



DOING BUSINESS IN AUSTRALIA:

TOP 10 QUESTIONS WHEN DOING BUSINESS IN AUSTRALIA



Australia (officially the Commonwealth of Australia) is a federation comprised of six states, two mainland territories and seven external territories. The federal government is based in the capital city of Canberra (within the Australian Capital Territory). Australia has a population of approximately 25 million people coming from a diverse range of ethnic backgrounds. Over 70% of Australians live in the major cities located on its coastline.

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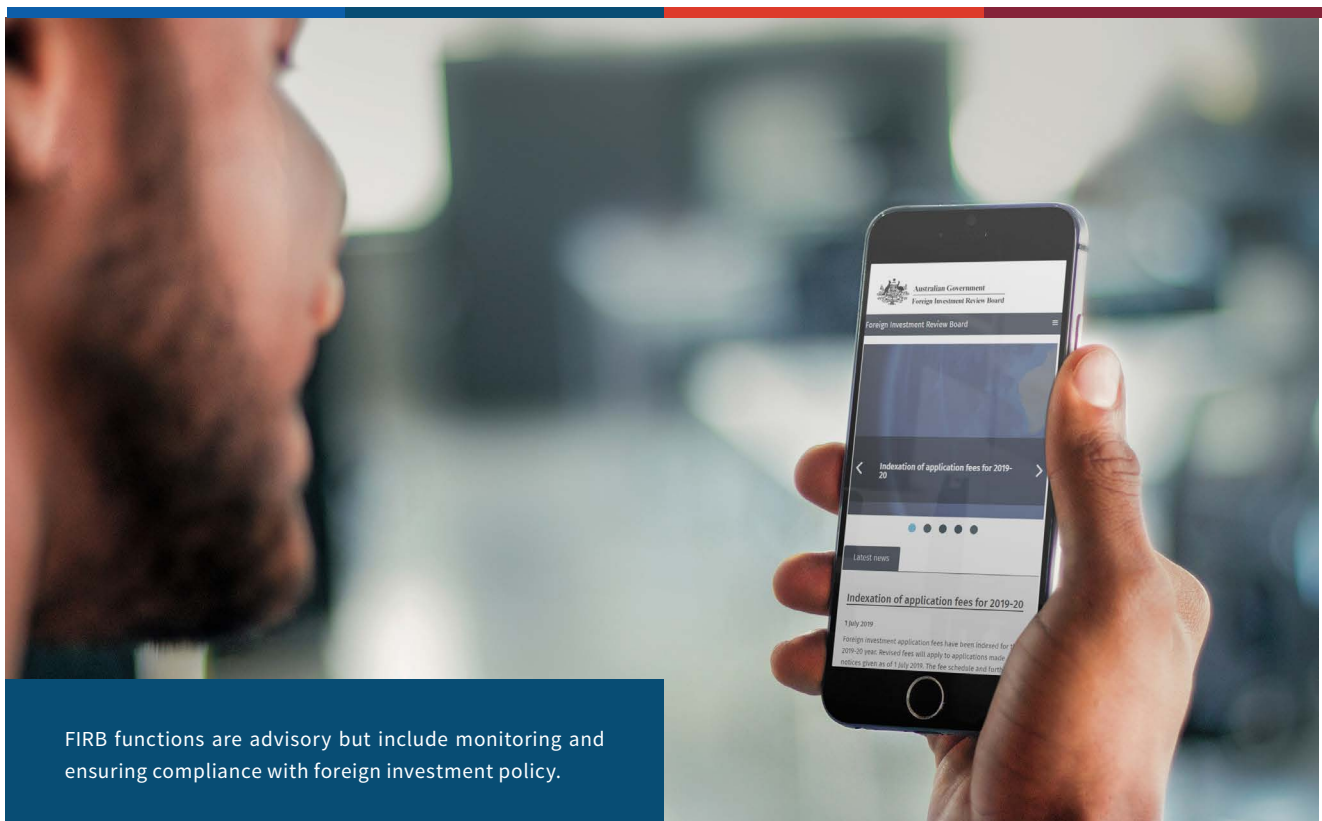
1. WHAT ROLE DOES THE GOVERNMENT PLAY IN APPROVING AND REGULATING FOREIGN DIRECT INVESTMENT?

