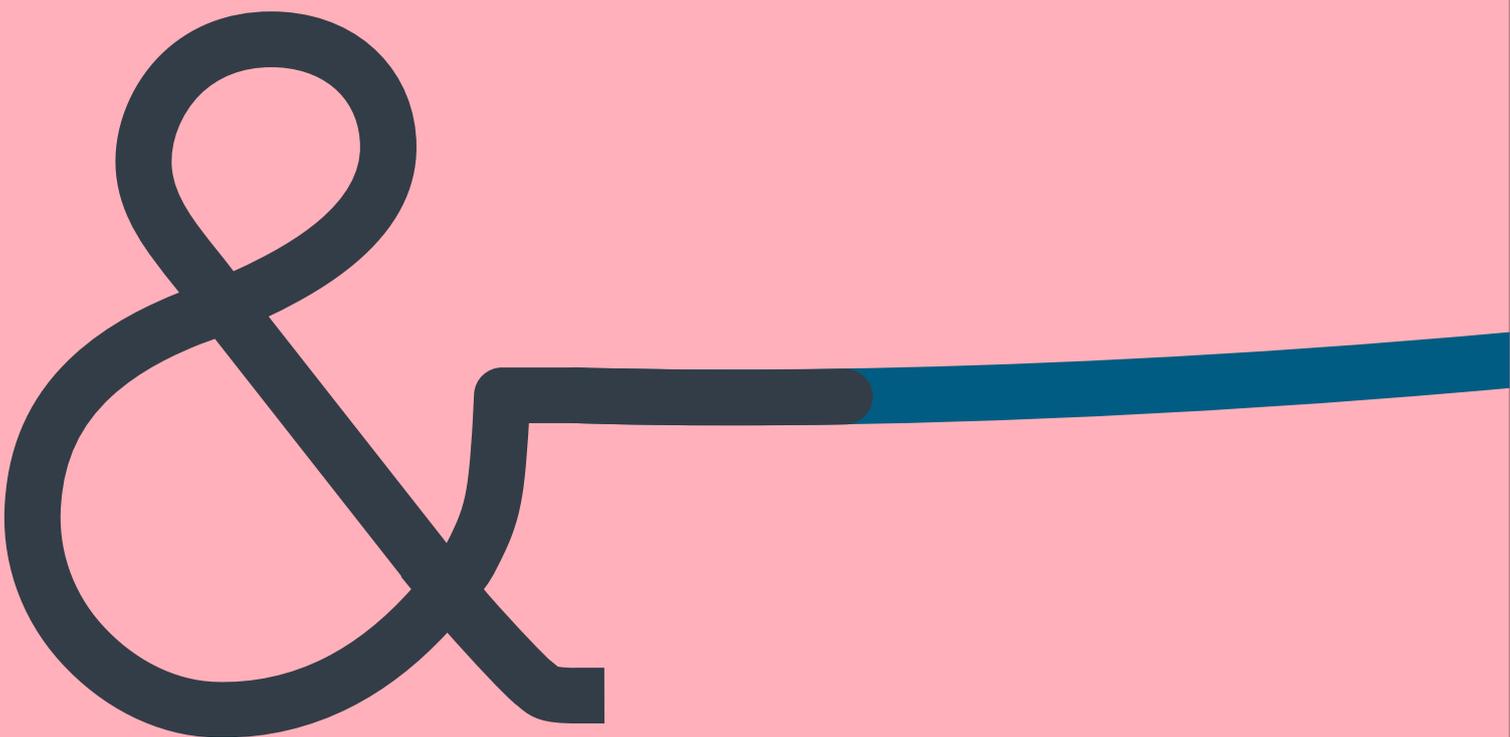


Bird & Bird

# Setting up a business in Australia

2022





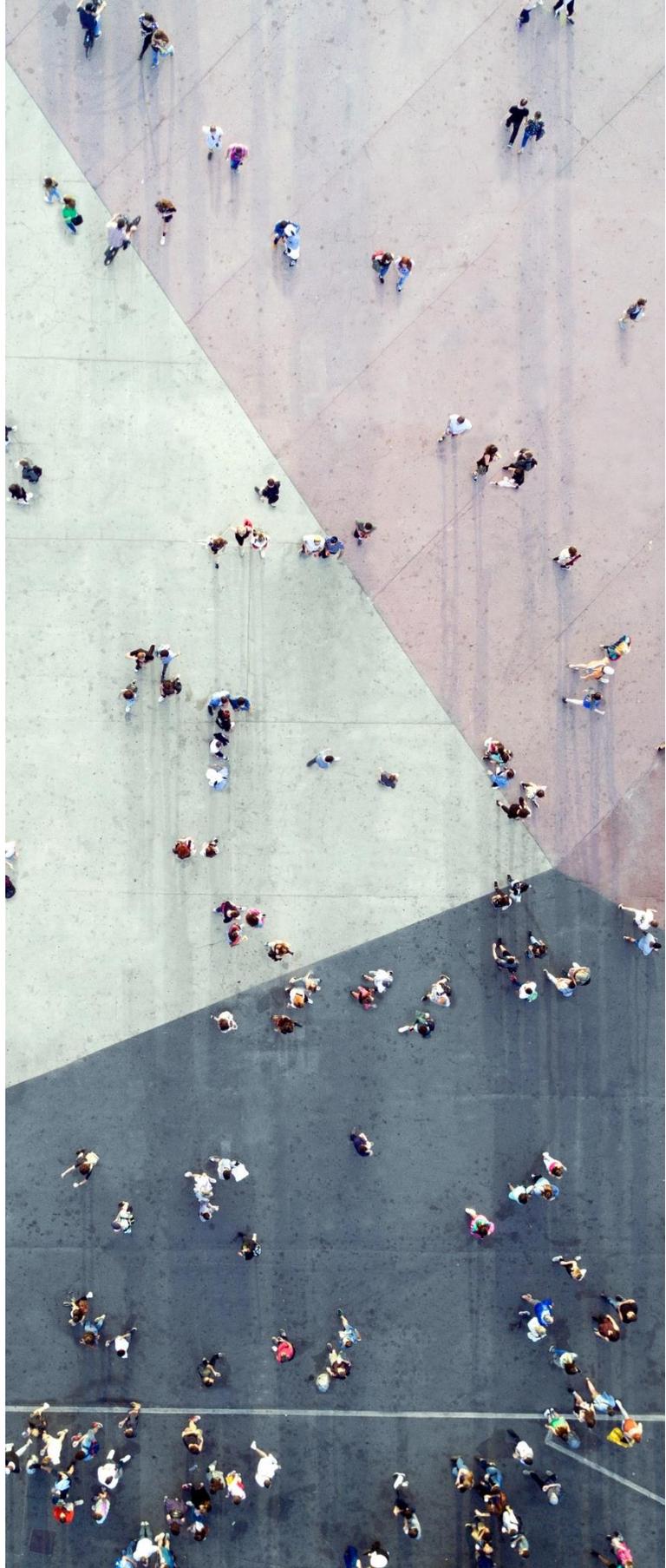
“They are easy to get along with, understand the commercial reality and provide unambiguous advice.”

*Chambers Asia-Pacific, 2022 (Australia)*



# Why conduct business in Australia?

Australia is a diverse, multicultural country that offers foreign investors a robust, well-regulated economy, advanced infrastructure, and a stable political environment, making it an attractive place to invest and do business.





“Bird & Bird is “commercially astute lawyer who takes the time to get to know the business, understands the needs of in-house lawyers and the nature of the advice that is needed, and tailors it accordingly.”

*Australia, Chambers Global, 2022*

## Business structures

There are several options open to foreign investors wishing to do business in Australia. The two most common options are incorporating an Australian proprietary company limited by shares and registering as a foreign company. The option chosen will depend on a number of factors, including the type of business being conducted and tax considerations.

