

MAJOR FORMS OF BUSINESS ORGANISATION



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GUIDE TO DOING BUSINESS IN AUSTRALIA





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GUIDE TO DOING BUSINESS IN AUSTRALIA AND NEW ZEALAND

PREPARED BY MERITAS LAWYERS
IN AUSTRALIA AND NEW ZEALAND



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Guide to Doing Business in Australia and New Zealand

This publication has been prepared to provide an overview to foreign investors and business people who have an interest in doing business in Australia and New Zealand. The material in this publication is intended to provide general information only and not legal advice. This information should not be acted upon without prior consultation with legal advisors.

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The following currency notations are used in this book:

AUD Australian Dollar

NZD New Zealand Dollar

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FROM THE EDITOR

This book is intended to provide practical and useful insights into the 10 most common questions facing foreign investors and businesses:

1. What role does the government play in approving and regulating foreign direct investment?
2. Can foreign investors conduct business without a local partner? If so, what corporate structure is most commonly used?
3. How does the government regulate commercial joint ventures between foreign investors and local firms?
4. What laws influence the relationship between local agents or distributors and foreign companies?
5. What steps does the government take to control mergers and acquisitions with foreign investors of its national companies or over its natural resources and key sectors (e.g., energy and telecommunications)?
6. How do labor statutes regulate the treatment of local employees and expatriate workers?
7. How do local banks and government regulators deal with the treatment and conversion of local currency, repatriation of funds overseas, letters of credit, and other basic financial transactions?
8. What types of taxes, duties and levies should a foreign investor expect to encounter?
9. How comprehensive are the intellectual property laws? Do local courts and tribunals enforce them objectively, regardless of the nationality of the parties?
10. If a commercial dispute arises, will local courts or arbitration offer a more beneficial forum for dispute resolution to foreign investors?

Contributing to this book are the law firm members of the Meritas alliance in Australia and New Zealand. Each firm is comprised of local lawyers who possess extensive experience in advising international clients on conducting business in their respective countries. The firms were presented with these 10 questions and asked to provide specifics about their jurisdiction along with timely insights and advice. In a very concise manner, the book should provide readers with a solid overview of the similarities and differences, strengths and weaknesses of the states and territories of Australia and New Zealand.

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TOP 10 QUESTIONS

1. WHAT ROLE DOES THE GOVERNMENT PLAY IN APPROVING AND REGULATING FOREIGN DIRECT INVESTMENT?

The government regulates foreign investment through the Foreign Investment Review Board (FIRB), which is a Board within the Commonwealth Department of Treasury. One of its roles is to examine proposals by foreign interests to undertake direct investment in Australia and to make recommendations to the government whether the proposals are suitable for approval under the Australian government's policy. The ultimate decision whether a proposal is approved lies with the Treasurer.

FIRB is also responsible for monitoring and ensuring compliance with foreign investment policy.

Different rules apply depending on the nature of the proposed foreign investment, for example, an investment in residential real estate or commercial real estate versus in an Australian business. Whether FIRB approval is required for a proposed foreign investment may also depend on whether the proposed investment exceeds certain set monetary thresholds.

The application process for obtaining FIRB approval is fairly rigorous but is generally determined within 30 days of lodgement of the application, although this period may be extended.

2. CAN FOREIGN INVESTORS CONDUCT BUSINESS WITHOUT A LOCAL PARTNER? IF SO, WHAT CORPORATE STRUCTURE IS MOST COMMONLY USED?

Yes, there is no general legal requirement for a foreign investor to conduct a business with a local partner.

The most common corporate structure used in conducting business in Australia is a company, although other structures such as joint ventures, partnerships and trusts may also be used.

Even with a local partner, FIRB approval may be required.

3. HOW DOES THE GOVERNMENT REGULATE COMMERCIAL JOINT VENTURES BETWEEN FOREIGN INVESTORS AND LOCAL FIRMS?

Generally, the government does not regulate commercial joint ventures between foreign investors and local firms; however, the government may regulate the foreign investor through FIRB and other laws such as the *Corporations Act* (which regulates companies generally) and taxation laws.

4. WHAT LAWS INFLUENCE THE RELATIONSHIP BETWEEN LOCAL AGENTS OR DISTRIBUTORS AND FOREIGN COMPANIES?

Broadly speaking the relationship between an Australian agent or distributor and an overseas supplier would be a contractual one governed by the same principles of contract law as the UK and other English speaking jurisdictions.

Under Australian tax law, the pricing of goods and services supplied under contract between an Australian agent or distributor and an overseas supplier is expected to be set on an “arms-length” basis. There are comprehensive and complex tax laws dealing with transfer pricing of goods and services imported to or exported from Australia for the purposes of protecting the revenue.

