



Maddocks

# Doing Business in Australia



## Introduction

Welcome to Maddocks' first edition of *Doing Business in Australia*. This publication is designed to be a straightforward and informative guide that outlines the main legal and commercial issues you need to be aware of when looking to invest in Australia.

Over the past 30 years, Australia has become an attractive place for foreign investment. The combination of rich natural resources, a diverse and skilled workforce, and stable government has seen a dramatic rise in both inbound and outbound investment. According to Australian Government's Department of Foreign Affairs and Trade, foreign investment into Australia has risen as a percentage of GDP from 30 percent in 1979-80 to 150 per cent in 2012-13.

With that escalation in investment has come a range of policy changes designed to both

encourage foreign investment and protect Australian national interests.

This publication will assist you in understanding these changes and the complexities and opportunities that exist when investing in Australia.

Maddocks is a proudly Australian, independent law firm. We have been advising government, corporate and individual clients since 1885 to help them achieve the best legal and commercial outcomes.

With offices in Canberra, Melbourne and Sydney, Maddocks

is ideally placed to advise both inbound and outbound investors.

We are sure you will find *Doing Business in Australia* a valuable resource. An electronic version of this publication is also available at [maddocks.com.au](http://maddocks.com.au).

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# Contents

Companies & Other Business Structures	4
Intellectual Property	8
Mergers & Acquisitions	12
Fundraising	14
Restrictions on Foreign Investment	16
Competition Law & Consumer Protection	20
Taxation	24
Property Development (Residential & Mixed Use)	28
Employment & Industrial Relations	32
About Maddocks	38



# Companies & Other Business Structures



A non-Australian corporation that wants to carry on business in Australia will usually either open a branch office or register a subsidiary company.

Companies in Australia are principally regulated by the *Corporations Act 2001* (Cth). This Act is administered by the Australian Securities and Investments Commission (**ASIC**).

## Registration of Foreign Companies

A foreign company that carries on business in Australia through a branch office or similar arrangement must register with ASIC.

A foreign company will carry on business in Australia if it:

- has a place of business in Australia; or
- administers, manages or deals with property in Australia as an agent, legal personal representative or otherwise.

A foreign corporation will also be likely to be carrying on business in Australia if it carries out commercial transactions involving repetition and continuity within Australia.

A foreign corporation carrying on business in Australia must:

- register its name;
- establish a registered office in Australia;
- appoint at least one local agent authorised to accept notices and ensure compliance with Australian corporations law; and
- lodge with ASIC copies of various corporate documents, details of current directors and registered offices in its home jurisdiction and in Australia.

## Registration of a Subsidiary

The majority of companies registered in Australia for commercial purposes are either:

- proprietary limited companies; or
- public companies.

A proprietary limited company:

- must have at least one director who is resident in Australia;
- is limited to not more than 50 members (excluding employees); and
- may not raise funds from the public.

Proprietary limited companies have simple and cost-effective administrative requirements.

A public company:

- must have at least three directors, one of whom is resident in Australia;
- has no restrictions as to membership; and
- may raise money from the public.

Public companies have greater administrative requirements.



## Duties of Directors & Officers

Directors and officers of a company based in Australia are required to fulfil various duties.

These duties are outlined in the *Corporations Act*. They include:

- to act with the care and diligence of a reasonable person; and
- to act in good faith and for a proper purpose.

A breach of these duties can expose the director or officer to civil penalties, damages and criminal convictions.

## Reporting Requirements

Companies will need to comply with certain reporting requirements. These include a requirement to continually notify ASIC of changes to directors, officers and other company details.

Companies are also required to periodically lodge financial statements with ASIC unless an exemption applies.

In the case of a foreign corporation registered with ASIC, these requirements will oblige the foreign corporation to lodge its annual accounts for its entire operation, not just the Australian part.



## Other Business Structures

As an alternative to operating through an incorporated vehicle, businesses in Australia are sometimes carried on using the following structures:



### Partnerships

This is a relationship between parties carrying on business in common with a view to profit. Partners may be individuals or companies. A partnership is not a legal entity separate from the partners, who will generally be jointly and severally liable on an unlimited basis for the obligations of the partnership. Some, but not all, Australian states and territories allow a form of limited partnership to be created.



### Joint Ventures

A true joint venture is a contractual arrangement under which the joint venturers share the product produced by the joint venture rather than profit. In a true joint venture, the liabilities of each joint venturer will be several. Joint ventures are common in the mining industry in Australia.



### Trusts

In a trust arrangement, assets are held by a trustee on behalf of beneficiaries. Trust arrangements are usually regulated by a trust deed and the trustee has extensive duties imposed by law. Trusts will either be fixed trusts, discretionary trusts or unit trusts. A unit trust will involve the beneficiaries holding units to which various entitlements attach.

The appropriate structure will depend on regulatory requirements, liability issues and taxation considerations.



# Intellectual Property



In Australia, intellectual property rights are protected by federal legislation and the common law. The administration of the legislative schemes relating to patents, trade marks, designs and plant breeders' rights is managed by IP Australia.

IP Australia is responsible for processing applications, conducting hearings and deciding on disputes relating to granting or denying Australian IP rights.



## Business & Trade Names

A company that wishes to carry on business in Australia under any name other than its exact company name must register a business name with the Australian Securities and Investments Commission (**ASIC**).

The obligation to register a business name is separate to protecting any intellectual property rights in a name or brand. Registering a business name does not provide exclusive ownership of, or any proprietary rights in, the business name. It also does not prevent other people from being able to register and use similar names.