Australian subsidiary company	Registered foreign company
<b>Overview</b>	
<ul style="list-style-type: none"> <li>• Commonly a proprietary company limited by shares</li> <li>• Shares may be wholly owned by the foreign parent</li> <li>• The company is a separate legal entity and can hold assets and owe obligations in its own name</li> </ul>	<ul style="list-style-type: none"> <li>• Not a separate legal entity</li> <li>• Liabilities are those of the foreign company</li> </ul>
<b>Registration requirements</b>	
<ul style="list-style-type: none"> <li>• Register with the Australian Securities and Investments Commission (<b>ASIC</b>) as a proprietary company limited by shares</li> </ul>	<ul style="list-style-type: none"> <li>• Register as a 'foreign company' with ASIC</li> </ul>
<b>Requirements:</b>	<b>Requirements:</b>
<ul style="list-style-type: none"> <li>• A registered office in Australia</li> <li>• At least one Australian resident director. All directors must apply for director identification numbers (<b>DINs</b>) (see overleaf for more information)</li> <li>• Adopt a company constitution</li> <li>• Lodge the application form and supporting documents with ASIC</li> <li>• Pay the prescribed fee</li> <li>• Maximum 50 non-employee shareholders and cannot raise money from the public (with some exceptions)</li> <li>• ASIC will register the company and issue an Australian Company Number</li> </ul>	<ul style="list-style-type: none"> <li>• A registered office in Australia</li> <li>• At least one local agent who is an Australian resident</li> <li>• Directors of the 'foreign company' must apply for DINs</li> <li>• Lodge application form and supporting documents with ASIC</li> <li>• Pay the prescribed fee</li> <li>• ASIC will register the foreign company and issue an Australian Registered Body Number</li> </ul>
<b>Subsequent requirements:</b>	<b>Subsequent requirements</b>
<ul style="list-style-type: none"> <li>• Apply for an Australian Business Number (<b>ABN</b>)</li> <li>• Apply for a tax file number (<b>TFN</b>) with the Australian Taxation Office (<b>ATO</b>)</li> <li>• Appoint a public officer for taxation purposes within 3 months of incorporation</li> </ul>	<ul style="list-style-type: none"> <li>• Apply for an ABN and TFN</li> <li>• Appoint a public officer for taxation purposes within 3 months of carrying on the business or deriving income</li> </ul>

Australian subsidiary company	Registered foreign company
<p><b>Other filings:</b></p> <p>Where appropriate, register for:</p> <ul style="list-style-type: none"> <li>• Goods and Services Tax (<b>GST</b>) within 21 days of incorporation if annual turnover is expected to exceed \$75,000</li> <li>• Payroll tax in each state and territory (as applicable)</li> <li>• Pay As You Go withholding (<b>PAYG</b>) before the first payment withholding amount is required</li> <li>• Fringe Benefits Tax (<b>FBT</b>) during an FBT year (1 April to 31 March) if liable to pay FBT during that year</li> </ul>	<p><b>Other filings:</b></p> <ul style="list-style-type: none"> <li>• Where appropriate, register for GST, Payroll tax, PAYG and FBT</li> </ul>
Reporting obligations	
<ul style="list-style-type: none"> <li>• Must lodge annual report with ASIC (unless relief – which must be applied for annually – is available)</li> <li>• Annual audit required (unless relief – which must be applied for annually – is available)</li> </ul>	<ul style="list-style-type: none"> <li>• Reduced administrative and reporting obligations</li> <li>• Must lodge annual return and financial statements with ASIC (unless relief – which must be applied for annually – is available)</li> <li>• Annual audit is generally not required but ASIC can require one</li> </ul>
Taxation	
<ul style="list-style-type: none"> <li>• Taxed in Australia on income and gains made in and outside Australia</li> <li>• Withholding tax for dividends, interest and royalty payments to parent is payable (the tax rate will depend on double taxation treatment)</li> </ul>	<ul style="list-style-type: none"> <li>• Generally taxed in Australia only on income and gains made in Australia</li> <li>• Remittance of branch profits is exempt from withholding taxes</li> <li>• May be eligible for tax exemption if double taxation treaty is in place with company's country of incorporation</li> </ul>

## Director Identification Numbers (DINs)

It is now a requirement for directors of Australian companies and registered foreign companies to obtain a DIN. The DIN must now be applied for prior to being appointed as a director.

