

Structures for establishing a business in Australia

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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 ASIC 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.



Australian Government
Australian Trade Commission



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 ASIC, 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 companies or businesses valued over A\$231 million (indexed annually on 1 January each year). A\$1004 million threshold (indexed annually) applies to US investment in non-sensitive sectors.
- Acquisitions of 'substantial interests' in offshore companies whose Australian subsidiaries or gross assets are valued above A\$231 million (indexed annually). A\$1004 million threshold (indexed annually) applies to US investment in non-sensitive sectors.
- Direct investments by foreign governments and their related entities, regardless of the value of the investment.

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 the Act 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 and Government policies such as in relation to tax, competition and environmental issues. The Government's foreign investment policy sets out guidelines on national interest considerations see:

http://www.firb.gov.au/content/_downloads/Australia's_Foreign_Investment_Policy.rtf

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

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

Registering a Foreign Company

A foreign company conducting business in Australia, other than through an Australian subsidiary, must register with the ASIC.

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 ASIC 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 ASIC 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 ASIC 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.

Useful websites

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

Australian Securities & Investment Commission www.asic.gov.au

The Australian Stock Exchange www.asx.com.au

The Foreign Investment Review Board www.firb.gov.au

Gateway to Government Information and Services www.business.gov.au

About Austrade

The Australian Trade Commission – Austrade – is the Australian Government's trade and investment development agency. Through Austrade's global network, we assist Australian companies to succeed in international business and attract productive foreign direct investment into Australia. Austrade is the first national point-of-contact for all investment inquiries. Working in partnership with business and government, Austrade can provide your company with the information needed to establish or expand a business in Australia. Austrade can also help by connecting you with the right industry and government contacts as well as providing information on investment regulations and government assistance programs.

For more information email info@austrade.gov.au or visit austrade.gov.au

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