



AUSTRALIAN BUSINESS  
Lawyers & Advisors

# Doing business in Australia

MARCH 2018

# Introduction

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## Guide to doing business in Australia

This Guide answers some of the most common questions an overseas investor may ask when establishing a business presence in Australia.

This Guide is not a substitute for legal advice specific to the circumstances of the relevant overseas investor.

## About Australian Business Lawyers & Advisors

Australian Business Lawyers & Advisors (ABLA) is an incorporated legal practice that is a wholly owned subsidiary of NSW Business Chamber. This puts ABLA in a unique position for a legal practice. As a mission based business, we focus on your business success and deliver commercially appropriate solutions to resolve your problems.

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# Overview of the Government and the Legal System

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## Government

Australia is a federation made up of 6 States (New South Wales, Victoria, Queensland, South Australia, Western Australian and Tasmania), 2 internal Territories (Northern Territory and Australian Capital Territory), and multiple small external territories. Australia has a growing resident population which currently exceeds 24 million.

Australia's system of government is based on the British Westminster parliamentary model. There are 3 levels of government - Federal, State or Territory, and Local. Foreign companies doing business in Australia must comply with laws existing at all three levels of government.

## Federal Parliament

The Constitution is the document that gives the Federal Parliament its powers. The Federal Parliament's responsibilities, subject to the Constitution, include the implementation of laws relating to corporations, taxation, defence, trade and commerce, workplace relations, trade practices (anti-trust), banking and insurance.

The Federal Parliament is comprised of two houses, being the 'House of Representatives' (lower house) and the 'Senate' (upper house). A Federal bill must be passed by both houses before it becomes law.

## State and Territory Parliaments

It is important that businesses are aware of the applicable State and Territory laws that apply to it in each State and/or Territory that they operate in, as different requirements may apply in relation to compliance with the laws of each individual State or Territory.

In Australia, Federal laws prevail over State laws to the extent that the two are inconsistent. The Federal Parliament may also make laws in respect of the two Territories, or may otherwise override the laws made by the Territory governments. The State and Territory Parliaments have the power to make laws for any purpose, unless a purpose has been specifically reserved for the Federal Parliament under the Constitution.

Areas of law that are important for State and Territory Governments include employment law (including payroll tax, unfair dismissal, workers compensation, and employee entitlements), property and business transactions (including stamp duty and tax), mining, consumer protection, and trade regulation.

The States and Territories compete with one another for foreign investment, including in relation to the establishment of offices for multinational corporations looking to move into the Asia Pacific region. States may be willing to provide benefits to corporations in return for a commitment to establish a head office in that State which will employ an agreed minimum number of personnel.

## Local Governments

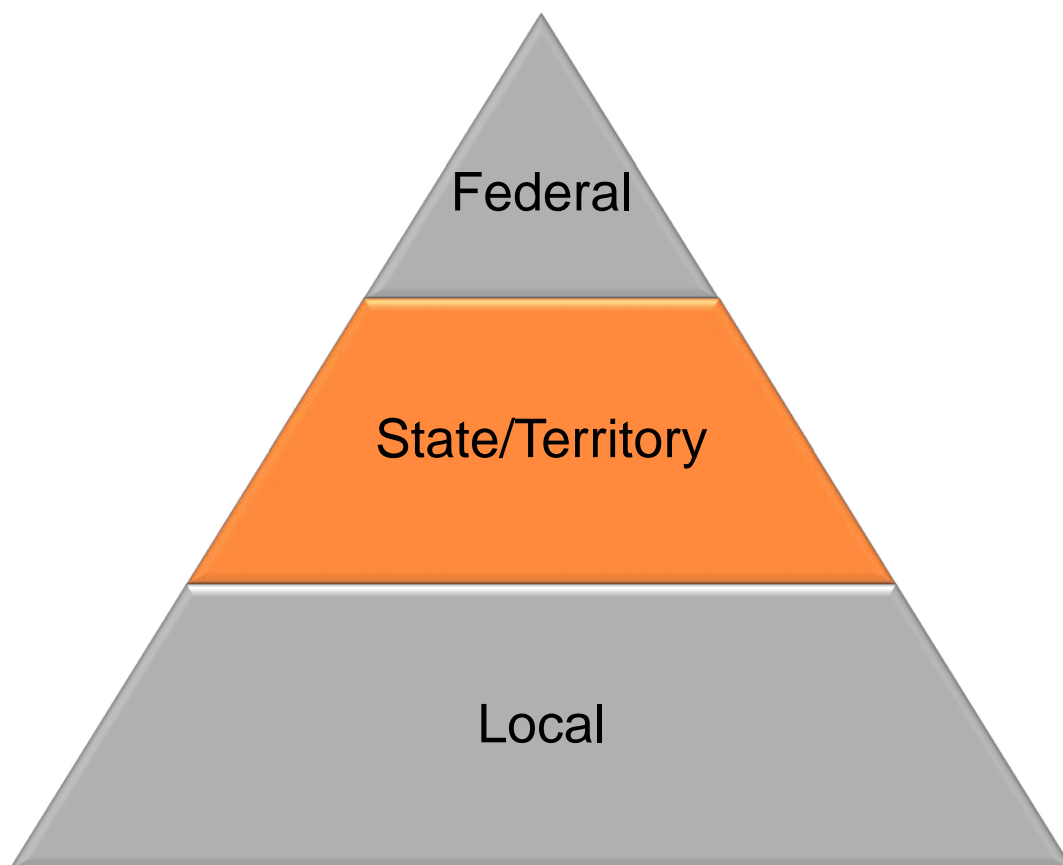
Issues that relate to small geographical districts, such as planning, building approvals, and some environmental matters are invariably managed by Local Governments. More information about environment, planning and development under Australian law can be found in the *Environment* section below.

## The Australian Legal System

The main sources of law in Australia are statutory law (such as legislation, regulations, and by-laws) as well as the common law (the decisions of the courts).

Statutory law is created by the Federal, Local, and State and Territory Governments. Meanwhile, the common law is created by the courts as they consider the matters brought before them. The common law decisions of higher-ranking courts prevail over the decisions of lower courts.

The Federal, State and Territory Governments have their own court systems. The highest appellate court in Australia is the High Court of Australia. The highest court in each State or Territory is the Supreme Court. In addition, there are numerous Federal, State and Territory panels and tribunals administering particular areas of law.



# Establishing a business in Australia

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## Introduction

When considering whether to begin operating a business in Australia, investors and business operators should consider the following:

- any need for foreign investment review (as outlined below);
- whether an existing business should be acquired, or whether a new business should be created;
  - if a new business is being set up, whether it will be operated through a subsidiary, or directly; and
  - if an existing business is being acquired, whether the acquisition is subject to regulation.

The *Corporations Act 2001* (Cth) (**Corporations Act**) is the primary governing instrument of corporations in Australia (see *Corporate law and regulatory bodies* below).

## Foreign investment review

### Foreign investment laws

Foreign investment in Australia is primarily controlled by:

- the *Foreign Acquisitions and Takeovers Act 1975* (Cth) (**FATA**); and
- Australia's Foreign Investment Policy.

Australia's foreign investment laws typically aim to encourage investment in Australia on the condition that the investment is in the national interest of Australia.

