



Doing Business & Investing in the USA

A Legal Perspective

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Doing Business & Investing in the USA – A Legal Perspective

- **Overview**
 - Formation
 - Corporate structure
 - Tax
 - Intellectual property
 - Privacy
 - Real estate
 - Employment
 - Litigation
 - Raising capital

■ Formation of entities

- The regulation of the formation and operation of corporations is left largely to the individual states.
- A US corporation may be formed under the laws of any state and have its principal place of business elsewhere provided it 'qualifies to do business' in each state in which it operates.
- Investors may choose the state law that best fits their needs.
- **DELAWARE**
 - Approximately 60% of Fortune 500 companies and over 50% of publicly-traded corporations are Delaware corporations.
 - No requirement for in-person meetings (*ie meetings by teleconference*) or even meetings at all (*ie by written consent*) – convenient where owners and directors are located outside of the US.
 - Simple annual reporting requirements.
 - Convenient incorporation process.
 - Tax advantages (generally no state corporate income tax, sales tax, etc.)

▪ **Corporate Structure**

▪ **Corporation**

- The debts, liabilities, acts and obligations of the corporation are separate from those of its shareholders.
- Files and pays its own tax return without regard to the tax status of its shareholders.

▪ **Limited Liability Partnership (LLP)**

- Provides partnership benefits - partners have limited liability.
- Partnership is not responsible for paying taxes itself.
- Partners have the right to manage the business directly.

▪ **Limited Liability Company (LLC)**

- Combines advantages of both a partnership (taxation purposes) and a corporation (limited liability to owners of the entity). Can elect to be treated as a corporation.
- Like corporations, a LLC has an existence separate from the persons who own, control and manage it.



Essential to consider the taxation consequences of each structure

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■ Taxation

- One of the most complex tax systems in the world.
- Federal, state and local government tax authorities.
- US individuals, organisations and companies are subject to income taxation – 'pay as you go' approach.
- Foreign corporations and their US branches are subject to US tax only on their income that is effectively connected to a US trade or business (**ECI**) or income that is Fixed, Determinable, Annual or Periodic (**FDAP**).
- Be mindful of the tax treaty between Australia and the US.



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For Australian tax residents investing in the US, some of the key Australian tax considerations include:

- Transfer pricing rules require cross-border transactions to be subject to "arm's length conditions" and appropriately documented.
- Thin capitalisation limits on debt financing for outbound investors, including recent changes to "safe harbour" (currently 60% of assets) and "worldwide gearing" tests.
- Tax exemption for dividends received where shareholding in US company is at least 10% (integrity measures currently being introduced for "hybrid" instruments).
- Capital gains tax exemption for disposal of shares in a US company, to the extent it carries out an "active" business.
- Controlled foreign corporations (**CFC**) rules - potential attribution of foreign profits to Australian shareholders on an accruals basis.
- GST - in particular the availability of input tax credits (GST credits) on Australian costs associated with the investment.

▪ Intellectual Property

- IP is often viewed as a company's 'most valuable asset'.
- Similar, but not identical, protections to Australian law.
- Protected under Federal law as patents, copyrights and trademarks.
- Take caution with employees and assignment of IP – in the US, IP can be found to vest with a particular employee and not the company. Different to Australian law.

▪ Patents

- Recently reformed to a 'first-to-file' system such that the right to the grant of a patent for a given invention lies with the first person to file a patent application for protection of that invention, regardless of the date of actual invention.

- **Trademarks**

- Follows a 'first-to-use' rule for obtaining trade mark rights, such that the first person to use a mark in the US will generally have superior rights to a person who files a trade mark application at a later date.

- **Copyright**

- Similar to Australian law.
- US copyright law protects 'original works of authorship' including literary, dramatic, musical, artistic, and certain other intellectual works. This protection is available to both published and unpublished works.
- Different to Australia (where no registration is required), must register the work with the United States Copyright Office to put you in a stronger position if infringement litigation arises.