To gain exclusivity over a particular business name, the business name will need to be registered as a trade mark with IP Australia.



## Trade Marks

In order to obtain trade mark protection in Australia, the owner is required to register the trade mark with IP Australia in accordance with the *Trade Marks Act 1995* (Cth).

Trade marks can be registered for names, logos, aspects of packaging, shapes, colours, sounds and scents.

Registration gives the owner an exclusive right to use, and authorise others to use, the trade mark for an initial period of 10 years, renewable for further 10-year terms.

As the application process can take six to 12 months, a foreign company intending to carry on business in Australia should consider applying to register their trade marks as far in advance of their commencement of trading in Australia as possible. It is advisable to undertake an availability search before using or seeking to register a trade mark in Australia.

Under international conventions, trade marks registered in other jurisdictions may, in some circumstances, obtain the benefit in Australia of the earlier priority date of the initial application.

In addition, unregistered trade marks may have some protection in Australia under the common law doctrine of passing off and/or under the misleading and deceptive conduct provisions of the *Competition and Consumer Act 2010* (Cth).



## Copyright

The *Copyright Act 1968* (Cth) protects all original literary works, dramatic works, musical works, artistic works, sound recordings, cinematograph films, sound recordings, sound and television broadcasts and published editions.

Copyright does not require registration. Rather, copyright arises automatically if the criteria for copyright subsistence exist.

In order to obtain copyright protection in Australia, it is necessary that a work be original, and it involves a sufficient degree of effort. Artistic quality or merit of the work is not a consideration.

In Australia, certain moral rights of authors are also protected by the *Copyright Act*. These are the right of attribution of authorship, the right not to have a work falsely attributed and the right to maintain the integrity of the work.

Copyright in works created by an employee in the course of employment automatically vest in the employer, unless otherwise specifically agreed between the parties. It is important to note copyright will vest in the creator of the work in most other circumstances unless there is a specific assignment of the copyright to another person. Accordingly, if you engage a third party to create a work on your behalf, the agreement should specifically deal with ownership of copyright.

In general, copyright subsists for the life of the author plus 70 years.



## Patents

Patents for inventions can be granted under the *Patents Act 1990* (Cth). In Australia there are two types of patents:

- standard patents; and
- innovation patents.

The grant of a standard patent confers an exclusive right to the owner to exploit the invention during the term of the patent (20 years for standard patents, but may be extended by up to five years for certain patents for pharmaceutical substances).

In order to qualify for standard patent protection, an invention must satisfy a number of criteria, including that it constitute a 'method of manufacture', it is novel, and it involves an inventive step.

An application for a standard patent undergoes a substantive examination process before being granted. It typically takes at least two years for a complete standard patent application to proceed to grant. A standard patent is enforceable against others from the date of application.

The *Patents Act* also recognises innovation patents, which are intended for less significant inventions and have a lower inventive threshold. As compared with standard patents, innovation patents are simpler, faster to obtain and suited to inventions that are technologically simple or have a short life span. The innovation patent has a term of eight years and cannot be extended. Unlike the standard patent, the innovation patent is only enforceable against others once a substantive examination is performed, and the patent is 'certified'.

Australia is a member of the Paris Convention and the Patent Co-operation Treaty, which are both designed to facilitate the filing of patent applications internationally.



## Registered Designs

Designs are protected under the *Designs Act 2003* (Cth). A design is 'the overall appearance of a product resulting from one or more visual features' and will be registrable if it is 'new' and 'distinctive', assessed against designs publicly used in Australia or published within or outside Australia. A design includes shape, configuration, pattern and ornamentation.

A design is new unless it is identical to a design that forms part of the prior art base for the design. 'Distinctive' means substantially different in overall appearance to other designs already in the public domain.

Design registration protects designs that have an industrial or commercial use. A registered design gives the owner exclusive rights to commercially use, licence or sell the product for which registration is granted. A design can be registered for up to 10 years.

Convention priority for members of the Paris Convention can also be claimed for designs filed internationally up to six months before the application date in Australia.



## Domain Names

The most relevant domain names to Australian businesses are '.com.au' domain names. These are licensed by a small number of accredited Australian registrars on a 'first come, first served' basis.

To register a '.com.au' domain name, applicants must:

- have an Australian connection, which includes either:
  - (i) being an Australian registered company;
  - (ii) being a registered foreign trader in Australia; or
  - (iii) owning an Australian registered trade mark;
- seek the domain name for an appropriate commercial purpose; and
- have a bona fide intention to use it.

Registration does not confer ownership of the domain name, but rather an exclusive licence to use it for the period of registration.



## Confidential Information

While there is no specific legislation in Australia that protects confidential information, protection comes from the common law duty of confidence.

An action for breach of confidence in Australia must have the following elements:

- the information must have the necessary quality of confidence about it;
- the information must have been communicated in circumstances importing (either expressly or impliedly) an obligation of confidence; and
- there must have been unauthorised use of that information to the detriment of the party communicating it.

Once established, the duty of confidence remains until the information loses its quality of confidence. For example, once information is in the public domain it will cease to be confidential.



## Other IP Regimes

Other intellectual property regimes also apply to certain specialised areas, such as plant breeder's rights for the licensing and commercialisation of plant varieties, and circuit layout rights for the protection of integrated circuits and semi-conductor chips.