The FATA applies to investments that are proposed by individuals who are not ordinary residents in Australia, and corporations or trusts in which there is a substantial foreign interest, or in circumstances where several persons who are not ordinary residents in Australia hold an aggregated interest of 40% or more (collectively, **foreign investors**).

Under the FATA or relevant policy guidelines, foreign investors are required to notify the Treasury, through the Foreign Investment Review Board (**FIRB**), of certain proposed transactions. The transactions cannot be concluded until either the Treasury has notified the foreign investor that it does not object to the transaction, or the relevant waiting period has expired. The Treasury requires notification of the following proposed transactions:

- acquisitions of a 'substantial interest' (20% shareholding in the business, or 40% if the investment is made with other foreign persons and associates) in an existing Australian corporation or business where the consideration value is over A\$252 million (or A\$1,094 million if the investment is in an Australian corporation or business that operates in non-sensitive sectors);

- investments of 5% or more in the media sector; and
- acquisitions of interests in land above certain thresholds (starting at A\$15 million in the case of agricultural land).

To notify FIRB, a potential investor must lodge a statutory form and provide the information required with the form. Decisions are usually made within 10 days of an application being submitted, but may take up to 30 days in rare cases.

An interim stop order may be issued by FIRB if it requires additional time within which to consider an application. This will prevent the transaction from completing until the additional time period (which may be extended for up to an additional 90 days) has elapsed. It is more common for FIRB to request that an applicant withdraw and re-submit its notification. The Treasurer will examine particularly large or significant proposed transactions in consultation with FIRB.

It is not common for proposed transactions to be rejected by FIRB. A transaction will only be rejected if it is found to be inconsistent with Australia's national interest. However, approval may also be granted subject to the applicant agreeing to adhere to certain conditions, which are compulsory for the applicant if the transaction is to complete.

Businesses operating in industry sectors such as media, telecommunications, banking, civil aviation and shipping are subject to special rules under the Foreign Investment Policy.

#### **Guidelines for investments by foreign governments or their agencies**

FIRB must be notified of all proposed investments by foreign governments and their agencies (for example, state-owned entities and sovereign wealth funds). The Treasurer assesses the applications for these proposed investments similarly to ordinary applications by corporations and individuals. However additional considerations may also factor in to the Treasurer's assessment of whether the investment will be in the national interest of Australia.

In assessing proposals for investments by foreign governments, FIRB will take into consideration:

- the extent of influence and control that a foreign government has over the operations of an applicant, as well as any restrictions on how the entity may govern itself internally;
- the commercial objectives of, and applicable regulatory regime which applies to, the applicant. For sovereign wealth funds, FIRB will consider the fund's investment policy and the way in which it would exercise its power to vote in relation to Australian companies;
- whether competition in an industry or market sector may be adversely impacted by a proposed investment. FIRB will ordinarily seek guidance from the ACCC where questions of this nature arise;
- whether and to what extent the proposal, if approved, will impact on the revenue of the Australian government, and any government policies. The investment should not impact on the government's taxation revenue;
- the impact that a proposed investment might have on the ability of Australia to protect its strategic and security interests; and

- the impact that a restructure following acquisition of the Australian business would have on the trading activities of that business. For example, whether exports or research and development would be harmed.

These issues will often apply both to entities that are owned by foreign governments, and those that are not.

## Establishing a business presence in Australia

### Do you need to register a business presence in Australia?

Foreign companies are not always required to register a business presence in Australia before undertaking business in Australia. However, if a company “*carries on business*” in Australia, and the company is a “*foreign company*”, then the company is required to be registered with the Australian Securities and Investments Commission (**ASIC**).

The Corporations Act defines a “*foreign company*” as:

- a body corporate which has been formed or incorporated in an external territory or outside Australia; or
- an unincorporated body that is formed in an external territory or outside Australia and may sue and be sued or may hold property in the name of its secretary or other officers.

A foreign company “*carries on business*” in Australia if it:

- has a place of business in Australia;
- establishes or uses a share transfer office or share registration office in Australia; or
- administers, manages, or otherwise deals with property situated in Australia as an agent, legal personal representative or trustee, whether by employees or agents or otherwise.

However, the law in Australia does not consider a foreign company to be carrying on business in Australia merely because it:

- is or becomes a party to a legal proceeding or effects settlement of a legal proceeding or of a claim or dispute;
- holds meetings of its directors or shareholders or carries on other activities concerning its internal affairs;
- maintains a bank account;
- effects a sale through an independent contractor;
- solicits or procures an order that becomes a binding contract only if the order is accepted outside Australia;
- creates a debt or a charge on property;
- secures or collects any of its debts or enforces its rights in regard to any securities relating to such debts;
- conducts an isolated transaction that is completed within a period of 31 days, provided that it is not one of a number of similar transactions repeated from time to time; or

- invests any of its funds or holds any property.

Only passive or isolated transactions will typically reap the benefit of these exclusions. For example, if a company makes multiple contracts in Australia, or makes investments that require repeated administration management, the company is likely to be carrying on business in Australia under the law.

It is an offence to fail to register a foreign company carrying on business in Australia.

### Types of business entity

The primary ways in which foreign companies enter the Australian market are:

- by registering a foreign company in Australia and establishing a branch office; or
- by creating a new company in Australia or acquiring a “shelf company” and establishing a subsidiary.

### Other business entities

**Joint ventures** - There is no definition under Australian statutory law or the common law of what constitutes a “*joint venture*”. However, the following are considered to be variations of “joint ventures” in Australia:

- **incorporated joint venture** - each joint venturer holds a percentage of the share capital in a company that is incorporated to conduct the joint venture;
- **unincorporated joint venture** - no separate company is established to conduct the joint venture, but the joint venturers have a contractual association with each other; or
- **unit trust** - a trust is created with the joint venturers holding a percentage of the issued units.

(The tax implications of the above variations of “*joint venture*” are different in each case).

**Partnership** - Each State has its own laws in relation to partnerships which govern traditional “general partnerships” and “limited partnerships”. The following are types of partnerships in Australia:

- **general partnership** - each partner is jointly and severally liable for the liabilities of the partnership, and this liability will likely be unlimited. The partnership is not a separate legal entity from the partners, who are individual natural persons or corporations;
- **limited partnership** - at least one general partner has unlimited liability and at least one limited partner has capped liability. Some non-resident investors who are investing in eligible venture capital investments through a limited partnership are able to access exemptions from capital gains tax in relation to capital investments.

**Trusts** - A trust is not a separate legal entity, but is instead a legal relationship between the trustee (the legal owner of the trust property) and a beneficiary. The trustee has fiduciary duties that it must uphold in relation to the trust.



The major differences between a branch office and a subsidiary are summarised in the following table.

