

COMPANY LAW



MERITAS[®]
LAW FIRMS WORLDWIDE

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.

Meritas firms offer clients the ability to access high-quality legal services throughout Australia, New Zealand and worldwide. With nearly 7,000 business lawyers in over 200 cities, Meritas gives your company access to local counsel around the world.

Meritas firms:

- Offer high-quality, worldwide legal services through a closely integrated group of full-service law firms
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- Provide global reach and access to local knowledge at market rates
- Offer coordinated service across jurisdictions
- Can be found on www.meritas.org which enables direct access to member firms through a searchable database of lawyer skills and experience plus links to contacts at each Meritas firm

There are over 170 lawyers in six firms across Australia and New Zealand providing clients a local legal partner with deep international resources. Our lawyers are supported by knowledgeable and conscientious patent agents, trade mark agents, notaries, administrative legal assistants, real estate law clerks, corporate clerks and litigation support specialists. We are closely integrated and strategically placed to deliver coordinated, efficient legal services.

The following currency notations are used in this book:

AUD Australian Dollar

NZD New Zealand Dollar

Please be aware that the information on legal, tax and other matters contained in this booklet is merely descriptive and therefore not exhaustive. As a result of changes in legislation and regulations as well as new interpretations of those currently existing, the situations as described in this publication are subject to change. Meritas cannot, and does not, guarantee the accuracy or the completeness of information given, nor the application and execution of laws as stated.

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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With over 55 years' experience Snedden Hall & Gallop is Canberra's most established independent law firm, with the skills and experience necessary to provide a full range of legal services to corporate, government, associated bodies and individuals. Our lawyers are among the most experienced practitioners in the territory, with many having been in practice for several decades. For over 55 years, the firm has utilised its skills and knowledge to provide a full range of legal services to companies, small to medium businesses and individuals across the ACT and surrounding region.

Snedden Hall & Gallop is dedicated to achieving the best results for our clients. Many of Canberra's most prominent businesses choose us as their legal counsel and have done so for several years and often several decades. Our lawyers are there for our clients in the best of times and the worst of times.

Snedden Hall & Gallop offers a range of legal services to both private and corporate clients, and specialises in the areas of:

- Business Law
- Dispute Resolution
- Employment Law
- Superannuation Litigation
- Migration Services
- Wills and Estate Planning
- Property Law
- Compensation Law

Snedden Hall & Gallop is committed to providing an unparalleled quality of service. We pride ourselves on the personal attention we give to every client, including a high level of client-to-lawyer contact. Our lawyers are always available for face-to-face conferences, and we have a policy of promptly responding to phone calls and emails. Additionally, our team is in constant consultation with each other, resulting in the efficient delivery of advice that draws on the vast expertise within our firm.

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Swaab Attorneys is a multi-award winning, mid-sized commercial law firm offering legal services across a number of core practice areas and industry groups. We are based in Sydney; Australia's largest city, with a population in excess of 4.3 million people.

Our firm is shaped by our Swaab Brand of Service: a set of service standards we aspire to meet in all of our dealings, both with colleagues within our business and with our clients. In August 2014, Swaab Attorneys was named a finalist in the ALPMA Thought Leadership Awards for the development of the "USB separation survival kit." Swaab has also been a finalist in the BRW Client Choice Awards for seven consecutive years and have won three times, the most recent win being Best Law Firm (rev under AUD50m) and Best NSW Firm at the 2012 BRW Client Choice Awards. But it's not just our client service that has been awarded, we have also appeared for four consecutive years on the BRW Great Place to Work list.

We have strong capabilities in most areas of commercial and corporate law. We practice in corporate structuring and commercial transactions, intellectual property, franchise law and employment, property, planning and projects, real estate transactions and all areas of commercial litigation. We also have a large private client practice servicing family law, estate planning and other "high net worth" personal services.