# Mergers & Acquisitions



The level of regulation that applies to mergers and acquisitions transactions depends on the nature of the transaction (asset sale or share sale) and the type of target (private or public company).

## Private Treaty Acquisitions

Apart from any requirements to obtain the approval of the Commonwealth Treasurer under Australia's foreign investment laws (see *Restrictions on Foreign Investment*, page 16) and any competition issues (see *Competition Law*, page 20) acquisitions by foreign entities of assets or shares in Australian companies with less than 50 members are, as a general matter, not subject to detailed regulation and are usually done by way of private agreement between parties.

Australian practice for private acquisition transactions (and the issues that arise) are broadly consistent with major overseas jurisdictions.

Whether a transaction is structured as an asset sale or a share sale will depend on a number of factors including:

- the taxation consequences of each method;
- whether the target entity has residual liabilities; and
- the ease with which major contracts, leases and authorisations can be assigned.

## Takeover Legislation

If an Australian company or a managed investment scheme (for example, a property trust) has more than 50 members or is listed on the Australian Stock Exchange (**ASX**) (the **target**), any acquisition of its shares will be governed by the takeover laws in Chapter 6 of the *Corporations Act 2001* (Cth). These rules apply to acquisitions of a target by anyone, not just by foreign parties.

In general, any person is prohibited from acquiring a 'relevant interest' in the voting securities of a target that takes interest from:

- less than 20 percent to 20 percent or more; or
- more than 20 percent to anything below 90 percent,

unless an exception applies.

An acquisition which results in a person holding a relevant interest in 5 percent or more of the voting shares in a target must be notified by a public filing with either ASX or the Australian Securities and Investments Commission (**ASIC**) within 48 hours of the time of the acquisition.

What constitutes a 'relevant interest' is broadly defined but includes:

- voting securities of which the person is the registered holder; and
- voting securities where the person can control the disposal of those securities or the voting power attached to those securities.

A person is also deemed to have a relevant interest in the voting securities in which that person's associates have a relevant interest.

There are exceptions to the prohibition for acquisitions done by:

- an on-market bid – buying the shares of an ASX-listed company through the ASX;
- an off-market bid – making an offer directly to the company's members;
- the acquisition of less than 3 percent of voting securities in any six-month period (the 'creep rule');
- acquisitions approved by non-associated security holders (that is, by other than the buyer, seller and their respective associates); and
- court-approved schemes of arrangement.

On-and-off market bids can be done without the participation of the target company (although this may affect the likelihood of success), whereas a scheme of arrangement requires the participation of the target. If an acquirer gains 90 percent or more of the shares in the target company, the *Corporations Act* includes a regime to compulsorily acquire the remaining 10 percent.

The takeover laws are complex and Australian law advice should be sought before a significant transaction is entered into in connection with a target.





# Fundraising



Any company that proposes to raise capital in Australia through the issue of securities (for example, shares or debentures) or financial products (for example, units in a trust, derivatives or interests in a scheme) is required to comply with the disclosure regime under the *Corporations Act 2001* (Cth), regardless of where the issuer is incorporated.

## Disclosure Requirements

The *Corporations Act* provides that, unless an exception applies, companies must provide prospective investors with a disclosure document setting out the information required for an investor and their professional advisers to make an informed decision about their investment.

An offer of securities can be made under a prospectus or, subject to the type of fundraising and compliance with specified restrictions, an offer information statement or a profile statement, each to be lodged with the Australian Securities and Investments Commission (**ASIC**). An offer of financial products, other than securities, must be made under a product disclosure statement.

The form of content requirements of each of these disclosure documents and the statutory and regulatory requirements associated with the fundraising process are heavily regulated by the *Corporations Act*.

## Exceptions

Offers of securities to the public do not need to be made under a disclosure document if the offer is made in accordance with the exemptions specified in the *Corporations Act*. Exceptions that are frequently relied on include:

- small-scale offerings (less than 20 personal offers made within a 12-month period, raising less than A\$2 million in aggregate);
- the offers are made to sophisticated, professional or experienced investors, who are presumed not to need disclosure due to their financial capacity, experience or association with the issuer;
- offers with a minimum subscription of A\$500,000;
- the offers are made to current holders of the securities under a dividend reinvestment plan or share purchase plan;
- offers made to employees under certain employee share plans;
- where no money or other form of payment is payable for the securities under the offer; and
- where other disclosure regimes apply under the *Corporations Act*, including schemes of arrangements and takeovers.

Where an issuer relies on an exception to the disclosure requirements for a fundraising, the general prohibitions against misleading or deceptive conduct continue to apply for any documents or other information provided in connection with the fundraising.

## Liability

Both criminal and civil consequences may apply where a company breaches the disclosure obligations under the *Corporations Act*.



# Restrictions on Foreign Investment



Foreign investment can be a tricky issue in Australia, where the law and politics can sometimes be at odds.

Under Australian law, certain investments by foreign persons in Australia may be restricted or subject to approval by the Foreign Investment Review Board (**FIRB**).

While the Australian Government maintains that it welcomes foreign investment, investments viewed as being against the national interest may not be allowed.