Issue	Branch office	Subsidiary
<b>Corporate law issues</b>	<ul style="list-style-type: none"> <li>• liability stays with the foreign company</li> <li>• foreign company must register with ASIC</li> <li>• assigned an Australian Registered Body Number (<b>ARBN</b>) only</li> <li>• financial reports must be lodged with ASIC annually, including global financial accounts of the foreign company, unless relieved by ASIC. ASIC will usually accept reports prepared in accordance with the laws of foreign company's origin</li> </ul>	<ul style="list-style-type: none"> <li>• liabilities remain with subsidiary (separate legal entity) unless parent or foreign company gives a guarantee, or the subsidiary trades while insolvent</li> <li>• company is registered with ASIC. Third parties in Australia are more likely to deal with an Australian company</li> <li>• assigned an Australian Company Number (<b>ACN</b>)</li> <li>• annual lodgement of financial reports with ASIC unless exempted by ASIC. Small proprietary companies may be exempted</li> </ul>
<b>Foreign investment review</b>	<ul style="list-style-type: none"> <li>• approval may be required before an acquisition of assets or land</li> </ul>	<ul style="list-style-type: none"> <li>• approval may be required before the establishment of the subsidiary</li> <li>• approval may be required before an acquisition of assets or land</li> </ul>
<b>Taxation</b>	<ul style="list-style-type: none"> <li>• taxed as a non-resident, separate entity</li> <li>• taxed on all income sourced from Australia at the company tax rate (currently 30% unless the business is a 'small business entity')</li> <li>• may be subject to GST obligations and obliged to obtain an Australian Business Number (<b>ABN</b>) and register for GST</li> </ul>	<ul style="list-style-type: none"> <li>• Australian resident for tax purposes</li> <li>• taxed on all income regardless of source at the company tax rate</li> <li>• may be obliged to obtain an ABN and register for GST</li> </ul>
<b>Exchange controls</b>	<ul style="list-style-type: none"> <li>• restrictions and reporting requirements imposed on head / branch dealings</li> </ul>	<ul style="list-style-type: none"> <li>• reporting requirements on significant cash transactions</li> </ul>

## Opening a branch office

In order to open a branch office, the foreign company is required to be registered in Australia.

### Steps to register a foreign company

1. Conduct an ASIC search to ensure that the name of your company is available.
2. Reserve the company name (optional).
3. Complete and lodge an application form with ASIC together with the required documents, and pay the prescribed fee.

The following information is usually required upon registration of a company:

- (a) a list of the company's directors, including each director's full name, all former names, residential address, date of birth, and place of birth;
- (b) for directors who are resident in Australia and members of a local board of directors, a memorandum that is duly executed by or on behalf of the foreign company stating the director's powers;
- (c) the company's foreign registered office or principal place of business;
- (d) the company's registered office in Australia;
- (e) details of an agent in Australia who is authorised to accept legal process and notices on the company's behalf;
- (f) a memorandum of the Australian agent's appointment;
- (g) a current certificate of registration or similar document (within 3 months of registering with ASIC) that confirms that the company is currently registered;
- (h) a certified copy of the company's constitution (or memorandum and articles of association); and
- (i) a certified English translation of any documents that are not in English.

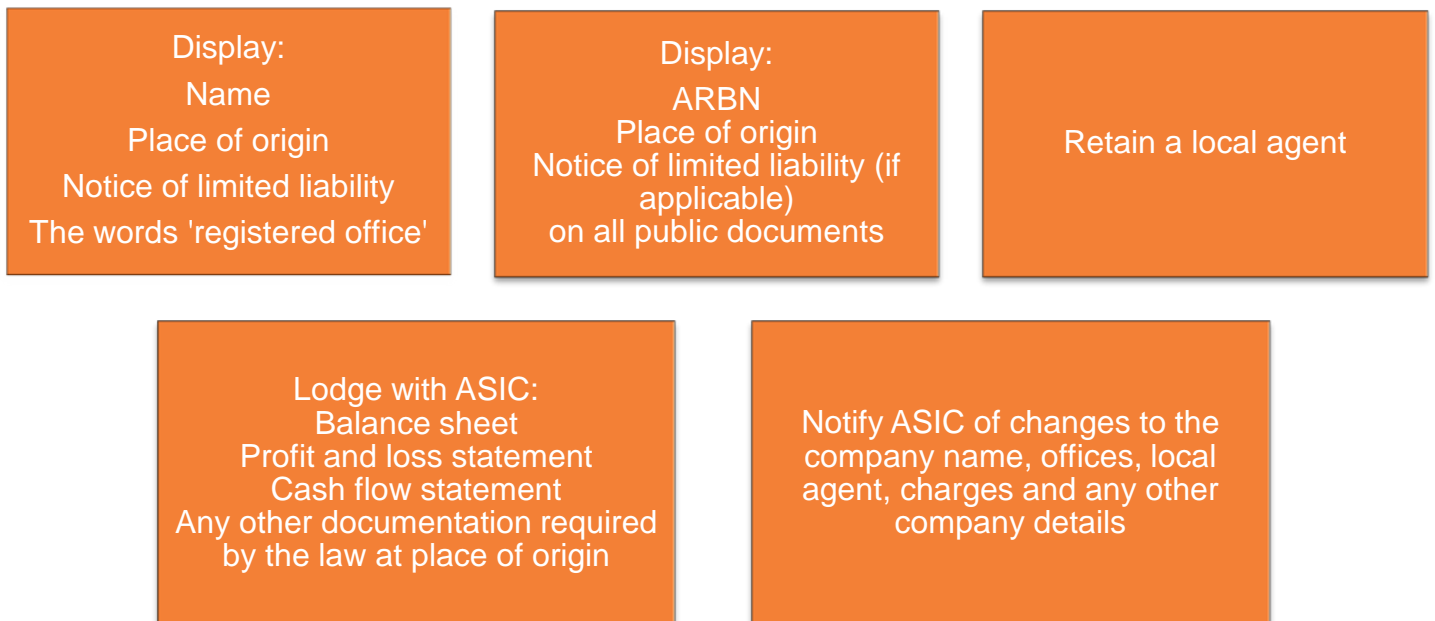
Once registered, the foreign company will be issued with an ARBN.

### Obligations of a registered foreign company

The registered foreign company must:

1. display at its registered office and all places of business its name, place of origin, notice of limited liability (if applicable) and the words "*registered office*" (if applicable);
2. display its ARBN, name, place of origin, and notice of limited liability (if applicable) on all public documents;
3. retain a local agent;

4. lodge the following financial statements (which ASIC may require to be audited) with ASIC once a year:
  - (a) balance sheet;
  - (b) profit and loss statement;
  - (c) cash flow statement; and
  - (d) any other document the company is required to prepare by the laws of its place of origin; and
5. notify ASIC of changes to the company name, offices, local agent, charges and other company details



### Creating a subsidiary

Creating a new subsidiary requires the incorporation of an Australian company.

#### Types of Australian companies

The following types of companies can be registered with ASIC:

1. a **proprietary company** either limited by shares or with unlimited share capital; or
2. a **public company** limited by shares, limited by guarantee, unlimited with share capital, or with no liability (only applicable to mining companies).

Each company type attracts different restrictions and corporate governance requirements.

## Proprietary Companies

- The most common type of Australian company is a proprietary company. It is more common to incorporate as a proprietary company as the administration is somewhat simpler than for public companies and is suitable for smaller operations.
- Section 113 of the Corporations Act requires that a proprietary company:
  - must be limited by shares or be an unlimited company with share capital;
  - must have no more than 50 non-employee shareholders; and
  - must not fundraise from the public or do anything governed by Chapter 6D of the Corporations Act (disclosure obligations).
- ASIC may direct a proprietary company to change to a public company if it has contravened the requirements in section 113 of the Corporations Act. For example, if a proprietary company has more than 50 non-employee shareholders, it must convert to a public company.

