

# Structures for Establishing a Business in Australia

## Background

A business enterprise in Australia may be operated by an individual, a trust, a company, a joint venture, a partnership or a branch of a foreign company. Each has different legal and taxation implications.

A foreign investor may conduct business in Australia through any of these structures. The most common choices include establishing an Australian subsidiary by registering or acquiring an Australian company, or by registering as a 'foreign company'. In both cases, registration is with the Australian Securities & Investments Commission (ASIC) and governed by the *Corporations Act 2001*.

In choosing a business structure, you should carefully examine what structure will best serve your proposed operations in Australia.

## Establishing a New Australian Subsidiary

A foreign company can establish a new Australian subsidiary by registering a new Australian company, or by acquiring an existing 'shelf' company (which is a recently registered company that has not yet traded).

If registering a new company, the *Corporations Act 2001* allows for the registration of four types of companies:

- A company limited by shares;
- A company limited by guarantee;
- A company with unlimited liability;
- A no liability company (for mining purposes).

The most common type of company is a company limited by shares, which may be either a proprietary (private) company or a public company.

A proprietary company is most common because it has the advantage of being simpler to manage and less expensive to administer.

A company wishing to apply to the Australian Securities & Investments Commission for registration must:

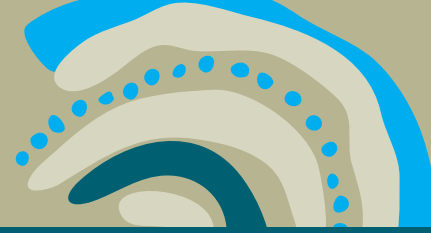
- Ensure that the company's name is available.  
A name would be unavailable if it is currently registered by another company or business or is unacceptable under Corporations Regulations 2001 by containing a restricted word or expression, or suggesting a connection to government.  
If a name is available it may be reserved for a period of two months while the company organises preparation of the necessary registration documents.
- Complete and lodge the relevant application form and documents. An Australian subsidiary of a foreign company is a separate legal entity. It must have a registered office within Australia.

There are also requirements to have Australian resident directors:

- A proprietary company must have at least one director, but need not have a secretary. One director and the secretary (if any) must reside in Australia.
- A public company must have at least three directors and at least one secretary. Two of the directors and one secretary must reside in Australia.

There are, however, no minimum capital requirements for an Australian subsidiary of a foreign company.

Whether an Australian subsidiary is established by registering a new company or acquiring an existing 'shelf' company, it will need to lodge documents with the Australian Securities & Investments Commission, apply for an Australian Business Number (ABN), a Tax File Number (TFN), and also be registered for the Goods and Services Tax (GST).



## Acquiring an Australian Company

An alternative to establishing a branch or subsidiary company may be to acquire the shares in, or the assets of, an established Australian company.

When acquiring an Australian company, foreign investors need to be aware of when prior approval for investment in Australia is required under the Government's foreign investment policy and the *Foreign Acquisitions and Takeovers Act 1975*.

Proposals by foreign interests to invest in Australia which require prior approval and therefore should be notified to the Government include:

- Acquisitions of 'substantial interests' in existing Australian businesses with total assets, or where the proposal values the business, at over \$100 million.
- For US investors, different thresholds apply. They are: \$100 million for investors in prescribed sensitive sectors or by an entity controlled by the United States government, or \$871 million in any other case.
- Proposals to establish any new business involving a total investment of \$10 million or more.
- Proposals by US investors, except an entity controlled by a US government, do not require notification but remain subject to other relevant policy requirements.
- Takeovers of offshore companies whose Australian subsidiaries or gross assets are valued at more than \$200 million or more and represent less than 50 per cent of total assets.
- For US investors, the \$871 million threshold applies, except for offshore takeovers involving prescribed sensitive sectors or an entity controlled by a US government, whereby a \$200 million threshold applies.
- Direct investments by foreign governments or their agencies irrespective of size.

A substantial foreign interest occurs when a single foreigner (and any associates) has 15 per cent or more of the ownership or several foreigners (and any associates) have 40 per cent or more in aggregate of the ownership of a corporation, business or trust.

Under the *Foreign Acquisitions and Takeovers Act*, the Australian Government has the power to block proposals that are determined to be contrary to the national interest.

The national interest, and hence what might be contrary to it, is not defined in the Act. Instead it confers upon the Treasurer the power to decide in each case whether a particular proposal would be contrary to the national interest.

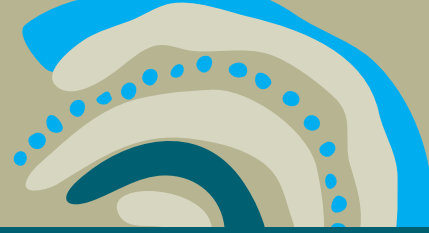
The concept of national interest can embody a number of elements, including considerations of national security matters, community interests, economic development, environmental issues and Australia's international obligations.

The Government's foreign investment policy statements set out guidelines on national interest matters in relation to real estate and other sensitive sectors. The Government receives advice from the Foreign Investment Review Board (FIRB) on foreign investment proposals.