The government regulates foreign investment through the Foreign Investment Review Board (FIRB), which is a nonstatutory advisory body.

Its major role 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.

Different rules apply depending on the type of the proposed foreign investment. An investment in land (residential, commercial or agricultural) has different applicable rules to an investment in an Australian business. Whether FIRB approval is required for a proposed foreign investment may also depend on whether it exceeds certain set monetary thresholds.

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



FIRB functions are advisory but include monitoring and ensuring compliance with foreign investment policy.

TOP 10 QUESTIONS WHEN DOING BUSINESS IN AUSTRALIA



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 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 does regulate the foreign investor through FIRB and other laws including the Corporations Act (which regulates companies generally) and taxation laws.

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

Generally, the relationship between an Australian agent or distributor and an overseas supplier is contractual and 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. Comprehensive and complex tax laws apply to the transfer pricing of goods and services imported to or exported from Australia for the purposes of protecting 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 price 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 sensitive sectors where foreign investment will be prohibited or restricted as being against Australia’s national interest or security. These include land (agricultural, residential, commercial and mining), media, telecommunications, transport and military (albeit FIRB approval may be granted in these sectors in certain circumstances).

Even if a proposed foreign investment is not within a sensitive sector, FIRB has an overriding policy to decline approval where the proposed investment is against the national interest or is against Australia’s national security.

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

For Local Employees

Australia's industrial relations system is strongly regulated by state and federal legislation. Companies that are trading corporations need to comply with the Fair Work Act 2009.

Most blue-collar and clerical workers have their employment terms and conditions set by the National Employment Standards (NES) and various awards and approved collective agreements. The NES sets 10 minimum standards for all employees.

Senior executives and management typically have their terms and conditions of employment set by contractual agreements negotiated directly between the employer and the employee. These contracts must still exceed the NES.

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

Expatriate Workers

Expatriate workers' terms and conditions depend on 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, specific visas are usually required for non-Australian residents who seek employment or are employed in Australia. Any non-Australian residents employed are covered by the Australian industrial relations system including workplace health and safety and workers' compensation referred to above.



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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?