The steps for Australian resident directors are as follows:

Details	
Download app	
1	<ul style="list-style-type: none"> <li>• The director must set up a myGovID by downloading the myGOVID app from the Apple Store or Google Play Store</li> <li>• Provide full name, DOB, and email address</li> <li>• The director will be prompted to choose their identity strength. The director must have a mygovID identity strength of <i>standard</i> or <i>strong</i> in order to apply for a DIN</li> </ul>

Required documents	
2	<p>The director will require:</p> <ul style="list-style-type: none"> <li>• tax file number</li> <li>• residential address</li> <li>• at least two ID documents to verify their identification</li> </ul>
Complete application	
3	<ul style="list-style-type: none"> <li>• Once the above steps are completed, the director can then apply for their DIN. The process takes no longer than 5 minutes</li> </ul>

For any persons who are not resident in Australia or who are not able to create a mygovID account, it is necessary to complete a hard copy application and send it to Australian Business Registry Services (**ABRS**).

The steps for foreign directors to apply for DINs are as follows:

Details					
Required documents					
<ul style="list-style-type: none"> <li>• 1</li> </ul>	<p>The director must gather eligible identification documents, being certified copies of one primary and two secondary documents. Notaries public or staff at the nearest Australian embassy, high commission, or consulate, including consulates headed by AusTrade honorary consuls, can certify these documents.</p> <table border="0"> <thead> <tr> <th>Primary identity documents</th> <th>Secondary identity documents</th> </tr> </thead> <tbody> <tr> <td> <ul style="list-style-type: none"> <li>• Birth certificate</li> <li>• Passport</li> </ul> </td> <td> <ul style="list-style-type: none"> <li>• National photo identification card</li> <li>• Foreign government identification</li> <li>• Drivers' licence</li> <li>• Marriage certificate</li> </ul> </td> </tr> </tbody> </table>	Primary identity documents	Secondary identity documents	<ul style="list-style-type: none"> <li>• Birth certificate</li> <li>• Passport</li> </ul>	<ul style="list-style-type: none"> <li>• National photo identification card</li> <li>• Foreign government identification</li> <li>• Drivers' licence</li> <li>• Marriage certificate</li> </ul>
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<ul style="list-style-type: none"> <li>• Birth certificate</li> <li>• Passport</li> </ul>	<ul style="list-style-type: none"> <li>• National photo identification card</li> <li>• Foreign government identification</li> <li>• Drivers' licence</li> <li>• Marriage certificate</li> </ul>				
Complete and sign application					
2	<ul style="list-style-type: none"> <li>• Complete and sign the application, a copy of which can be found <a href="#">here</a>.</li> </ul>				
Submit application					
3	<ul style="list-style-type: none"> <li>• Submit the application and supporting materials to the ABRS by post to the following address:            Australian Business Registry Services            Locked Bag 6000            Albury, NSW 2640            Australia</li> </ul>				



“Everything is followed up in a timely manner. They seem to have a great external partnership network across various countries - that gives us some great service options as well.”

*Australia, Chambers Asia Pacific, 2022*

# Setting up a business in Australia

## *Foreign Investment Review Board approval*

A foreign investor that wishes to do business in Australia, or to invest in an Australian business, may require the approval of the Foreign Investment Review Board (**FIRB**).

Several factors determine if FIRB approval is required, including the identity and country of origin of the foreign investor and its ultimate beneficial interest holders, the nature and type of the investment and the value of the investment.

In general, FIRB approval is required if a foreign investor proposes to acquire a substantial interest (20% or more) in an Australian entity that is valued above \$289 million (or \$1,250 million in the case of investors from certain countries with a free trade agreement with Australia).