## Public Companies

- A public company is defined in the Corporations Act as any company other than a proprietary company.
- The ongoing reporting obligations for a public company are more onerous than for a proprietary company. For example, a public company is required to prepare and lodge annual audited financial accounts and directors' reports with ASIC.
- Incorporating as a public company should therefore only be considered where the company will have more than 50 non-employee members or is planning on undertaking functions that are limited to a public company (for example, acting as the responsible entity for a managed investment scheme, or public fundraising, or listing on a stock exchange).

## Public Company Limited by Shares

A public company limited by shares is defined in the Corporations Act as a company whose members have liability limited to the amount unpaid on shares held by them.

## Public Company Limited by Guarantee

- A public company limited by guarantee is defined in the Corporations Act as a company whose members have liability limited to an amount agreed to be contributed when the company is wound up.
- A 'not for profit' or charitable organisation should be incorporated as a public company limited by guarantee. This structure will limit the liability of the company's members to the amount that the members have undertaken to contribute to the property of the company if it is wound up.
- Section 150 of the Corporations Act provides that a public company limited by guarantee may also be registered without the word 'Limited' in its name if its constitution:

- requires the company to pursue charitable purposes only and to apply its income only for promoting those purposes;
- prohibits the company making distributions to its members or paying fees to its directors; and
- requires the directors to approve all other payments the company makes to directors.

### Public Company Unlimited with Shares

A public company unlimited with shares is defined in the Corporations Act as a company whose members have no limit placed on their liability. This is not a common entity.

### No Liability Company

The Corporations Act provides that a company may be registered as a no liability company if the company has a share capital, exists solely for the purpose of mining, and has no contractual right under its constitution to recover calls made on its shares from a shareholder who fails to pay them.

### Steps to incorporate an Australian subsidiary

The steps to incorporate an Australian subsidiary are as follows:

1. Choose whether a new company will be formed or a shelf company acquired.
2. Choose a name for the Australian subsidiary and ensure it is available by conducting a search of ASIC's database.
3. Reserve the name (optional).

Whether you are forming a new company or acquiring a shelf company, ASIC will require you to provide information that is mostly the same, including:

- the proposed type of company (e.g. a proprietary company limited by shares);
- the proposed company name;
- the registered office and principal place of business;
- details of each person (or company) who has consented to becoming a member, the number and class of shares each member agrees to take up, and the amount to be paid for each share (and the amount each member agrees in writing to be unpaid if applicable). Each member must have consented to these details in writing;
- details of each person who has consented to become a director (one of whom must be resident in Australia) or secretary of the company, including each person's full name, all former names, residential address, date and place of birth; and
- details of any holding company.

A proposed public company must also lodge a copy of its constitution with ASIC.

Once registered, the company will be issued with a 9-digit Australian Company Number (**ACN**).

## Obligations of an Australian company

Normally, a proprietary company must:

1. display its name and ACN at its place(s) of business;
2. display its name and ACN on all public documents,
3. notify ASIC of changes to its company details;
4. maintain registers of its members, option holders, debenture holders and chargees;
5. keep member meetings and directors meetings; and
6. pay a review fee to ASIC each year.

If the proprietary company is controlled by a foreign company for all or part of the year and is not consolidated in financial statements for that year which are lodged with ASIC, it must prepare:

- a balance sheet;
- a profit and loss statement;
- a cash flow statement;
- notes to the financial statements;
- a director's declaration about the statements and notes;
- a consolidated statement; and
- a director's report.

The financial statements are usually required to be audited. Copies of the above documents are also required to be sent to the company's members.

Public companies have additional obligations under Australian law, including the obligation to hold annual general meetings.

## Other establishment considerations

### Australian Business Number (ABN)

An ABN is a unique identification number that is used by Australian businesses when dealing with the Australian Tax Office (**ATO**) and other government agencies across all levels of government.

An ABN is mandatory for businesses that need to register under the Goods and Services Tax scheme (see *Taxation* below). It is used for a range of purposes, including obtaining input tax credits under the Goods and Services Tax scheme.

ABN's are issued by the ATO and are usually comprised of the corporation's ACN prefixed by two additional numbers.

## Registering a business name

Unless a business is carried on under the name of the individual or company that operates it, the trading name must be registered with ASIC in the national Business Names Index.

Business names can usually be registered if they are available, unless the business name is already registered to another person, or if the business name is misleading or deceptive.

It is important to note that registered business names do not provide the same level of protection as registered trade marks (see *Intellectual Property* below). Proposed business names should be checked against registered trade marks through a search conducted with IP Australia.

## Acquisitions

### Introduction

A foreign company may also acquire an existing business. The Corporations Act will regulate some acquisitions under certain circumstances.

### Significant thresholds

A number of significant thresholds exist which are relevant to any foreign entity that wishes to acquire a substantial stake in a company listed on the Australian Stock Exchange (**ASX**). Some of these thresholds also apply to unlisted companies:

- 5% - if a person's interest is greater than 5%, then they must file a substantial shareholder notice with ASX using the publicly available notice. Each change of 1% or more in the holding must also be notified, unless the person's interest falls below 5%;
- 10% - if a shareholder has an interest of more than 10%, that shareholder is able to prevent a bidder from acquiring the shares held by any remaining shareholders;
- 20% - an interest of more than 20% can be obtained using a limited number of methods. The two primary methods are by a takeover bid or a scheme of arrangement (see the table on the next page);
- 25% - a shareholder with an interest greater than 25% can block special resolutions (which require 75% support) being passed, such as changes to the company's constitution, some capital reductions and buy-backs;
- 50% - a shareholder with an interest greater than 50% achieves voting control for ordinary resolutions, such as the power to appointment and remove directors;
- 75% - a shareholder with an interest greater than 75% can ensure a special resolution is passed;
- 90% - a shareholder with an interest of 90% or more can enforce compulsory acquisition (squeeze out) of minority shareholders; and
- 100% - complete control of the target is achieved.

## Acquiring more than 20%

The two most common ways in which investors wishing to acquire a holding of more than 20% in a listed company do so are by **takeover bids** and **schemes of arrangement**. The key features of each are described below:

Issue	Takeover bid	Scheme of arrangement
<b>Agreed or contested?</b>	Can be used for either agreed or hostile acquisitions.	Requires the co-operation of the target company.
<b>Offer price</b>	Various forms of payment including cash, shares in itself (or a related company) or a combination of cash and shares may be offered by the acquirer.	
<b>Process</b>	<ol style="list-style-type: none"> <li>1. A bidder's statement is sent by the acquirer to all target company shareholders, providing details of the offer, source of funds, intentions in relation to the target and the formal offer terms.</li> <li>2. The target company sends a statement to all shareholders, containing the directors' recommendation about accepting or rejecting the bid.</li> <li>3. The shareholders must be allowed at least 1 month to consider the offer, but up to 12 months may be allowed if necessary to satisfy all conditions.</li> <li>4. Payments to shareholders are made when all conditions are satisfied or waived.</li> </ol>	<ol style="list-style-type: none"> <li>1. The target company prepares a notice of meeting and explanatory statement, including the directors' recommendation, for a meeting to approve the proposed scheme of arrangement. The bidder will provide information required for the notice of meeting.</li> <li>2. ASIC must be given at least 2 weeks to review the draft meeting documents before the target company seeks court approval to convene the meeting.</li> <li>3. The meeting documents must be provided to shareholders at least 28 days prior to the meeting. If shareholders approve the transaction, a final court approval is obtained.</li> <li>4. Payments to shareholders are then made.</li> </ol>
<b>Conditions</b>	<ul style="list-style-type: none"> <li>• Minimum acceptances.</li> <li>• Regulatory approvals (e.g. FIRB, ACCC).</li> <li>• No material adverse change in the target's business.</li> </ul>	<ul style="list-style-type: none"> <li>• Regulatory approvals (e.g. FIRB, ACCC).</li> <li>• No material adverse change in the target's business.</li> <li>• No change in the directors' recommendation.</li> </ul>
<b>Shareholder approval requirements</b>	Approval by shareholders at a general meeting is not required.	The proposal must be approved by 75% of the votes cast (by number of shares) and greater than 50% of the number of members who vote (by headcount).
<b>Timing</b>	At least 3 months from initial announcement to completion.	Approximately 3 months from initial announcement to completion.