▪ Privacy

- Very different to Australian law.
- 'Piece meal' system – generally protected under State law but there are some applicable Federal laws.
- Applied to specific sectors/issues (eg children online).
- Some sectors are subject to very rigorous Federal law (eg Health sector).
 - Very onerous, a lot of obligations on 'covered entities'.
 - Must safeguard 'protected health information' (**PHI**) (paper and electronic information).
 - Must notify individuals of uses of their PHI and keep track of disclosures of PHI and document privacy policies and procedures.
 - Must appoint a Privacy Official and a contact person responsible for receiving complaints and train members of the workforce in procedures regarding PHI.

▪ Real Estate

- Similar process to Australia.
- Title insurance.
- Due diligence process is important.
- Important to utilise local knowledge – Australian REITs for example have struggled.
- Consider joint venture options.



▪ **Employment**

▪ **Hiring**

- Employees can be hired on an 'at-will' basis, meaning they are employed for an indefinite period of time and either the employee or employer may terminate the employment at any time without prior notice.

▪ **T&Cs of Employment**

- Where a contract is in place, employers in the US are free to determine the compensation and benefits for their employees without any regulation by the government subject to various exceptions.
- Use the correct employing entity.

▪ **Employment (cont)**

▪ **Terminating**

- 'At-will' employees may be terminated at any time and for any reason, as long as the reason is not an unlawful one.
- Employers usually are not required to inform terminated employees, either verbally or in writing, of the reason for their termination.

▪ **Senior Employees**

- Notice provisions
- Health insurance
- Change of control provisions
- Stock options
- Written contract important and US law will apply
- Relocation benefits (very mobile workforce)

▪ **Litigation**

- Litigious environment.
- When contracting with a US party it is important to ensure the contract includes provisions dealing with an entitlement to recover the legal fees accumulated in connection with the litigation.
- Unless a contract or statute provides otherwise, US Courts require each party to bear the cost of its own attorney's fees.



▪ Raising Venture Capital in the US

- Understand the process in detail
 - Well worn path – speak to experienced mentors and advisors
 - US VC funds:
 - strict investment guidelines
 - very sophisticated
- Do not underestimate what is involved - prepare in advance
- A sophisticated company deck, business model and an IP plan are most important at the outset

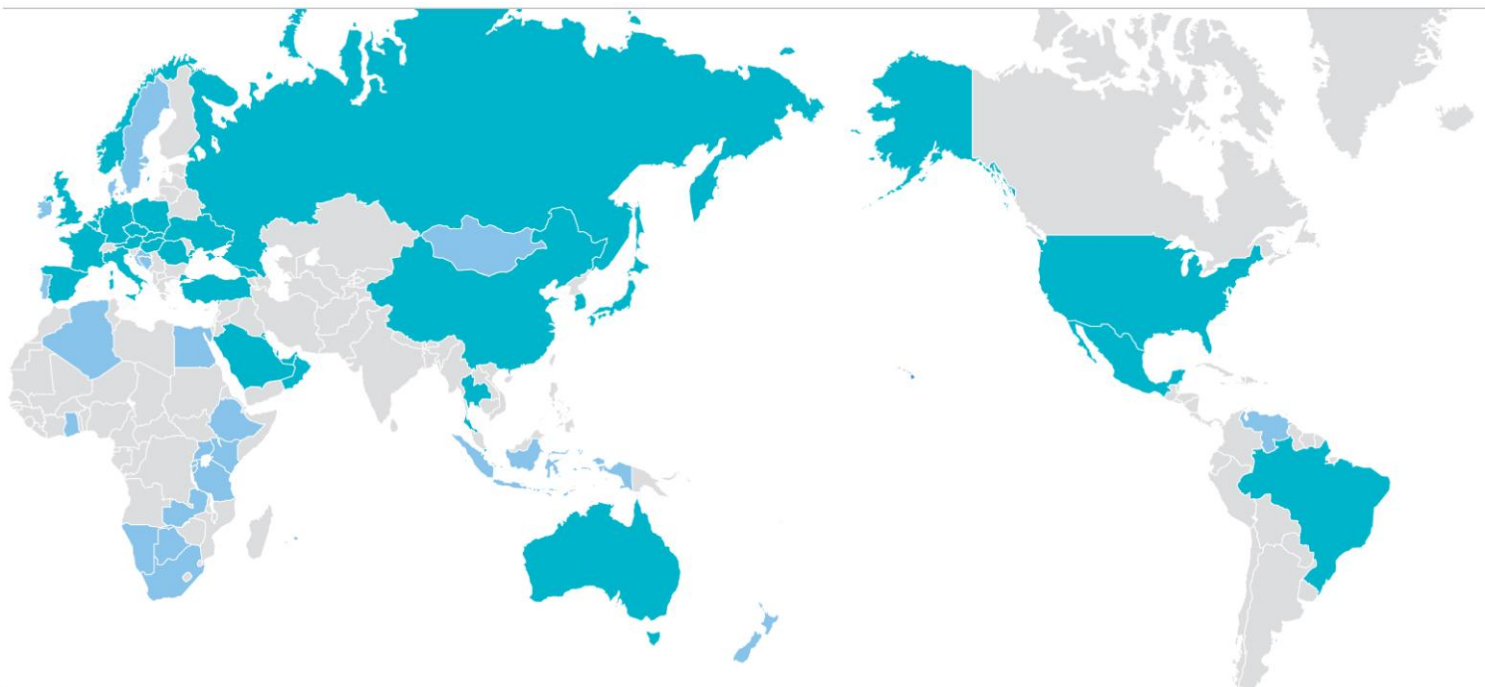
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- Some US VCs will be reluctant to invest in an Australian company
 - Consider a flip from Australia to the US (CGT rollover)
 - Need to limit number of shareholders
 - IP can remain in Australia
- If you want to incorporate direct in the US, ensure you set up a Delaware C-corp rather than a LLC