Where the Commissioner of Taxation forms the opinion that cross-border transactions have not been priced on an arms-length basis, the Commissioner has power to make compensating adjustments and impose penalties.

5. WHAT STEPS DOES THE GOVERNMENT TAKE TO CONTROL MERGERS AND ACQUISITIONS WITH FOREIGN INVESTORS OF ITS NATIONAL COMPANIES OR OVER ITS NATURAL RESOURCES AND KEY SECTORS (E.G., ENERGY AND TELECOMMUNICATIONS)?

FIRB controls whether a foreign investor may invest in certain sectors. There are certain sectors where foreign investment will be prohibited or restricted or otherwise restricted as being against the national interest or as being against Australia’s national security. These include residential real estate, media, telecommunications and military (albeit FIRB approval may be granted in these areas in certain circumstances).

Even if a proposed foreign investment does not fall within a sensitive sector, FIRB has an overriding policy where approval may be declined where the proposed investment is against the national interest or is against Australia's national security.

6. HOW DO LABOR STATUTES REGULATE THE TREATMENT OF LOCAL EMPLOYEES AND EXPATRIATE WORKERS?

LOCAL EMPLOYEES

Australia's system is strongly regulated by state and federal legislation. Companies that are trading corporations fall within the federal system of industrial relations presently administered pursuant to the Fair Work Act 2009. A review of the Act is currently underway with the Review Panel scheduled to report to the federal government by 31 May 2012.

Most blue-collar and clerical workers have their employment terms and conditions determined by reference to the National Employment Standards, and various awards and collective agreements approved by Fair Work Australia, a third party tribunal.

Senior executives and management more commonly have their terms and conditions of employment determined by reference to common law agreements negotiated directly between the employer and the employee. The terms of such agreements must still exceed the statutory minimum standards.

Workplace health and safety, discrimination, and workers' compensation for workplace injury are regulated by state or territory legislation.

EXPATRIATE WORKERS

The terms and conditions for expatriate workers will greatly depend upon the type of visa arrangements approved by the Australian immigration authorities. Business people visiting from overseas can continue to enjoy the benefits of their home-based employment arrangements while undertaking short-term business activities in Australia. However, where visas are required, the employees will most commonly be required to be engaged as if they were employees fully covered by the Australian industrial relations regime and legislation referred to above. In any event, key legislation covering such issues as workplace health and safety and worker's compensation will apply to any person working in Australia.

7. HOW DO LOCAL BANKS AND GOVERNMENT REGULATORS DEAL WITH THE TREATMENT AND CONVERSION OF LOCAL CURRENCY, REPATRIATION OF FUNDS OVERSEAS, LETTERS OF CREDIT AND OTHER BASIC FINANCIAL TRANSACTIONS?

Generally, Australia does not have any exchange controls. The Australian Dollar (AUD) is a floating currency widely and transparently traded, although the Reserve Bank may, from time to time, buy or sell AUD to smooth out unusual market events.

There are no restrictions on repatriation of profits back to overseas parents by way of dividends or loan repayments other than:

- The usual requirement that the Australian entity meet the solvency test of being able to meet its debts as and when they fall due, or
- In some cases, making sure the company does not fail the thin capitalisation test to ensure that its interest expense is fully deductible for tax purposes.

Local banks are generally well capitalised and sophisticated financial institutions. As such, they are accustomed to trading in foreign exchange and dealing with letters of credit and other trade-based securities.

There are, however, some reporting requirements in relation to the movement of large sums of money and there may also be financial sanctions imposed in relation to transactions involving certain countries, entities or individuals.

8. WHAT TYPES OF TAXES, DUTIES AND LEVIES SHOULD A FOREIGN INVESTOR EXPECT TO ENCOUNTER?

For most operating companies the following taxes would be encountered by an Australian operation:

- Company tax at 30% on taxable income
- Withholding tax on any dividends to the extent that these are unfranked (i.e., franked dividends to overseas shareholders are free of withholding tax)
- Withholding tax at 10% on interest payable to an overseas party
- Withholding tax on royalties payable to an overseas party
- State duties on the acquisition of land and other assets including shares in a company

- In some cases, payroll tax on wages and salaries (a state-based impost)
- Resource Rent Tax (oil and gas only)
- Pay-as-you-Go withholding tax (on the salaries and wages of employees which is remitted directly to the Commissioner of Taxation and a credit allowed to respective employees on filing their income tax return)
- In some cases, Fringe Benefits Tax on non-cash compensation paid to employees

9. HOW COMPREHENSIVE ARE THE INTELLECTUAL PROPERTY LAWS? DO LOCAL COURTS AND TRIBUNALS ENFORCE THEM OBJECTIVELY, REGARDLESS OF THE NATIONALITY OF THE PARTIES?