<b>Squeeze out</b>	The acquirer must have at least 90% of the shares at the end of the bid to then be able to compulsorily acquire any dissenter's shares on the same terms as the bid.	Not required as the scheme (if approved) binds all shareholders, whether or not they voted in favour of the scheme.
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Detailed advice should be obtained before a 20% limit is exceeded to ensure compliance with the strict requirements of any exceptions.

# Overview of Laws in Australia

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## Introduction

This section provides an overview of the key areas of law that an overseas investor must comply with while doing business in Australia.

## Corporate laws and regulatory bodies

### Corporations Act and ASIC

The Corporations Act and its regulations are the principal governing documents for companies doing business in Australia.

The Corporations Act governs:

- the registration of a foreign company's presence in Australia;
- the structures of domestic or foreign companies under which they may conduct business in Australia;
- the requirements and reporting obligations of the business; and
- the procedure for acquiring a company listed on the Australian Securities Exchange.

These issues are administered and enforced by ASIC.

### Other important bodies

- The **Australian Competition and Consumer Commission (ACCC)** monitors competition, fair trading and consumer protection issues. It is the primary administrator of the national competition legislation which covers a range of topics, including anti-competitive practices, company mergers and acquisitions, consumer protection, and product safety and liability.
- The **Australian Tax Office (ATO)** is the statutory authority responsible for administering the Australian tax system. Among other things, it is responsible for the tax aspects and regulation of Australia's superannuation system, administering the process of annual self-assessment, and conducting random audits on companies and individuals.
- The **Australian Securities Exchange (ASX)** supports equities, derivatives and enterprise trading markets. It applies the ASX Listing Rules and ensures companies comply with certain disclosure and market awareness obligations.
- The **Office of the Australian Information Commissioner (OAIC)** is Australia's data protection authority, and is established under the *Australian Information Commissioner Act 2010* (Cth). It has functions dealing with privacy, freedom of information and certain government policy functions in relation to government information.

- The **Australian Prudential Regulation Authority (APRA)** is a statutory authority responsible for management of financial institutions. It regulates banks, life insurance companies, building societies, credit unions, friendly societies and superannuation funds.
- The **Offices of State Revenue (OSR)** are the state bodies responsible for collecting State-based taxes (e.g. stamp duty). In New South Wales, the OSR is a division of the Department of Finance, Services and Innovation.



## Taxation

### Overview

The Federal Government levies taxes including income tax, capital gains tax, fringe benefits tax, goods and services tax, customs duty on imports, withholding taxes and exports duty.

The State governments also levy taxes such as transfer duty, land tax and payroll tax. These taxes vary between States.

The Australian tax year generally ends on 30 June, although companies may choose to lodge their tax return in line with reporting requirements in their home jurisdiction.

### Taxation of a branch office

Under the Income Tax legislation, a non-resident company, which includes a branch office, is liable to pay tax on Australian-sourced income. However, this is generally overridden by provisions of any relevant Double Taxation Agreement (**DTA**) between Australia and the country in which that company is normally domiciled. Accordingly, foreign companies are only taxed on Australian-sourced profits if business is being conducted through a Permanent Establishment (**PE**) in Australia.

A PE is defined in most DTAs to mean “*a fixed place of business through which the business of an enterprise is wholly or partly carried on*”. A PE will exist if it carries on business through a person who has complete authority to enter into contracts on behalf of the enterprise on a regular basis. On this basis, a branch office may constitute a PE in Australia, depending on the nature of activities conducted.

Small business entities will have their profits taxed at the Australian small business corporate taxation rate of 28.5%. Most other PEs will have their profits taxed at the corporate tax rate of 30%. Expenses reasonably incurred by the PE in connection with generating assessable income, whether incurred in Australia or elsewhere, will also be deductible.

Capital gains roll-over relief is available on certain capital gains tax events, such as transfer of an asset from a PE to a subsidiary, which would facilitate any transfer of such assets from a PE to a subsidiary in due course.

### Taxation of a subsidiary

Under Income Tax legislation, resident companies are taxed on their worldwide income, assessable at the corporate tax rate.

Withholding tax is payable on royalties and unfranked dividends paid to a subsidiary of a non-resident company, but usually at reduced rates under the relevant DTA.

A subsidiary or branch in any case must appoint an Australian resident person to act as its public officer. The appointment must be made within 3 months of the branch or subsidiary coming into existence, notified to the ATO.

## Goods and Services Tax

Australia imposes a broad based consumption tax on goods and services (**GST**) of 10%. A business with annual turnover of more than \$75,000 is required to remit GST of 1/11th of the GST-inclusive price of taxable supplies. In order to preserve tax neutrality, recipients of taxable supplies are entitled to an input tax credit. Suppliers then either remit the net amount or claim a net refund from the ATO at the end of the tax period, which is usually quarterly.

As suppliers pass on the cost of GST to customers, only the final customer ultimately pays the GST. Foreign investors should be aware that some supplies are GST-free while others are input taxed, and to take note of whether a price is inclusive of GST.

## Capital Gains Tax

Capital gains tax is imposed on the capital proceeds of the disposal (or deemed disposal) of a capital asset. Capital losses can only be offset against capital gains, but may be carried forward indefinitely. Capital gains will only arise where the asset has a 'necessary connection with Australia', which include interests in land, or shares in a land-rich Australian company. Capital gains are taxed at the corporate tax rate.

## Dividends

Australia employs a dividend imputation system, where tax paid at the corporate level is imputed to dividend recipients who receive a franking credit for tax paid. However, imputation credits are not available to foreign recipients of Australian dividends. The general dividend withholding rate for dividends payable to non-residents is 30%, but is often reduced under the relevant DTA. Dividends of an Australian PE paid to foreign recipients are therefore taxed at the corporate tax rate and at the relevant dividend withholding tax rate.

## Royalties

Royalties paid by an Australian company to a foreign domiciled entity will be subject to royalty withholding tax rate of 30%, subject to the relevant rate under an applicable DTA. However, royalties earned by an Australian PE will be subject to assessment in Australia.

## Employment taxes

Employers are required to withhold and/or calculate certain amounts in respect of the salary or wages of employees for the purposes of certain employment taxes:

- **PAYG** – employers are required to withhold personal income tax amount of employees to be remitted to the ATO.
- **Fringe Benefits Tax** – tax payable on benefits provided to employees such as allowances, accommodation, travel expenses etc.
- **Superannuation** – employers are required to contribute 9.5% of an employee's salary to a complying superannuation fund. This will rise to 10% on 1 July 2021, and then by 0.5% on 1 July each year following until it reaches 12% on 1 July 2025.
- **Pay-roll Tax** – a State based tax calculated on the salaries and wages paid by an employer in respect of services performed in that particular state.