## Who Qualifies as a ‘Foreign Person’?

The *Foreign Acquisitions and Takeovers Act 1975* (Act) (**FATA**) defines foreign persons to include, among other things:

- an individual not ordinarily resident in Australia;
- a corporation in which an individual not ordinarily resident in Australia, a foreign corporation, or a foreign government holds a substantial interest (being an interest of at least 20 percent);
- a corporation in which two or more persons, each of whom is:
  - (a) an individual not ordinarily resident in Australia;
  - (b) a foreign corporation; or
  - (c) a foreign government,
- hold an aggregate substantial interest (being an aggregate interest of at least 40 percent);
- the trustee of a trust in which an individual not ordinarily resident in Australia, a foreign corporation or a foreign government holds a substantial interest;
- the trustee of a trust in which two or more persons, each of whom is an individual not ordinarily resident in Australia, a foreign corporation or a foreign government, hold an aggregate substantial interest; and
- a foreign government.

## What Types of Investment Need FIRB Approval?

Whether your investment requires FIRB approval will depend on a range of factors. These include the type of investment, the industry in which the business operates, the percentage of the asset or interest to be acquired and the dollar amount proposed to be invested.

Where the proposed investment by a foreign person exceeds the percentage and threshold specified by FIRB for a particular type of investment, FIRB approval will need to be obtained before the investment is made. The percentage and dollar thresholds for some common investments (subject to other detailed requirements) are:

Type of investment	Minimum % asset acquired	General threshold (indexed annually)
Acquisition of business	20 percent	Business value of A\$252 million*
Agribusiness	10 percent	Investment of A\$55 million*
Media business	5 percent	Regardless of value
Agricultural land	Not applicable	Cumulative threshold of A\$15 million*
Commercial land	Not applicable	Land value of A\$252 million for developed commercial land (subject to a A\$55 million threshold for 'sensitive' land)* \$0 for vacant commercial land
Mining tenements	Not applicable	\$0
Residential <ul style="list-style-type: none"><li>– specific rules apply to the acquisition of residential land and must be considered in detail</li></ul>	Not applicable	\$0*

\* Subject to higher thresholds for agreement country investors eg. United States, Chile, New Zealand etc (subject to change).

For more details on thresholds, refer to **firb.gov.au**.

## Foreign Government Investors

All foreign government investors must obtain approval before acquiring a direct interest in Australia (generally at least 10 percent), starting a new business or acquiring an interest in Australian land regardless of the value of the investment.

## Agreements to Acquire

If a proposed acquisition requires FIRB approval, the foreign person must obtain the FIRB approval before entering into any agreement for the proposed acquisition, or, if an agreement is to be entered into before FIRB approval is obtained, the agreement must be subject to a condition precedent that FIRB approval be obtained.

If not, then the execution of the agreement will breach the FATA.

## National Interest Test

FIRB will apply a 'national interest test' when considering whether to approve an application. While the true definition of this test can sometimes be mysterious, there are some considerations FIRB will take into account. These include:

- national security;
- competition;
- other Australian government policies (including tax);
- impact on the economy and the community; and
- character of the investor.

The broad scope above effectively provides FIRB with a fair amount of discretion in reviewing and approving applications.

## Fees

Since 1 December 2015, fees are payable on FIRB applications.

The amount of fees depends largely on the type of investment and, in some cases, the dollar amount of the proposed investment. For example, fees for the acquisition of developed commercial land is A\$25,000 irrespective of the value of the acquisition, while the fees for the acquisition of residential land depends on the amount paid for the acquisition.

For more details on the fees, refer to **firb.gov.au**.

## How Long Before a Decision is Made?

Under the FATA, FIRB has 30 days to consider an application and make a decision. The applicants will be informed of the decision within 10 days of it being made.

FIRB may extend this period by up to a further 90 days by publishing an interim order. Investors, at FIRB's request, may also voluntarily extend the period by providing written consent.

## Penalties

Penalties for a breach of the FATA are quite significant. Generally, the penalties for a breach by individuals is A\$135,000 or three years jail or both. The penalty for a breach by companies is A\$675,000. There are also provisions for civil penalties to be imposed by FIRB.

In addition, FIRB has powers to prohibit an investment, or order a divestment of a completed acquisition, if it is satisfied that the investment would be contrary to the national interest.

## FIRB Advice

The rules around FIRB and the FATA can be complex.

Whether FIRB approval is required and the category of such approval will need to be considered in detail depending on the facts of the proposed investment. Maddocks can advise on whether FIRB approval is required and assist in the application and appeal process.





# Competition Law & Consumer Protection



Foreign investors in Australia will need to understand the laws relating to competition, and consumer protection.

In Australia, the promotion of market competition is regulated by the *Competition and Consumer Act 2010* (Cth) (**CCA**). The CCA is consistent with antitrust legislation in many overseas jurisdictions.

The CCA also has provisions dealing with access to services provided by major facilities of national significance, the prescription of industry codes and the regulation of the telecommunications industry and the international shipping industry.

The CCA is administered by the Australian Competition and Consumer Commission (**ACCC**) which has wide powers to enforce the provisions of the CCA and obtain information from various entities.

## Mergers & Acquisitions

The CCA prohibits any acquisitions (of shares or assets) that would have the effect or the likely effect of substantially lessening competition in a market in Australia.

There is no requirement to notify the ACCC of a transaction which may result in a substantial lessening of competition, but if the parties choose not to notify the ACCC and the acquisition proceeds without approval there is a risk that the ACCC may take action to prevent the transaction from occurring.

The ACCC encourages parties to raise with it at an early stage, transactions which may have competition law issues. The ACCC has an informal clearance process, which involves providing information about the parties, the transaction and the relevant market. Clearance for non-complex transactions is expected within 4-6 weeks; however, transactions with more significant competition issues can take 9-12 weeks. Informal clearance can be sought on a confidential basis, and the ACCC will deliver a preliminary, non-binding view on that basis.