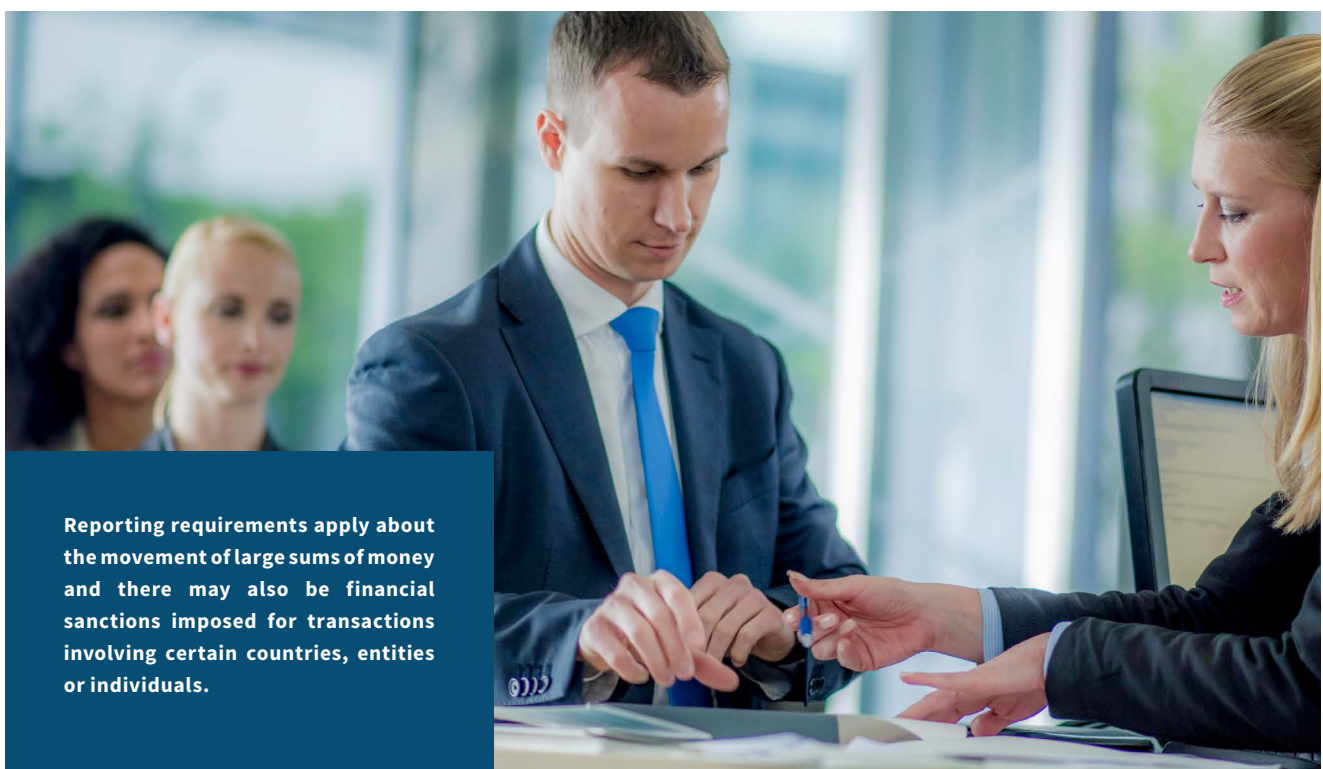
Generally, Australia does not have any exchange controls.

The Australian dollar (\$) is a floating currency widely and transparently traded, although the Reserve Bank may, from time to time, buy or sell \$ 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. Our banks are accustomed to trading in foreign exchange and dealing with letters of credit and other trade-based securities.



Reporting requirements apply about the movement of large sums of money and there may also be financial sanctions imposed for transactions involving certain countries, entities or individuals.

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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 27.5% to 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, businesses and other assets including shares in a land rich company
 - Payroll tax on wages and salaries (a state-based impost subject to monetary exemptions)
 - 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 by the employer and a credit allowed to respective employees on filing their income tax return)
 - Fringe Benefits Tax on non-cash compensation paid to employees' subject to monetary limits
 - Goods and Services Tax (GST) at 10% to supply of goods and services, and real property
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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 Organization and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), as well as the Berne, Paris and Rome Conventions; the Patent Cooperation 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 (e.g. Copyright Act, Trade Marks Act, Patents Act, Designs Act, Plant Breeders Rights Act and Circuit Layouts Act) and common law (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) regardless of the nationality of the parties.

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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 action in the Federal Court. Increasingly, courts, generally with the support of litigants and their lawyers, are requiring that pro-active case management, mediation and other alternate dispute resolution (ADR) processes be implemented as early as possible to resolve disputes without the costs and delays involved in trials. ADR processes (which include mediation) are cross jurisdictional and therefore increasingly attractive for the resolution of international disputes.

Australia has comprehensive accreditation and regulation standards for mediators and arbitrators.



Arbitration is also an option in Australia although generally it is now the same cost as a court trial. The popularity of ADR processes has generally reduced court trials and arbitrations.

ABOUT BENNETT & PHILP

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AREAS OF PRACTICE

We provide personalised service across six core areas of specialisation:



Business Advisory
Services



Disputes & Litigation



Intellectual
Property



Property & Real
Estate



Compensation
Law



Wills & Estates

WHY CHOOSE BENNETT & PHILP?

WE ARE RIGHT-SIZED

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WE GENUINELY CARE

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We care about the growth of your business; and meeting your individual needs. As a law firm with the full range of business advisory and personal legal services, we can support you across every stage of life and business.

WE ARE A ONE-STOP-SHOP

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