of residence if they maintain a home in Australia, and would have continued to live at the former place if they did not have to work temporarily in a different location.

LAFHA is an allowance paid to an employee to compensate for additional expenses incurred whilst living away from home. The tax exempt component of LAFHA is covers such items as accommodation, food and other specific items. Each year the Australian Taxation Office publishes a tax determination which sets out acceptable amounts for the reasonable food component of the allowance. A reasonable amount for accommodation is based on several factors including location and family size.

While LAFHA is not available for most foreign workers, relocation expense FBT exemptions may be applicable.

We recommend taxation advice is sought in relation to packaging employee salaries for LAFHA.

**Employee Entitlements**

**Basic Employee Benefits & Conditions**

In Australia, the standard working week is 35 — 38 hours, generally Monday to Friday. Employees generally receive four weeks’ annual leave.

**Personal Leave (Sick Leave)**

Generally employees are entitled to 10 days paid personal/carer’s leave per year.

**Annual Leave**

Annual leave usually accrues at a rate of 20 days per year. On termination of employment, an employee must be paid any annual leave entitlement not taken.

**Long Service Leave**

Employees are entitled to Long Service Leave. The most common requirements are three months leave after 10 years continuous service with one employer. In some states the continuous service is 15 years.

**Occupational Health & Safety**

Legislation in each State & Territory specifies responsibilities for employers to ensure the health, safety and welfare at work of employees, independent contractors and members of the public.

Workers compensation insurance is generally compulsory for all employers.