There is also a formal clearance procedure, which involves the payment of a fee and a public process, set out in the CCA. This formal procedure is rarely used.

For more information on mergers and acquisitions, see *Mergers & Acquisitions*, page 12.

## Anti-competitive Conduct

In addition to prohibiting certain mergers, the CCA also prohibits anti-competitive arrangements. These arrangements include:

### Cartel conduct

For example, price fixing, market sharing and collusive tendering. A cartel exists when businesses agree to act together instead of competing with each other.

### Anti-competitive agreements

Any contract, arrangement or understanding that has the purpose or effect, or likely effect, of substantially lessening competition in a market, is prohibited. Arrangements that may limit competition could include agreements not to supply distributors or resellers of a particular type, or in a particular area.

### Resale price maintenance

An agreement between a manufacturer and a wholesaler or retailer not to sell a product below a specified price.

### Exclusive dealing

When a business will only supply goods or services, or give a particular price or discount on the condition that the purchaser either buys or supplies goods or services from or to a particular third party.

### Misuse of market power

Taking advantage of power in a market to damage a competitor, prevent a new entrant or eliminating competition.





## Consumer Protection

Additional consumer protection is set out in the Australian Consumer Law (**ACL**) which is a schedule to the CCA and primarily ensures that businesses do not participate in:

- unconscionable conduct;
- false or misleading conduct; or
- pyramid selling.

The ACL also regulates the quality and safety of products supplied to consumers. The ACL requires that goods sold to Australian consumers:

- are of acceptable quality;
- have been accurately described; and
- satisfy any manufacturer's express warranty.

### How does this affect a business operating in Australia?

If you operate a business in Australia you must ensure the business complies with the CCA and the ACL.

Penalties for businesses participating in restrictive trade practices can include:

- fines of up to A\$10 million;
- a penalty amount equal to three times the financial gains from the offending conduct; or
- 10 percent of the annual turnover from the previous year.

Penalties for businesses participating in cartel conduct can include up to 10 years in prison in addition to monetary fines.

Penalties of up to A\$1.1 million may apply to businesses contravening the ACL.



## Unfair Contracts

Australian consumer laws provide that terms in a contract between a business and a consumer, or (from November 2016) a business and a 'small business', will be void if:

- the term is unfair; and
- the contract is a standard form contract.

A contract is a 'small business contract' if, at the time the contract is entered into, at least one party is a business that employs fewer than 20 people, and either:

- the upfront price of the contract is A\$300,000 or less; or
- the contract has a duration of more than 12 months and the upfront price of the contract is less than A\$1 million.

A term is unfair if:

- it would cause a significant imbalance in the parties' rights and obligations under the contract;
- it is not reasonably necessary to protect the legitimate interests of the party who would be advantaged by the term; and
- it would cause detriment (financial or otherwise) to a party if the term was relied on.

Examples of unfair contract terms include terms that permit one party (but not the other) to:

- terminate the contract;
- vary the terms of the contract; or
- renew or not renew the contract.





# Taxation



In Australia, each level of government imposes its own taxes. However, by far the most significant taxes are levied by the Commonwealth Government. The Commonwealth Government is the only level of government that collects income tax.

It is not possible to provide a comprehensive review of the various taxation regimes in Australia in the space available. The impact of the various taxation regimes means, however, specific advice should be obtained before any major transaction is entered into.



## Income Tax

Income tax is imposed on the taxable income of entities, including companies, individuals, partnerships and trusts.

An entity's taxable income is calculated as its assessable income less allowable deductions. Generally speaking:

- assessable income includes all the ordinary income and statutory income derived by it (subject to source rules for non-residents, discussed further in the following column, *Residents and Non-residents*; and
- deductions are generally allowed for any losses or outgoings that are incurred in gaining the assessable income and/or are incurred in carrying on an Australian business.

Where allowable deductions exceed assessable income for a year, an entity incurs a tax loss. Subject to satisfying strict rules around the availability of tax losses, tax losses may be carried forward indefinitely and offset against future taxable income.

The current tax rate for companies in Australia is 30 percent.

The tax period coincides with the Australian financial year, which is the period from 1 July to the following 30 June.

The income tax regime is administered by the Australian Taxation Office (**ATO**).

The Commonwealth Government also imposes a Capital Gains Tax (**CGT**) by including in assessable income the gains made from specified CGT events. However, in general, non-residents (see following column, *Residents & Non-residents*) are generally not subject to CGT except where the gain relates to land, interests in land or shares or rights in land rich entities.



## Residents & Non-residents

Under the income tax legislation, residents of Australia are taxed on their worldwide income (that is from sources both in and out of Australia).

A company will be a resident if it is incorporated in Australia or if it carries on business in Australia and has its central management here.

It will also be a resident if its controlling shareholders are residents of Australia.

Non-residents are ordinarily only taxed on income derived from sources in Australia (including certain specified capital gains). However, the source rules for non-residents are subject to the application of a double tax agreement (**DTA**) between Australia and another jurisdiction which can tax non-residents on income derived through a permanent establishment carried on in Australia (rather than based on source).



## Withholding Taxes

Interest paid by an Australian resident company to a non-resident lender is generally subject to an interest withholding tax of 10 percent unless:

- the lender provides the loan through an Australian branch;
- the Australian resident borrows in respect of a foreign branch;
- the debt qualifies for an exemption under a public offer test; or
- the interest is exempt or the rate otherwise reduced under a DTA.