We have a number of international clients for whom we act as attorneys and agents to assist them with their introduction to Australia's business landscape and the development of their business in Australia.

Our clients are medium sized, fast growing businesses and publicly listed companies in various retail, property, health, and insurance and not-for-profit industries as well as property trusts, state government departments and local government agencies. By way of example our client base includes; a major commercial property trust (Investa Funds Management), a Canadian mining



group (Red Lion Management), a Chinese commercial glass manufacturer (Austech Group), a subsidiary of a US owned rail freight and logistics company (Freightliner Australia), a global online marketing and research provider (Pureprofile Inc), Australia's largest online auction house (GraysOnline), one of Australia's largest supermarket retailers and one of the world's largest private hospital providers.

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MacDonnells Law is one of Queensland's largest and longest established independent law firms with 100 personnel, including 10 partners and 40 legal staff.

MacDonnells Law is unique in that it is the only independent law firm in Queensland to have full service offices in three of Queensland's major geographical, demographic and commercial centres, namely Cairns, Townsville and Brisbane.

For more than 130 years, the firm has offered state-wide legal services to commercial, insurance, government and individual clients throughout Queensland. Our connected, state-wide network gives us the unique ability to provide personal, local support from our regional offices, respond to client needs no matter where they are in Queensland, and ability to respond promptly regardless of the nature, size, complexity or duration of a matter.

Our firm is structured into five state-wide practice groups, comprised of highly experienced legal practitioners from all areas of law, including:

- **Commercial and Corporate:** contracts, commercial advisory, corporate law, property, intellectual property and conveyancing;
- **Dispute Resolution and Litigation:** insurance, industrial relations and employment, workplace safety, commercial disputes, trade practices law, debt recovery and insolvency;
- **Government:** government advisory, planning and environmental law, development advisory, building and construction, native title and cultural heritage.
- **Personal Law:** family law, collaborative law, asset protection and wills and estates.

At state-level, the firm plays an integral part in both the legal profession and business communities with the firm's senior personnel holding influential positions in key industry advocacy groups including the Australian Institute of



Company Directors, Tax Institute of Australia, Urban Development Institute and Property Council.

The MacDonnells Law team also has a strong understanding of government processes and policy that impact commercial organisations, as we are a platinum partner to the Local Government Managers Association (LGMA), a strong supporter of the Local Government Association of Queensland (LGAQ) and provide legal services to several state government entities.



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MADGWICKS

Lawyers

Madgwicks is a progressive Australian business law firm servicing local, national and international clients. Our staff pride themselves on responsive

legal services driven by a passion for client success.

The firm develops close working relationships with clients, providing practical commercial advice, focusing on legal solutions to achieve our clients' goals. Our clients view us as a crucial business partner as we have an intimate knowledge of their business, industry and the specific project. We position ourselves as a key element to the success of a project, and our clients view us as such.

The relationship between client and law firm is of extreme importance. Madgwicks places great emphasis on establishing an open, trusting and strong relationship with our clients. The value the firm places on relationships is reflected in the internal culture of the firm which has many long term professional and support staff employees.

The firm's clients include private and listed corporations, financial institutions, professional firms, business and private individuals. Madgwicks has clients in a diverse range of industries, including manufacturing, retailing, business services, energy, information technology, financial services, superannuation, building and construction, property development, transport, agribusiness, marketing, tourism and hospitality.

Our lawyers are skilled in handling the needs of overseas companies wishing to invest in Australia and are familiar with the rules and procedures relating to foreign investment in Australia.

Establishing operations in Australia

Australia is a great place to do business and a safe place to operate a business. With a strong economy, Australia represents an attractive proposition for offshore companies looking to grow their global operations.

While Australia's stable Government and well established legal system make it a low risk place to invest, companies looking to start operations face a myriad of registration and compliance issues. It is essential to get the right professional advice prior to commencing operations to give your business the best chance to flourish.