Applications for foreign investment proposals are made to the Foreign Investment Review Board and more information about how to apply can be found at the Board's website ([www.firb.gov.au](http://www.firb.gov.au)).

## Remaining a Foreign Company

Foreign companies may apply for listing on the Australian Stock Exchange (ASX). To obtain and maintain a stock exchange listing, companies need to meet the prescribed requirements set out in the stock exchange listing rules. This includes firm disclosure and reporting requirements. Foreign listed organisations may also qualify as a Foreign Exempt Listing. Further information can be found on the ASX website – ([www.asx.com.au](http://www.asx.com.au)).



## Registering a Foreign Company

A foreign company conducting business in Australia, other than through an Australian subsidiary, must register with the Australian Securities & Investments Commission.

A foreign company wishing to apply for registration must:

- Ensure that the company's name is available. A name would be unavailable if it is currently registered by another company or business, or is unacceptable under Corporations Regulations 2001 by containing a restricted word or expression, or by suggesting a connection to government.
- If a name is available it may be reserved for a period of two months while the company organises preparation of the necessary registration documents.
- Complete and lodge the relevant application form and documents, including a certified copy of the company's certificate of incorporation (or a document of similar effect) and constitution documentation.
- Have a registered office in Australia.
- Appoint a local agent to represent the company in making sure it complies with its legislative requirements in Australia.
- If the Australian Securities & Investments Commission is satisfied with the application and supporting documentation and the statutory registration fee is paid, registration usually occurs within approximately five business days of receipt of the application.
- The Australian Securities & Investments Commission will allocate an Australian Registered Body Number (ARBN) to the foreign company and issue to it a
- 'Certificate of Registration' evidencing its registration as a foreign company in Australia.

In terms of post registration obligations, a registered foreign company is required to lodge with the Australian Securities & Investments Commission, at least once every calendar year, a copy of its balance sheet, profit and loss and cash flow statements.

Registered foreign companies must also notify the Australian Securities & Investments Commission of certain changes as they occur (within prescribed time limits) — such as changes to the structure of the company itself (i.e. its name or constitution) or changes concerning its directors, local agent or office addresses.

## Joint Ventures

Foreign investors may enter into joint venture agreements with Australian entities to carry out commercial activities, thus avoiding the need to incorporate an Australian subsidiary or register as a foreign company.

A joint venture is often used when the parties intend to simply undertake one venture rather than carry on a continuous business. Joint ventures are a popular structure for mining and manufacturing enterprises.

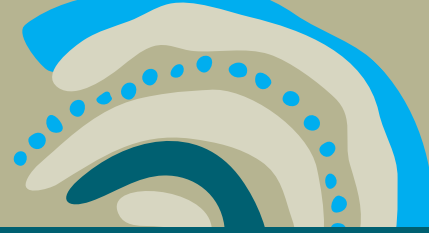
The joint venture will be governed by the terms of the joint venture agreement between the parties as well as by common law and contract law.

## Partnerships

Partnerships are a common arrangement, particularly in some fields such as law or accounting. Partnerships are formally recognised legal relationships and are governed by State laws consisting of mixtures of trust law, agency law and contract law.

This type of business structure is very easy and cheap to establish and can be created by either a formal agreement (partnership deed/agreement) or even by the parties' conduct.

Partnerships have a great deal of flexibility and offer confidentiality, as they are not required to make public disclosures. Each partner will be taxed separately on the income he or she receives.



Partnerships have some drawbacks, particularly relating to liability. The partners are all jointly and severally liable for the debts of the firm and have unlimited liability.

There is limited growth potential using this type of business structure as the maximum number of partners in a partnership is limited to twenty, except in the case of certain professional partnerships.

### Trading Trusts

There are two basic types of trading trusts available in Australia: discretionary trusts and unit trusts.

In general, a discretionary trust is more commonly used for family trust purposes rather than for investment purposes. Unit trusts (especially public unit trusts) are designed for investment purposes.

The structure of a unit trust resembles that of a company. This is because the beneficial interest in the trust's property is divided into units and the investors hold a number of units according to their investment.

The trust is a popular vehicle for land acquisition in Australia as it is a flexible business relationship for income tax purposes and the identity of the beneficiary may also remain anonymous to the public, although it must be disclosed to authorities such as the Foreign Investment Review Board.

Trusts, like joint ventures, are typically governed by the common law and contract law, although there are also certain industry-specific laws.

### Useful links

For further information on alternative business structures in Australia, or Australia's foreign investment policy, go to:

[Australian Securities & Investments Commission](http://www.asic.gov.au)  
[www.asic.gov.au](http://www.asic.gov.au)

[The Australian Stock Exchange](http://www.asx.com.au)  
[www.asx.com.au](http://www.asx.com.au)

[The Foreign Investment Review Board](http://www.frb.gov.au)  
[www.frb.gov.au](http://www.frb.gov.au)

[Gateway to Government Information and Services](http://www.business.gov.au)  
[www.business.gov.au](http://www.business.gov.au)

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#### For more information visit

[www.austrade.gov.au/invest](http://www.austrade.gov.au/invest)