Dividends paid by resident companies to non-resident shareholders are subject to a withholding tax of 30 percent. This rate may be reduced under a DTA. Further, because of Australia's dividend imputation system (the crediting against the dividend income of shareholders of tax paid by the company), where an Australian company pays a 'fully franked' dividend to a non-resident shareholder, no withholding tax will be payable.

Royalties paid by a resident company to a non-resident will be subject to a withholding tax of 30 percent, which may be reduced under DTAs.

Australian sourced income derived by a non-resident through a trust (other than the types above) is subject to tax in the hands of the trustee (at the rate applicable to the beneficiary) with credit provided to the beneficiary for the trustee tax paid.

Australia has also recently introduced (from 1 July 2016) a 10 percent withholding obligation on payments made to non-residents on the sale of certain Australian real property interests (land, interests in land or shares or rights in land rich entities).





## Debt Funding & Thin Capitalisation

The interest expenses and expenses incurred by an Australian entity in obtaining and maintaining debt funding (known as **debt deductions**) will generally be deductible for tax purposes in Australia.

However, an Australian entity that is controlled by non-residents may be subject to the so-called thin capitalisation rules if the annual debt deductions of the Australian entity exceed A\$2 million.

Where the thin capitalisation rules apply, a portion of the debt deductions may be denied if the level of debt of the Australian entity exceeds the 'safe harbour' maximum allowable debt-to-equity ratio.

Generally speaking, the 'safe harbour' maximum allowable debt-to-equity ratio of an Australian subsidiary or branch cannot exceed 60 percent (3:2 debt-to-equity). If the 'safe harbour' limit is exceeded, a portion of the debt deductions may be disallowed.

Under the thin capitalisation rules, it is not prohibited for a foreign entity to fund its Australian business using debt in excess of the safe harbour. These rules merely seek to deny an interest deduction on the debt in excess of the safe harbour.



## Transfer Pricing

Australia's transfer pricing regime is intended to ensure that prices and conditions of transactions between an Australian entity and its foreign associates are undertaken on 'arm's length' terms.

Australia's transfer pricing regime has a wide application and can operate to adjust or reconstruct prices and transactions between the Australian operating entity (either a branch or an Australian subsidiary) and the foreign related entity where the parties have not been transacting at arm's length.

The ATO prescribes particular pricing methodologies it considers acceptable for the purposes of determining whether a transaction is at arm's length. The ATO also requires entities keep sufficient documentation to be able to demonstrate that their international dealings comply with the arm's length principles.

Under Australia's self-assessment system, it is the Australian subsidiary's responsibility to prove to the ATO (upon request) that arm's length principles have been adhered to.



## Other Australian Taxes

Foreign entities looking to do business in Australia should also be aware of the following taxes and imposts:

- Australia imposes payroll tax in each state and territory based broadly on an employee's wages and salaries that exceed prescribed thresholds. The amount of payroll tax payable will differ between each state or territory and generally ranges between 5 to 6 percent.
- Australia imposes fringe benefits tax on employers on a wide range of cash and in-kind fringe benefits provided to employees. The amount of fringe benefits tax is based on the value prescribed to the benefits provided under the fringe benefits tax legislation at a rate of 46.5 percent.
- Australia imposes a Goods and Services Tax (**GST**) of 10 percent on the supply of goods and services connected with Australia where an entity is registered or required to be registered for GST. An Australian operation must be registered for GST where its annual turnover is A\$75,000 or more. Generally speaking, the GST turnover threshold is based on the value of supplies made in a 12-month period. GST is also imposed on all goods imported into Australia.
- Australian states and territories impose stamp duty on prescribed transactions. Transactions that may attract a stamp duty liability include the transfer of property and shares. Rates of duty differ between states and territories and generally range between 5 to 7 percent.





# Property Development (Residential & Mixed Use)



The lifecycle of a development project contains many moving parts. Developers need to navigate a range of different legal requirements before getting to the point where income is generated. Without proper advice during the six different stages of the lifecycle, that income could be minimised or not realised at all.

There are six main stages of the apartment development project lifecycle. The following is a snapshot of the legal issues you need to be aware of when beginning a development project.



## Stage One

### Asset Acquisition & Structuring

You will need to undertake due diligence investigations of a site, including:

- title review, including ownership, restrictions and encumbrances;
- asset investigation, including surveys, building and environmental inspections;
- existing tenancy reviews (including retail legislation issues);
- Goods and Services Tax and land tax; and
- planning.

When conducting the site acquisition, you will need advice on the corporate structure for the purchasing entity (such as joint venture, and other tax efficient development structures).

You will then need to decide on your development delivery model, such as:

- direct acquisition of the land;
- acquisition of the corporate landholder;
- joint ventures; and
- development agreements.

This will involve the drafting and negotiation with the vendor/land owner of appropriate transaction documentation.



## Stage Two

### Subdivisions & Authorisations

You will need expert advice on subdivisions and owners corporations. The issues you will need to decide on include how many owners corporations are required and lot liability on plans of subdivision. You will also need owners corporation rules and leases or licences over common property for uses, such as access rights, car parks, signage and storage.

Planning is a significant aspect of development projects. You will need advice on the interpretation of planning schemes, planning permit requirements and strategic planning issues, s173 agreements, issues relating to large residential subdivisions, including the need for construction of infrastructure such as water services and electricity substations.