Madgwicks expertise for inbound clients

The core advisor for businesses planning to start up operations in Australia is a legal firm. Madgwicks has a team of highly experienced lawyers who:

- Are experienced in establishing businesses from offshore
- Have specific industry experience and knowledge
- Are accessible and eager to establish a long term relationship with an in-bound company looking to start up operations in Australia
- Provide a comprehensive range of services covering every aspect of business start up
- Are well connected in business circles with the ability to source other specialist advisors as well as facilitate alliances, suppliers and relationships with potential clients

Our legal services for business start-ups include:

- Structuring of business
- Employment contracts and workplace relations compliance
- Tax structuring compliance
- Intellectual property
- Commercial advice

We can also assist clients in respect to migration law matters as well as finding and leasing property and identifying other key service providers such as accountants and business advisors.

Services offered to Meritas members and their clients

- Free 30 minute consultation
- Introduction to key contacts
- Use of meeting rooms
- Advice on accommodation
- Immigration and relocation assistance
- Assistance with tickets to Melbourne events

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Williams + Hughes is a Western Australian law firm specializing in commercial law and commercial litigation and dispute resolution. We have offices in Perth, the State capital city, and Geraldton, Western Australia's largest regional city.

The firm was established in 1986 as one of Perth's first boutique commercial law firms. The firm grew quickly and attracted a wide range of quality work. We now act for a wide range of clients, including small to large businesses, private companies, public listed companies, multi-national groups and high net worth individuals.

Our primary focus is on commercial work, providing services in the business and corporate law, resources, commercial litigation and dispute resolution fields. We regularly act on complex, large matters against national and international global legal firms, and these firms regularly refer work to us where they are conflicted from acting. We operate in all civil and commercial jurisdictions and are particularly active in the Federal and Supreme Courts

Apart from English, we have staff members that speak Cantonese, Mandarin, German, French, Italian and Indonesian (various levels of competency).

What makes our practice unique is the way we work to deliver a positive outcome for our clients. We are creative and precise in our thinking, pragmatic in our approach, responsive to our client's changing needs and understand the importance of achieving practical commercial solutions.

A key differentiator is that we work hard to understand our client's industries. Often we become trusted business advisers, and are involved in the early stages of developing transactions rather than being brought in later to document agreed deals.

Our philosophy, **working in your favour**, has helped our practice grow over the last 29 years into one of Western Australia's most respected commercial law firms.

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*.

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 principal 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 *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.

COMPANY LAW

Some general matters relating to company law in Australia are discussed below.

REGULATORY SCHEME

The *Corporations Act* principally regulates companies, their incorporation, the acquisition of shares, securities, and the futures industry.

The *Corporations Act*, together with major pieces of legislation such as the *Australian Securities and Investments Commission Act*, the Australian Securities and Investments Commission Guidelines and the Listing Rules of the Australian Stock Exchange Limited, form a uniform regulatory scheme for companies which applies in all Australian states and territories.

The regulatory scheme in relation to companies has been and continues to be the subject of ongoing reform and it is to be expected that the process will continue.

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION (ASIC)

A federal body, the Australian Securities and Investments Commission is responsible for administering the regulatory scheme throughout Australia. ASIC has broad-ranging powers and functions (alongside the Australian Stock Exchange [ASX] for publicly listed companies) as the regulator and enforcer of company law and is the principal registry and information source for company matters.

INCORPORATION (also called “registration”)

A company has a separate legal identity from its shareholders and directors, who are usually not liable for the company’s debts. A company can own property, enter into contracts, and commence legal proceedings in its own name. It is the most common form of business organisation in Australia.

Companies are incorporated under the *Corporations Act*. Incorporation involves appointing directors (one of whom must be resident in Australia), usually issuing shares, nominating a registered office in Australia (which can be in any state or territory of Australia) and sometimes lodging copies of the company’s constitution (its governing document, if it elects to adopt one) with ASIC. Alternatively, companies that are already incorporated but have never traded may be purchased for immediate use. These companies are known as “shelf companies” and are available from the Meritas member firms in Australia. A shelf company generally costs about AUD 1,000. ASIC is required to make certain company records available for public inspection.