Australia is a member of World Trade Organisation and TRIPS, as well as the Berne, Paris and Rome Conventions, the Patent Co-Operation Treaty, the Madrid Protocol (for trade marks) and a member of other international IP treaties administered by the World Intellectual Property Organisation. As a result, Australia has a comprehensive intellectual property regime. It includes legislative regimes (e.g., *Copyright Act*, *Trade Marks Act*, *Patents Act*, *Designs Act*, *Plant Breeders Rights Act* and *Circuit Layouts Act*) and common law regimes (e.g., the protection of confidential information and common law trade marks). Australia's intellectual property statutes create both civil and criminal liability for infringements, but criminal prosecutions are rare. Where applicable, Australian intellectual property laws are enforced objectively (principally in the federal jurisdiction) and are enforced regardless of the nationality of the parties, subject to a principle of reciprocity in respect of copyright infringement such that Australia courts will only recognise copyrights of foreign nationals to the extent that courts of that national's country recognise an Australian copyright.

10. IF A COMMERCIAL DISPUTE ARISES, WILL LOCAL COURTS OR ARBITRATION OFFER A MORE BENEFICIAL FORUM FOR DISPUTE RESOLUTION TO FOREIGN INVESTORS?

All Australian courts including federal, state and territory courts offer well-regulated dispute resolution processes. The *Federal Civil Dispute Resolution Act 2011* requires parties to litigation to certify that they have taken genuine steps to resolve a dispute prior to commencing proceedings in the Federal Court. Increasingly these courts, generally with the support of litigants and their lawyers, are requiring that pro-active case management, mediation and other alternate dispute resolution processes be implemented as early as possible to resolve disputes without the costs and delays involved in full-blown trials.

Further, in September 2010, the Federal Attorney General's Department established a Mediation Standards Board for the accreditation and regulation of Australian mediators. Accredited commercial mediators may be sourced through accrediting organisations such as LEADR and Institute of Arbitrators and Mediators Australia.

Mediation is cross-jurisdictional and therefore increasingly attractive for the resolution of international disputes.

While arbitration is also available, with well-regulated commercial arbitration procedures in most jurisdictions, the growth in alternative dispute resolution processes has meant that in general terms litigants are less attracted to arbitration than they may have been in the past. The fact that arbitration is no longer seen as a significantly less expensive alternative than traditional court-based litigation is a likely contributing factor to this.

MAJOR FORMS OF BUSINESS ORGANISATION

A foreign company or investor proposing to establish a business in Australia may choose from a number of different entities or forms of business organisation. Each of these forms has its advantages and disadvantages. Business owners will need to carefully consider them and take advice to determine which is the most appropriate form for their business.

The major forms of business organisation are:

Company

- Locally Incorporated Subsidiary of a Foreign Company
- Branch Office of a Foreign Company
- Incorporation Transferred from Country of Origin

Joint Venture

- Unincorporated Joint Venture
- Incorporated Joint Venture

Partnership

- Australian states recognise limited liability partnerships

Trust

- Discretionary Trust
- Unit Trust

COMPANY

A foreign company seeking to establish a business in Australia may choose among three main forms of corporate organisation.

- **Locally Incorporated Subsidiary of a Foreign Company**
A local subsidiary is a separate legal entity from its foreign parent or holding company. It must be incorporated in Australia and is required to comply with all relevant Australian laws. Australia has a uniform national corporations law; as such there is no geographical restriction upon the territorial operation of an Australian company, nor a requirement to register in each Australian state in which it seeks to operate.

An Australian company will usually be fully taxed in Australia on all its income and profits, whether that income arises from its business activities conducted in Australia or elsewhere in the world. However, income of an Australian company that is from a non-Australian source that flows through to an Australian

nonresident shareholder will, in certain circumstances be outside the Australian tax net. An Australian company must file an annual report and accounts, although many smaller companies may be exempt from many reporting requirements.

As a local subsidiary is a separate legal entity, the liability of the foreign company parent for its subsidiary's indebtedness is, in the absence of guarantees given by the parent or other contractual arrangements, limited to any unpaid amounts on share capital subscribed for by the parent. However, the parent may also be liable for insolvent trading by its subsidiary in circumstances where the parent ought to have known that the subsidiary was insolvent.

There is no minimum capitalisation requirement imposed by Australian company laws on an Australian company, although in certain circumstances various taxation acts may impose capitalisation requirements. Nonetheless, in Australia, a company with paid up capital of AUD1 is very common.

The cost of incorporating an Australian company is modest. The incorporation process is quick and easy, with same day incorporations possible.

- **Branch Office of a Foreign Company**

A branch office is simply a local Australian office of the foreign company and does not have a separate legal identity from its parent. The foreign company must be registered in Australia as a foreign company and must comply with all relevant Australian laws.