For projects involving foreign investment, you will need to get advice on Foreign Investment Review Board (**FIRB**) approvals (see *Restrictions on Foreign Investment*, page 16). FIRB approval is needed when acquiring an interest in property either via direct acquisition or indirectly through acquisition of a foreign-owned corporation.





### Stage Three

#### Sales & Leasing

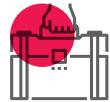
There are different contractual requirements for different types of developments: apartments, mixed use and master planned communities, including the establishment and management of off-the-plan sales contracts using provisions that are constantly revised. You may need to prepare bespoke special conditions for interest sharing, optional upgrades, combining apartments, recreational facilities and the retail component of any development.

As part of a mixed use development, the retail or commercial and office lots may be retained by the developer and leased to a tenant. In that case, you will need leases and agreements for lease for these.

You will need to make sure that marketing and sales material for your project comply with Australian consumer law. This includes website terms and conditions, disclaimers, hard copy marketing brochures, renders, artists' impressions and videos.

The agreement appointing a selling agent will also need to be carefully negotiated to ensure commission arrangements and agent obligations are properly structured.

Consideration will need to be given as to how sales to foreign purchasers will be handled in light of FIRB requirements (including whether to obtain a FIRB 'blanket' exemption certificate).



### Stage Four

#### Project Delivery

The success of the construction of a project will depend on the quality of the advice you have received.

You will need to prepare a range of documents, from tender documents through to advice on the preparation and negotiation of construction and finance-related documents, including:

- 'construct-only' and 'design and construct' building contracts; and
- consultancy agreements.



### Stage Five

#### Project Finance

Depending on the type of development you have undertaken, you will need to know about the project financing options available to you. These range from senior bank debt, mezzanine and equity mezzanine funding, to wholesale and institutional capital raisings, and any appropriate combination of these funding arrangements to suit the given project requirements.



### Stage Six

#### Income Realisation

Now that the project is complete, it is time to generate income. You will need to obtain the proper conveyancing services required for your project.

This will include exchanging the standard sales contract and managing the conveyance through to settlement, including preparing statutory declarations, receiving deposits and arranging investment of deposits, liaising with existing mortgagees and purchasers' solicitors on settlement, attending settlement, distributing settlement monies as instructed, and advising authorities of change of ownership.





# Employment & Industrial Relations



Generally, Australia’s statutory employment laws (both federal and state) apply to all private sector employees working in Australia. The principal federal law is the *Fair Work Act 2009* (Cth) (**FW Act**). State and other federal laws also cover matters including discrimination, long service leave, workers’ compensation, workplace surveillance, privacy and work health and safety.

## Recruitment

During the recruitment process, employers are permitted to conduct various checks about prospective employees.

These may include background or reference checks, police checks and working with children checks (where relevant).

The recruitment process is subject to discrimination, adverse action and privacy laws (each discussed in this chapter).

Employers are also responsible for ensuring that all employees have a right to work in Australia. In Australia, foreign workers must hold a valid visa.

## Types of Relationships

Various types of working relationships are recognised in Australia, including the following:		
Employee	Contractor	Labour hire
An employee works under an employment contract in return for wages and has minimum entitlements under the FW Act (discussed further in this chapter). An employee can be employed in various ways, including on a full-time, part-time or casual basis.	A contractor operates an independent business, and can be engaged through a company. A contractor has no minimum entitlements under the FW Act.  The FW Act provides significant penalties for 'sham contracting'. 'Sham contracting' occurs when an employer represents an employment relationship as a contractor relationship so as to avoid providing the worker with minimum employee entitlements.	A business may employ or engage workers (labour hire workers) and provide those workers to another business (the host) to perform work. The labour hire workers are not, generally, employees of the host.

## The Fair Work Act, Awards & Enterprise Agreements

The FW Act establishes (among other things) the minimum entitlements for most employees in Australia. These entitlements are set out in the National Employment Standards (**NES**). The NES contains 10 minimum entitlements including maximum weekly ordinary hours, annual leave, parental leave, personal/carer’s leave, compassionate leave, flexible working arrangements, public holidays, notice of termination and redundancy pay. The FW Act also establishes a national minimum wage.

In addition to the NES, the Fair Work Commission (**FWC**) (the national employment tribunal) makes modern awards which cover certain employees within an industry, or employees who perform certain types of work. Modern awards supplement the NES and deal with matters such as working arrangements, overtime, penalty rates and rates of pay for the various classifications of employee covered by the award.

Employers may also enter into enterprise agreements with their employees which, when approved by the FWC, operate to the exclusion of any applicable modern award. An enterprise agreement must result in employees being 'better off overall' than if the modern award applied.

Not all employees are covered by a modern award or enterprise agreement.

Contracts & Policies

There is no requirement for an employer to issue a written employment contract or letter of offer. However, it is best practice to do so to ensure that the terms of the relationship are properly recorded. An employer cannot contract out of the NES, a modern award, or an enterprise agreement.

With some limited exceptions, there is also no requirement for an employer to issue employment policies. Again, however, it is best practice to do so regarding certain matters (such as workplace behaviour).

Bonuses, Including Employee Share Schemes

It is common for employers to have bonus schemes for some or all of their employees. These schemes may operate within Australia or internationally. The form of any award made under the schemes may include cash, options, or stock. In certain circumstances, care needs to be exercised to ensure compliance with regulatory requirements, including the *Corporations Act 2001* (Cth).