Each company, which is properly incorporated, is registered by ASIC and receives a unique nine-digit Australian Company Number (ACN). The ACN must appear on all of the company's public documents. Foreign companies and certain other bodies required to register under the *Corporations Act* also receive identification numbers known as the Australian Registered Body Number (ARBN).

All companies incorporated under the *Corporations Act* are able to conduct business in all states and territories of Australia without meeting further registration requirements.

TYPES OF COMPANIES

There are two principal types of companies under the *Corporations Act*. These are public and proprietary companies limited by shares.

The liability of shareholders of such companies is limited to any unpaid amount in respect of shares held by them.

Both proprietary and public companies must have a registered office in Australia where communications can be sent and where, in respect of a public company, the registered office must be opened to the public (usually between 10 a.m.–12 noon and 2 p.m.–4 p.m. each business day or at least for three hours between 9 a.m.–5 p.m. each business day). All companies must also have a “public officer” who is responsible for discharging obligations required by Australian taxation law. One of the directors of a company, the public officer of a company and the secretary of a public company must be ordinarily resident in Australia. The same person may, but need not fulfil the roles of director, secretary and public officer.

The distinguishing features of these types of companies are:

- **Public Company**

A public company may offer its shares for sale to the public. It must have at least three directors, no fewer than two of whom must be ordinarily resident in Australia. In addition, it must have at least one shareholder but there is no maximum limit on the number of shareholders. It is not necessary for a public company to be listed on the ASX.

There can be no restriction on the transfer of shares in a public company. Generally, a public company must be audited.

- **Proprietary Company**

A proprietary company is the most commonly used form of company in Australia. It is designed for a relatively small group of people (not exceeding 50) who do not seek to raise funds from

members of the public by inviting them to become shareholders and who seek to restrict the transfer of the company's shares. A proprietary company must have at least one director and one shareholder (who can be the same person). At least one director must ordinarily reside in Australia.

Proprietary companies are further classified as either large or small proprietary companies. To be classified as a small proprietary company, and so qualify for reduced financial reporting requirements, the company must satisfy at least two of the following criteria:

- The company and the entities it controls, if any, must have a consolidated gross operating revenue of less than AUD25 million for the financial year
- The value of its consolidated gross assets and the assets of any entities it controls, if any, total less than AUD12.5 million at the end of the financial year
- The company and any entities it controls, if any, have fewer than 50 employees at the end of the financial year

Other forms of companies, including companies limited by guarantee, no-liability and unlimited liability companies, are also available, depending on the purposes for which the companies are required. (A no-liability company is one where the holder of partially paid shares can choose to forfeit the partially paid shares without further liability rather than pay a call in respect of those shares. They are commonly used in mining projects.)

DIRECTORS AND OFFICERS

Directors of companies conducting business in Australia, and others acting in the capacity of directors, such as managers, owe certain duties to the company itself and, in certain circumstances, to other people associated with the company such as the shareholders and the creditors of the company. The directors' duties arise under both the general law and the *Corporations Act*. Of particular importance in Australia are two duties imposed by the *Corporations Act* on "officers," defined to mean not only the directors, but also people in accordance with whose directions or instructions the directors customarily act, and company secretaries and executive officers. The two duties require officers to act honestly, carefully and diligently and to prevent the company from trading when it is insolvent, that is, when it cannot pay its debts as and when they fall due. Breaching these duties can have severe consequences.