## Personal income tax

As provided by Income Taxation legislation, case law and ATO determinations, the incomes of individuals are subject to taxation depending on residence and source criteria charged on a progressive scale. Non-residents are taxed on their Australian-sourced income and capital gains from assets with a necessary connection with Australia, while residents have income tax calculated on their worldwide income. The top tax bracket is 45%.

## Competition and Consumer Law

The Australian Consumer Law (**ACL**) is governed by comprehensive legislative provisions which are principally contained in the *Competition and Consumer Act 2010* (Cth) (**CCA**). The Australian Competition and Consumer Commission (**ACCC**), which is an independent statutory authority financed by the Australian Government, is the principal regulator of competition and consumer law in Australia.

Competition and consumer law has widespread application to commercial transactions and disputes and must be considered whenever commercial transactions are being planned and implemented by foreign investors.

All businesses in Australia are expected to observe their obligations under the ACL:

- businesses must not make false, misleading or deceptive claims about a product or service.
- all businesses are entitled not to be treated in an unconscionable way by other businesses.

Contravention of the ACL is an offence, and the penalty for breach of the following key provisions carry a maximum fine of \$220,000 for an individual and \$1.1 million for a body corporate.

### Misleading and deceptive conduct

It is unlawful for a business to make statements in trade or commerce that:

- are misleading or deceptive
- would be likely to mislead or deceive.

Failing to disclose relevant information, promises, opinions and predictions can also be misleading or deceptive. For example, businesses cannot rely on small print and disclaimers as an excuse for misleading or deceptive conduct.

### False or misleading representations

It is unlawful for a business to make false or misleading representations about goods or services when supplying, offering to supply, or promoting those goods or services.

Whether a representation is false or misleading will depend on the circumstances. It is also unlawful for a business to make a misleading testimonial. A business must produce evidence to show that a testimonial is not misleading.

## Unfair contracts

Under the unfair contracts provisions any term of a standard form consumer contract or small business contract which is deemed to be “*unfair*” may be found to be void and treated as if it never existed. The regime applies to standard form contracts entered into between corporations and consumers or small businesses, and that relate to the supply of goods or service for \$40,000 or less in consideration.

## Unconscionable conduct

The ACL expands the common law of unconscionable conduct by introducing, in effect, a general duty to trade fairly in relation to consumers, and also in respect of certain business transactions.

Generally, ‘unconscionable conduct’ is a statement or action so unreasonable it defies good conscience. A business must not act unconscionably when:

- selling or supplying goods and services to a consumer
- supplying or acquiring goods and services to or from a business.

## Good business behaviour

When making business purchases, the ACL provides businesses with guaranteed rights.

When a business purchases a good of a value of \$40,000 or less, for use within the business, the law guarantees the product must be safe, durable, free from defects, fit for purpose, acceptable in appearance, match its description and match any sample or demonstration model. This does not affect other warranties that may be offered as part of the transaction.

## Be aware of your customers’ rights

Every business has a responsibility to respect a customer’s rights under the ACL, and to honour its legal obligations.

Foreign investors are reminded that when conducting business in Australia they are required to meet general standards of business conduct, as well as comply with specific protections for consumers against unfair business practices. These include:

- ensuring that standard form contracts do not have unfair terms;
- honouring consumer guarantees;
- ensuring the safety of products and services; and
- complying with rules on sales practices, including those on prices, consumer information, lay-by agreements and unsolicited consumer agreements.

## Enforcement

Compliance measures are supported by a range of escalating enforcement options that can be used if a business fails to comply with or seriously contravenes the ACL.

A business may be investigated by an ACL regulator as a result of:

- a complaint from a consumer, competitor or other regulator
- market intelligence
- information from whistleblowers / informers
- a targeted compliance activity designed to identify and reduce non-compliant behaviour by businesses in a particular industry or area.

ACL regulators have a range of civil, administrative and criminal enforcement remedies at their disposal under the ACL and supporting legislation.

## Employment law

The *Fair Work Act 2009* (Cth) introduced significant changes to the legal framework for industrial relations in Australia. Generally speaking, the changes established a new national framework for employers who are trading, financial or foreign corporations (**Corporations**).

Under the Federal framework, most State industrial laws do not apply to such employers, while State industrial laws still apply to private sector employers who are not Corporations, such as sole traders and partnerships.

In Australia, the terms and conditions of employment for the employees of Corporations are currently governed by one or more of the following:

- Federal legislation governing employment terms and working conditions, including most leave entitlements. State industrial legislation still applies, but only to a limited extent;
- Federal and former State awards – awards are quasi-legislative rulings regulating the minimum terms and conditions of employment for employees in specific industries and occupations; and
- the specific terms of the individual employment contract.

Typically, disputes between employers and employees may arise in relation to issues such as: remuneration; restraint of trade (the principles of law vary between each State); confidentiality; termination (subject to minimum statutory periods and in some cases, an implied term of reasonable notice); and allegations of unlawful discrimination.

## Contractual terms

Employment terms may be written or oral, and may include implied terms that are the custom or practice of the employer or a particular industry.

## Statutory entitlements

Federal industrial laws establish minimum entitlements for the employees of Corporations as set out below. These entitlements are referred to as the “*National Employment Standards*” (**NES**), which cannot be contracted out of.



The NES comprises:

- paid annual leave of 4 weeks per year;
- long service leave;
- paid public holiday entitlement;
- unpaid parental leave of up to 12 months with the right to extend for an additional 12 months;
- personal/carer's leave of 10 days per annum. Personal leave may be taken for an illness suffered by an employee or if the employee is caring for a family member or member of their household who is unwell. Unpaid carer's leave of 2 days per occasion is available if an employee's entitlement to personal/carer's leave is exhausted;
- bereavement leave of 2 days per occasion is also provided;
- community service leave;
- notice of termination and redundancy pay;
- maximum 38 hours plus reasonable additional work per week; and
- right to receive a Fair Work information statement.

### Termination of employment

Employers in Australia, whether or not they are a Corporation, may not lawfully terminate employees for certain reasons, including:

- the employee's membership of a trade union;
- the temporary absence of an employee due to illness or injury;
- the employee's legal proceedings against the employer or the employee's complaint in relation to another employee;
- discrimination on the grounds of an employee's race, colour, sex, sexual preference, age, physical or mental disability, political opinion, national extraction or social origin, carers responsibilities and/or pregnancy; and
- the employee's refusal to negotiate an individual workplace agreement with their employer.

Australian legislation contains provisions allowing most employees to commence proceedings for 'unfair dismissal', where it is alleged that the termination of their employment was harsh, unjust or unreasonable.

The main remedies available in unfair dismissal proceedings are reinstatement of the employee to the position held prior to termination (or to another suitable position within the business), or, more commonly, compensation.

Notice of termination should be tendered to employees upon the decision being made to terminate the employee's employment, except in circumstances where summary dismissal (i.e. dismissal without notice) is warranted, such as where there has been gross misconduct. Pay in

lieu of notice is also acceptable. Minimum notice entitlements are generally set out in Federal legislation, modern awards, or the contract of employment.