Superannuation & Tax

Federal superannuation laws require employers to make a prescribed minimum level of superannuation contributions (subject to a cap) for eligible employees each quarter. These contributions must be made into a complying superannuation fund.

Employers are required to deduct and remit to the Australian Taxation Office (**ATO**) income tax. Fringe benefit tax is also payable regarding many benefits provided to employees in connection with their employment. State laws require employers to pay payroll tax if their payroll exceeds a threshold amount.

For more information on Australia’s taxation system, see *Taxation*, page 24.

Privacy (Data Protection)

While there are extensive privacy laws in Australia, the obligations under those laws do not apply to employee records for current or former employees held by an employer (usually referred to as the employee records exemption). However, the exemption does not apply to potential employees or to other types of workers.

Anti-Discrimination, Sexual Harassment & Bullying

There are extensive anti-discrimination laws in Australia (both federal and state) that prohibit employers making decisions (whether directly or indirectly) based on unlawful reasons.

The unlawful reasons include gender, sexual preference, race, political opinion, religion, age and disability. Harassment and victimisation (including sexual harassment) are also unlawful.

These laws apply from recruitment through to termination of an employee’s employment. Bullying is also unlawful under both the FW Act and work health and safety laws.

Work Health & Safety

There are extensive workplace health and safety laws in Australia. Employers have strict duties under legislation concerning the safety of various persons who may be present at their workplaces.

Directors and officers of a company can be personally liable for failing to ensure that a company complies with its workplace health and safety duties (by virtue of their due diligence obligation).

Workers compensation is regulated by state laws and requires most employers to take out insurance to provide compensation to workers injured at work.







## The Role of Unions & Industrial Disputes

There is no requirement to establish a works council in Australia. However, employees are entitled to join a union if they wish to do so and an employer may have union consultation obligations under the FW Act, modern awards or enterprise agreements. Union officials are also entitled to enter an employer's workplace in certain circumstances.

Lawful industrial action may only be taken by employees (and their unions) in restricted circumstances.

## Restructuring or Reorganisation of Business - Transfer of Business or Shares

Where an employer decides to restructure its business, various obligations may arise under the FW Act, modern awards, enterprise agreements and contracts. These may include consultation, notice of termination and redundancy pay.

Where there is a transfer or transmission of an employer's business or assets, there are no TUPE-style laws in Australia. An employee will only transfer if they accept an offer of new employment. However, the FW Act, modern awards, enterprise agreements and contracts do deal with various associated matters such as consultation, leave, continuity of service and redundancy pay.

A sale of shares (or a change in control) does not ordinarily trigger any obligations for the employer.

## Terminating Employment

An employer must provide an employee with the minimum notice required under the NES to terminate the employee's employment. An employee's employment contract may provide for a longer notice period.

If an employee's employment is terminated due to their position becoming redundant, they may be entitled to redundancy pay under the NES. Again, an employee's employment contract may provide for a greater payment in these circumstances.

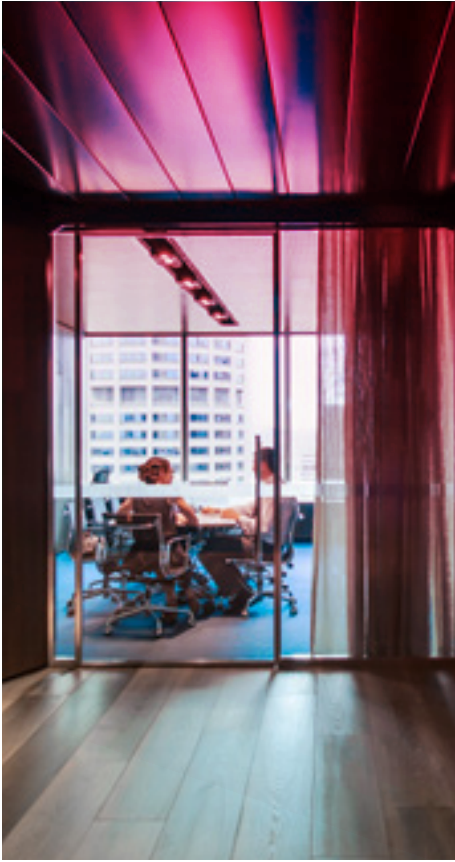
Employees may have various claims regarding the termination of their employment. These may include a claim for breach of contract, unfair dismissal (either because the process followed or reason for termination results in the termination being harsh, unjust or unreasonable), a claim of unlawful discrimination (discussed above), or a claim of adverse action. An adverse action claim is available where an employee's employment is terminated because that employee has a workplace right or has exercised a workplace right.

The *Corporations Act* also imposes restrictions on the benefits which may be provided to employees who hold, or have in the last three years held, a directorship in any group company or who are dealt with in a company's remuneration report (for companies listed in Australia). It is possible to provide benefits if they fall within limited exceptions (generally subject to a cap) or with shareholder approval.

## Protecting Your Business

An employee may be subject to post-termination restraints such as non-compete and non-solicitation under their employment contract. In addition, a former employee's use of employer confidential information is restricted by the *Corporations Act* and may be restricted by the employee's employment contract. Finally, employers commonly protect their intellectual property under their employment contracts.





# About Maddocks

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To talk to us about any of the topics raised in *Doing Business in Australia*, please visit: [maddocks.com.au/services-and-sectors/](http://maddocks.com.au/services-and-sectors/)

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