The branch office will be taxed in Australia on all its income and profits which arise from its business activities conducted in Australia, although the provisions of applicable Double Taxation Agreements between Australia and the foreign parent's country of incorporation may reduce the tax otherwise payable in Australia.

The branch office must file an annual report and accounts. If the accounts are not in English then a translation must be filed.

As a branch office is not a separate legal entity from the foreign company, the foreign company will be liable for the debts of the branch office.

Some advantages of having a local subsidiary or branch compared with appointing an agent include:

- Direct control over the business in Australia
- Potential cost reductions achieved by operating locally
- Identification with local business partners and customers

- Opportunities to establish or build a local corporate identity
- Access to other markets from a base in Australia

- **Corporation Transferred from Country of Origin**

A less common option is for a foreign company to transfer its incorporation from its original country of incorporation to Australia. It will then be treated as an Australian company.

Australian company law is generally discussed under the **COMPANY LAW** section.

JOINT VENTURE

Forming a joint venture with an Australian organisation is an increasingly popular form of business organisation for foreign companies and investors. A joint venture is a business organisation where two or more people become involved in a specific project or jointly participate in the conduct of a business operation.

There are two main forms of joint venture.

- **Unincorporated Joint Venture**

An unincorporated joint venture is not a separate legal entity. Rather it is a contractual agreement between two or more people who agree to conduct business for a particular purpose.

Where the participants share profits of the joint venture, the joint venture may, in certain circumstances, be classified as a “partnership.” If it is possible to structure the arrangements so that the participants share output rather than profit, then the joint venture may not be a partnership.

- **Incorporated Joint Venture**

More commonly, a separate special purpose company is incorporated to operate the joint venture and each participant becomes a shareholder in the company. This confers on them the protection of the company’s limited liability status. Australian company law regulates this type of joint venture.

There are many different ways to structure a joint venture, which may require specific treatment depending on the type of industry or project in which the joint venture will be involved. In addition, the participants must carefully consider foreign investment rules, taxation matters (which can differ depending on the structure), management and control of the joint venture, the respective rights and obligations of the participants, supply and purchase agreements, the division of profits, the sharing of costs and expenses and the termination or sale of the joint venture.

PARTNERSHIP

A partnership is an arrangement between two or more people to carry on a business with a view to profit. It may be formed by an agreement between the partners. In the absence of an agreement, the Partnership Acts in the states and territories set out many of the partnership rules that apply to the arrangement. The Partnership Acts follow the well-established common law model. If the partnership does not conduct business under the actual names of its partners, the partnership name in which the partnership operates must be registered in each state or territory in which the partnership proposes to conduct business.

Ordinarily partnerships are not separate legal entities and the partners have an unlimited personal liability, both jointly and severally, for the debts and obligations of the partnership. In addition, each partner is deemed to be an agent for the others and so may act on behalf of the other partners.

The laws of some states permit limited liability partnerships, which limit the liability of some partners who do not manage the partnership business. They are generally used for specialist investment activities and are not commonly used.

A non-limited liability partnership is not subject to taxation in its own right, but the partners are liable to pay tax on the amounts they receive from their partnership income and profits, which are assessed at the partners' marginal tax rates. A limited liability partnership is taxed as a company.

TRUSTS

Trusts are widely used in Australia as a trading vehicle. The two main forms of trust are:

- **Discretionary Trust**

A discretionary trust enables property to be held by a trustee who has discretion as to how to invest and direct the capital and income of the trust fund. The trustee also has discretion to determine the beneficiary or beneficiaries who will benefit from the income or capital of the trust. The role and power of the trustee, the purposes of the trust fund and the rules regarding its use are generally contained in a trust deed. Discretionary trusts are typically used in family and family-owned business arrangements as they can confer tax benefits on the beneficiaries and they are relatively simple to create and operate.

- **Unit Trust**

A unit trust is a common investment vehicle that allows the pooling of investment funds and the investment of those funds through a trustee, whose powers are clearly defined in the trust deed. The trustee may be assisted by a separate entity known as a manager, whose job is to select and manage the investments while the trustee acts as a guardian of the interests of the unit holders.

Trust beneficiaries, known as unit holders, have set interests in the income and capital of the trust. The unit holders can sell these interests.

Many unit trusts invite the subscription of public funds, which are then pooled and invested in specified items for income purposes or capital gain. Seeking public subscription of funds in Australia requires detailed disclosure under comparatively complex disclosure laws.

In certain circumstances there may be advantages in selecting a trust as the form of business organisation, particularly from a taxation viewpoint. However, care must be taken to determine that it is appropriate for, among other things, the type of business, the taxation status desired, the required return, the degree of control required and the flexibility needed.

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