Severance payments are payments tendered to an employee when their position is made redundant. The purpose of severance payments is to assist employees during the period that they are out of work and looking for alternative employment. Minimum severance payments may be set out in legislation, awards and sometimes in contracts of employment or company policies.

### Superannuation

The *Superannuation Guarantee (Administration) Act 1992* (Cth) requires employers to pay 9.5% of their employee's salary (up to a capped maximum amount) to an approved superannuation fund. This will rise to 10% on 1 July 2021, and then by 0.5% on 1 July each year following until it reaches 12% on 1 July 2025.

### Workplace health and safety

Each State and Territory has extensive legislation dealing with workplace health and safety (**WHS**) issues (also known as occupational health and safety in some States).

WHS legislation generally requires employers to ensure that:

- the premises controlled by the employer are safe and free from risk to the health and safety of employees;
- any plant or substance provided for use by employees is safe and from risk to the health and safety of employees;
- the systems of work and the working environment are safe and from risk to the health and safety of employees;
- employees are provided with information, instruction, training and supervision as necessary in respect of WHS issues; and
- employees are consulted in relation to WHS issues.

Employers are also required to have workers compensation insurance cover for their employees in respect of workplace injuries. The rates and regimes differ between the various States and Territories in accordance with the applicable legislation.

### Anti-discrimination

Discrimination in the workplace is dealt with under both State and Federal legislation. It is unlawful to discriminate against an employee, whether directly or indirectly because of an employee's race, sex or sexual preference, pregnancy, marital status, disability, identification as being transgender, age, or parental or caregiver status.

State and Federal legislation imposes significant obligations on employers with respect to discrimination, and employers may be held vicariously liable for discriminatory conduct engaged in by its employees. Employers should develop appropriate policies and training programs with

respect to discrimination matters in order to guard against this risk. Employers should ensure these policies are kept up to date in line with the applicable anti-discrimination laws.

## Privacy

The *Privacy Act 1988* (Cth) is an Australian law which regulates the handling of personal information about individuals. It sets out 13 Australian Privacy Principles (**APPs**) that apply to the handling of personal information by most Australian Government agencies and some private sector organisations. Employee records are generally exempt from the obligations contained in the APPs. The handling of personal information by a private sector employer is exempt from the APPs if it is directly related to a person's current or former employment relationship, or, an employee record relating to that person.

## Intellectual property

Intellectual property rights in Australia are protected by Federal legislation and the common law. Australia is also a signatory to the World Trade Organisation Agreement on Trade-related Aspects of Intellectual Property Rights, which sets minimum standards for intellectual property protection and enforcement.

## Copyright

The *Copyright Act 1968* (Cth) (**Copyright Act**) protects all original:

- literary works;
- dramatic works;
- musical works;
- artistic works;
- sound recordings; and
- film,

broadcast or published by an Australian, or first published in Australia. This protection is automatic under the Copyright Act. Literary, dramatic, musical and artistic works are protected for the life of the author (or from first publication if published posthumously) plus 70 years.

Australia is also a signatory to the *Berne Convention for the Protection of Literary and Artistic Works*. This Convention sets minimum rights to works first published in or created by citizens of other member countries.

## Trade Marks

When considering entering the Australian market, it is always worthwhile considering whether or not to register trade marks in Australia prior to the commencement of any dealings. The *Trade Marks Act 1995* (Cth) (**Trade Marks Act**) enables any person to register a word, phrase, sound, smell, shape, logo, picture, aspect of packaging, or a combination of these used in connection with their goods or services to distinguish them from that of other traders. The owner of a registered trade mark has the exclusive right to use (authorise others to use) the trade mark for 10 years, and the registration may be renewed indefinitely. Unregistered trade marks are

protected by the tort of passing off, as well as the misleading and deceptive conduct provisions of the consumer protection legislation.

Australia is a member of the *Madrid Protocol*, which is an international system for the registration of trade marks. Under the *Madrid Protocol*, a trade mark applicant may designate Australia as a country in which protection is sought. A foreign company should therefore check whether its trade marks have already been registered in Australia by virtue of a *Madrid Protocol* prior to registration under the Trade Marks Act.

### Patents

The *Patents Act 1990* (Cth) enables inventors, or persons entitled to be assigned an invention, to apply to protect an original device, substance, method or process. Like trade marks, patents are a registration-based form of rights protection. A standard patent lasts for 20 years, while an innovation patent lasts for 8 years.

Australia is a signatory to the *Patent Cooperation Treaty* which establishes an international patent protection system in member states.

### Registered Designs

The *Designs Act 2003* (Cth) (**Designs Act**) enables the protection of the visual appearance, shape, pattern, orientation or design of a “new and distinctive” manufactured article through a registration system.

“New and distinctive” means that a design must look different to the eye when compared with other available products. Additionally, the design must not have been publicly disclosed or advertised before the application date.

The Designs Act protects the visual appearance (not the function) of the design for up to 16 years.

Australia is also party to the *Paris Convention*, which in relation to design registrations outside of Australia. Under this Convention, the filing date of an Australian design application may be used to establish priority for corresponding design applications made in other countries, if acted upon within 6 months of filing an Australian application.

### Confidential Information

Confidential information is not specifically protected under Australian law. However, a common law doctrine recognises the obligation to keep information secret in circumstances where the information was communicated on the express or implied understanding that the information was for a restricted purpose.

Legal remedies are available where an unauthorised disclosure of confidential information causes detriment to the confiding party.

## Domain Names

The most relevant domain names to Australian business are *.com.au* domain names, which are licensed by accredited Australian registrars. Registrars offer licenses on a “*first come, first served*” basis. Eligibility and allocation requirements state that applicants must:

- be an Australian entity;
- have an appropriate commercial purpose for seeking the domain name; and
- have a *bona fide* intention to use the domain name.

There must also be a “*close and substantial*” connection between the domain name and the name or business activities of the applicant.

Strict regulations are imposed by the Australian Government in relation to the use of *.com.au* domain names in order to avoid the problem of cyber-squatting, and to better protect the rights of business name and trade mark owners. The Australian Government has also established a specialised dispute resolution procedure for conflicts over *.au* domain names.

Other domains available in Australia include: *.com.au*; *.org.au*; *.net.au*; and *.asn.au*.

## Government law

The responsibility for enacting and enforcing environmental laws is borne by each of the Australian States and Territories. Foreign companies should to inform themselves of the laws that may affect their operations at every location in which they operate or come into contact. Additionally, the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) regulates development that impacts on matters of “*National Environmental Significance*” at the Federal level, including:

- migratory species;
- threatened species;
- World Heritage Properties;
- declared Ramsar wetlands;
- Commonwealth property and marine areas; and
- the Nuclear industry (i.e. uranium mining).

Environmental laws enacted in the States and Territories can be split between two main categories:

1. environmental protection law (including protection of threatened species, water usage, land contamination, pollution and waste disposal, European and Aboriginal heritage and native title rights); and
2. development and planning law (also enacted at the Local Government level).

## Development and planning law

Different types of development are permitted in certain zones within a State or local council areas. The development and planning laws often prescribe such things as:

- standards of construction;
- pollution controls;
- traffic management;
- permitted densities;
- allowable heights and site coverage;
- use to which building can be put;
- Applicable design parameters, particularly where property or buildings are in or near conservation areas or heritage items;
- land clearing;
- effluent discharge; and
- types of facilities available.