Other key differences

- The US provides diversity of financing sources - angel, seed, VC & Corporate Venture options
- More later stage funding options
- Incentive plans are important to US employees – 10 to 15% of equity for employees is common
- Introductions are important and validate what you are doing
- Culture - a US approach to doing business is often more direct than in Australia

DLA's Global Reach



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AUSTRALIA
Brisbane
Canberra
Melbourne
Perth
Sydney

BRAZIL
São Paulo

CHINA
Beijing
Hong Kong
Shanghai

GERMANY
Berlin
Cologne
Frankfurt
Hamburg
Munich

HUNGARY
Budapest

ITALY
Milan
Rome

JAPAN
Tokyo

KUWAIT
Kuwait City

MEXICO
Mexico City

NETHERLANDS
Amsterdam

NORWAY
Oslo

OMAN
Muscat

POLAND
Warsaw

QATAR
Doha

ROMANIA
Bucharest

RUSSIA
Moscow
St. Petersburg

SAUDI ARABIA
Riyadh

SINGAPORE
Singapore

SLOVAK REPUBLIC
Bratislava

SOUTH KOREA
Seoul

SPAIN
Madrid

THAILAND
Bangkok

TURKEY
Istanbul

UKRAINE
Kyiv

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Abu Dhabi
Dubai

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Birmingham
Edinburgh
Leeds
Liverpool
London
Manchester
Sheffield

UNITED STATES
Albany
Atlanta
Atlantic City
Austin
Baltimore
Boston
Chicago
Dallas
Houston
Los Angeles
La Jolla
Miami
Minneapolis

New York
Northern Virginia
Philadelphia
Phoenix
Raleigh
Sacramento
San Diego
San Francisco
Seattle
Short Hills
Silicon Valley
Tampa
Washington, DC
Wilmington

RELATIONSHIP FIRMS

ALGERIA
Algiers

BOSNIA-HERZEGOVINA
Sarajevo

BOTSWANA
Gaborone

BURUNDI
Bujumbura

CROATIA
Zagreb

DENMARK
Copenhagen

EGYPT
Cairo

ETHIOPIA
Addis Ababa

GHANA
Accra

INDONESIA
Jakarta

IRELAND
Dublin

KENYA
Nairobi

MAURITIUS
Port Louis

MONGOLIA
Ulaanbaatar

NAMIBIA
Windhoek

NEW ZEALAND
Auckland
Wellington

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RWANDA
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SOUTH AFRICA
Cape Town
Johannesburg

SWEDEN
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