REPORTING REQUIREMENTS AND RECORDS

Companies conducting business in Australia are under various obligations to:

- Maintain their accounts in accordance with generally accepted accounting principles consistently applied in Australia
- Prepare annual financial statements and reports and distribute copies to their shareholders
- Lodge copies of those statements with ASIC and, if applicable, the Australian Stock Exchange (ASX)
- In some cases, prepare consolidated financial statements covering financial aspects of a group of companies
- Procure the preparation of reports by the directors on the company's performance
- For some companies, have their accounts audited regularly by an independent expert resident in Australia
- Disclose significant matters affecting their performance or prospects to ASIC and, if applicable, the ASX

The extent of the reporting obligations will depend on the size and activities of the company. In addition, companies are obliged to keep various records and maintain various registers in respect of their activities. The shareholders may inspect these records and registers.

AUSTRALIAN STOCK EXCHANGE (ASX)

Public companies may seek to raise funds from the public by listing on the ASX. The ASX quotes the shares of the large public companies on electronic trading boards in the major cities of Australia and enables trading of those shares to take place. Listing on the ASX is an option that is also available in limited circumstances to companies incorporated overseas.

In order to list on the ASX, companies must meet various stringent financial criteria set out in the ASX Listing Rules and satisfy comprehensive ongoing reporting requirements, in addition to satisfying the requirements of the *Corporations Act*. Listing can be an expensive process involving the issue of a detailed prospectus to potential investors describing the company's status and prospects. The company must also have a minimum of 300 shareholders with holdings valued at a minimum of AUD2,000 each, and at least 50% of the company's shares must be held by parties unrelated to the company and its directors. If between 50% and 75% of shares are held by related parties, the company must have a minimum of 350 shareholders. If more than 75% of the company's shares are held by related parties, the company must have a minimum of 400 shareholders. The issue or sale price for the securities must be at least AUD0.20.

A company that does not seek listing on the ASX is not subject to any minimum capital requirements and can be structured in various ways to suit the financing requirements of the shareholders.

Over the last decade, a number of specialist and “second board” exchanges have been set up in Australia, including:

- National Stock Exchange of Australia (NSX)
- Chi-X Australia
- Asia Pacific Stock Exchange (APX)

While the ASX remains the largest exchange in Australia, listings on the other exchanges continue to grow. The emerging exchanges offer listing options that target small-to-medium enterprises. These exchanges also provide opportunities for trading of other tradeable rights, such as water licenses.

MANAGED INVESTMENT SCHEMES

The *Corporations Act 2001* regulates managed investment schemes which are defined to include any arrangement where an operator manages an investment made by one or more passive investors, other than through the issue of shares or other securities in a company. These provisions aim to protect the interests of passive investors who do not have day-to-day control over the operation of the scheme in which they invest.

The managed investment scheme provision impose extensive licensing requirements. These usually require the appointment of a professional custodian to hold assets and the provision of a comprehensive compliance plan. Operators must demonstrate they have personnel who meet a “fit and proper person” test, who have the appropriate skills, qualifications and experience to operate the scheme. A product disclosure statement (similar to a company prospectus) must be issued to potential investors in the scheme. Licensed entities must satisfy a strict net tangible asset test.

As a result of this extensive regulation, there is substantial cost involved in setting up and running a licensed managed investment scheme. That cost is only warranted where there are substantial funds under management.

There are a number of exemptions from the managed investment scheme rules. These include exemptions for small-scale schemes and schemes that only have sophisticated investors. These exemptions have strict limits to their application. If a specific exemption does not apply, then the full managed investment scheme provisions apply.

ACQUISITION OF BUSINESSES

A business may be acquired in one of two principal ways:

- Its assets can be acquired (in which case the company itself is not acquired)
- The shares of the company which owns the business can be acquired

Each of these methods has its own advantages, depending on the outcome that is sought.

Complex rules apply in relation to listed companies. For instance, special take-over laws apply once a party has acquired a 20% interest in a listed company.

In addition, taxation and stamp duty consequences (discussed under **TAXATION**) must be carefully considered. Note in some jurisdictions stamp duty, which is a state tax, is simply called duty.

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