Appeal rights are available against the refusal of the authority to grant approval in the form applied for.

## Real Property

Property interests and acquisitions are varied and fall into the following two major categories:

1. Purchase and sale of realty;
2. Purchase and sale of leasehold interests.

The purchase or sale of real property in Australia can be undertaken by a foreign investor, subject to compliance with the regulations and requirements of FIRB (see *Foreign investment review* section above).

Although there are a variety of exceptions, most titles in Australia are issued by and to some extent guaranteed by each State and Territory.

The system of titles in Australia is referred to as the **Torrens system**. Rather than a multiple series of documents forming the chain of title, a single certificate is generally issued for each Lot that a person acquires and all interests are recorded on title (with some exceptions).

The names of the legal owner or corporation granting a legal mortgage are shown on the Certificate of Title.

The legal owner (the registered proprietor) and the lender/mortgagee have a primary right to the property, however this right is subject to certain exceptions that may be provable against the registered proprietor or mortgagee. Australian lawyers will check the status of title and ensure any foreign investor is protected.

**Purchase and sale contracts** in different States and Territories differ somewhat as to the Government requirements for disclosure, but generally follow a common pattern. A person selling must disclose essential items such as the zoning of the property, the name of the owner and any interests affecting the land, as well as attaching certain documents as required by law in each State or Territory.

In light of the need for FIRB approval, any contract for sale to a foreign investor must have a condition that the sale is subject to acceptance of the buyer by FIRB or where applicable, FATA.

**Stamp Duty** is normally payable by the buyer on all property purchases or transactions within Australia. The rate of duty payable varies between all States but generally, any purchase of a property attracts duty at a rate of between 4% and 6%. Some states also apply a premium duty rate for purchases of properties with a dutiable value of more than A\$3 million. Stamp Duty may also be payable (but at reduced rates than the rates on purchases) on mortgages in some Australian jurisdictions.

**Leases** for periods of greater than 3 years must be registered with the various State or Territories land titles offices. The 3 year term is the sum of the original term of the lease plus any option for renewal period available to the incoming tenant.

**Loans** by overseas banks to foreign purchasers secured over property in Australia is permitted. Many Australian banks have overseas branches which lend at the rate applicable in the overseas destination. Documentation is usually prepared by their Australian branch or head office.

Where the bank is not an Australian bank, the mortgage documentation is prepared by an Australian based lawyer in accordance with Australian legislative requirements.

### Execution of documents

Where individuals are purchasing property, a Power of Attorney can be prepared and signed to facilitate the signing of documents in Australia. This Power of Attorney normally must be registered when used for such purposes.

Where the purchaser is a foreign corporation, the corporation should appoint a company officer to be available to sign any documents.

Due to the requirements for specific witnesses to documents executed outside of Australia, it is usually preferable for the company officer to be resident in Australia and appointed for a specific purpose.

### Resumptions

Both the Federal and State Governments have power to resume or acquire land if or when needed.

There are specific provisions at both Federal and State level that protect the individual or corporate owner. Land cannot be resumed unless there is a specific need and only after negotiations have failed.

Where negotiations have failed, strict procedures are in place to ensure a fair valuation is undertaken and compensation paid to the person against whom the resumption orders are made.

## Visas for Australia

People entering and remaining in Australia must have a valid visa at all times unless they hold Australian citizenship. Australia's visa system differentiates between temporary residence and permanent residence visas.

### Types of business Visas

#### Visitor visa (subclass 600) Business Visitor Stream

- This visa allows you to visit Australia for business or visitor purposes
- This visa may be valid for up to 3, 6 or 12 months.

#### Temporary work skilled visa (subclass 457)

- The most commonly used program at present for employers to sponsor approved skilled workers to work in Australia is called the Subclass 457 visa program. This is a 3-step process which involves a sponsorship, nomination and application.
- The 457 visa will be replaced in March 2018 with a completely new Temporary Skills Shortage visa. This new visa will support businesses in addressing genuine skills shortages in their workforce.
- Currently there are certain listed eligible occupations that may be approved under the 457 visa program.
- Overseas Business Sponsors do not need to be operating in Australia, but need to meet similar employer eligibility requirements and are subject to the same legal obligations as Australian business sponsors.
- The Subclass 457 visa allows temporary residence and offers a number of pathways to a permanent residence visa program known as the Employer Nomination Scheme (**ENS**).
- Currently 457 visas may be valid for up to 2 or 4 years depending on the position the applicant is sponsored under.

#### Employer Nomination Scheme (ENS)-Subclass 186

The Subclass 186 Employer Nomination Scheme visa is a permanent residency visa that requires the sponsorship of a nominating employer.

There are two separate pathways or streams for the 186 visa. You can satisfy the requirements of either stream before applying for the 186 visa. The streams are called the Direct Entry stream, and the Temporary Residence Transition stream.

Those applying for the Direct Entry stream can apply directly for permanent residency.



Those applying under the Temporary Residence Transition stream have already been on a 457 visa for at least 2 years with their sponsoring employer.

### Regional Sponsored Permanent Residence Visa-Subclass 187

The Regional Sponsored Migration Scheme (**RSMS**) allows employers in regional or low population growth areas of Australia to sponsor employees who are foreign nationals for a permanent visa to work in regional Australia. The employee may be a highly skilled worker from overseas or a highly skilled temporary resident currently in Australia.

This visa involves a three-step process:

1. Regional Certification Board (**RCB**) approval.
2. Nomination by an approved Australian employer.
3. A Subclass 187 visa application by the skilled worker.

### Business Innovation and Investment (Provisional) visa (subclass 188)

Business Innovation and Investment Subclass 188 visas are for investors and business owners who wish to establish business operations in Australia. The visa is valid for 4 years.

There are 5 eligibility streams:

1. Business Innovation - for business owners seeking to establish business operations in Australia.
2. Investor - for persons who are willing to invest A\$1.5 million in an Australian State or Territory bonds.
3. Significant Investor - for persons willing to invest A\$5 million into complying investments in Australia.
4. Premium Investor - for persons with significant funds who are willing to invest at least A\$15 million into complying premium investments in Australia.
5. Entrepreneur - for persons who have a funding agreement from a third party for at least A\$200,000 to undertake a complying entrepreneur activity.

### Business Innovation and Investment (Permanent) visa (subclass 888)

The Business Innovation and Investment (Permanent) visa (subclass 888) is the second stage of the Business Innovation and Investment (Provisional) visa (subclass 188). You can apply for it after you have fulfilled the requirements of your provisional visa.

You do not need to submit a new Expression of Interest or be invited to apply for this visa. You need to be nominated by a State or Territory Government agency or Austrade on behalf of the Australian government if you are seeking to satisfy the primary criteria.

If you are already on a subclass 188 visa, then you just have to show evidence of nomination from the government entity, who nominated you.

You can either be in Australia or overseas when you lodge your application.

You must hold a subclass 188 Provisional Business Innovation and Investment Visa  
This visa is only available to applicants who are nominated by an Australian State or Territory Government. You must be nominated by the State or Territory Government who nominated you for the subclass 188 visa, unless you have obtained permission to change State or Territory.

You must have a genuine commitment to maintain your business or investment activities in Australia.

We would like to thank migration specialist George Sideridis for preparing the “Visas for Australia” section.

**George Sideridis**

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