FIRB approval is also required to acquire an interest in Australian land, including agricultural land, commercial land, residential land and mining or production tenements, unless an exemption applies (such as a monetary threshold). An 'interest in Australian land' includes entering a lease to occupy Australian land for a term (including any renewals) exceeding 5 years.

FIRB approval is also required for all acquisitions of vacant commercial land or residential land regardless of value.

All foreign government investors must also obtain FIRB approval before acquiring a direct or indirect interest in an Australian entity, starting a new business, or acquiring an interest in Australian land.

A fee is payable on submission of an application for FIRB approval. Depending on the circumstances, approval typically takes at least 30 days. Applications may be approved subject to a number of conditions.

## *Employment and immigration*

In general, employers and employees can negotiate the terms and conditions of employment. However, the contract of employment will be subject to employment legislation such as the *Fair*

*Work Act 2009* (Cth) (**Fair Work Act**), industrial instruments and general employment law.

The Fair Work Act contains ten non-excludable minimum employment conditions known as the National Employment Standards (**NES**). The NES applies to all employees in the private sector and includes paid leave, parental leave, redundancy pay, maximum working hours and flexible working arrangements. All employers who pay an employee above a certain threshold are required to make contributions to the employee's chosen pension plan (known as a 'superannuation fund'). Minimum contributions are calculated from the prescribed rate (currently 10% and increasing by 0.5% on 1 July each year until reaching 12% in 2025) of the employee's earnings. Employers are required to have a 'default' superannuation fund for employees who do not choose a particular fund.

All foreigners who wish to work in Australia must hold a valid visa that entitles them to work. There are several options available including short-term business and work visas, as well as sponsorship of overseas employees for long-term working visas.

## *Privacy*

Federal and state-based privacy laws govern the collection, use, disclosure, and transfer of personal and health information in Australia. While disclosure of personal information to overseas entities is allowed, the disclosing entity remains generally responsible for how the information is handled overseas.

## *Intellectual property*

Australia has a robust framework of intellectual property protection and enforcement mechanisms that are of a standard consistent with the United States and Europe.

Additionally, Australia is also a signatory to a number of international agreements that reduces the regulatory requirements for obtaining protection of patents, trademarks, copyright, and designs in a number of countries.

# Setting up a business in Australia

## Contracts

Australian law recognises the basic principle of freedom of contract and, in general, parties to a contract are free to choose the terms and content of their agreements, subject to certain federal and state legislation. This includes the Australian Consumer Law (**ACL**) which prohibits unfair terms in standard form contracts and the *Contracts Review Act 1980 (NSW)* which gives courts general powers to deal with 'unjust' contracts.

## Competition and consumer law

The Australian Competition and Consumer Commission (**ACCC**) implements and enforces the *Australian Competition and Consumer Act 2010 (CCA)*. The CCA aims to promote fair trading and competition, prohibiting anti-competitive conduct, cartel conduct, exclusive dealing, resale price maintenance, misuse of market power, and anti-competitive mergers.

The ACCC also administers the ACL. The ACL protects consumers by prohibiting misleading and deceptive conduct and unconscionable conduct, voiding unfair contract terms in standard form consumer contracts, and establishing a regime for statutory consumer guarantees which apply to goods and services purchased by customers, and which cannot be excluded, restricted, or modified by contract. Breaches of the CCA can attract significant criminal and civil penalties including fines, imprisonment, and other orders.

## Tax

Companies incorporated in Australia are subject to a corporate tax of about 25%–30% on their global income (depending on their annual turnover). If the company is a registered foreign company, only income derived from Australian sources is subject to corporate taxes. In addition, withholding tax applies to payments of dividends, interest, and royalties to non-Australian entities. The rate depends on the type of payment and any taxation treaties between Australia and the entity's country of origin. Australia does not impose a separate branch remittance tax.

In general, most goods and services supplied to Australian consumers are subject to GST of 10%. Entities that supply such goods or services are required to remit 10% of the taxable value of the goods or services directly to the ATO. Exemptions are available for certain goods and services.

## Real estate

The majority of land in Australia uses the Torrens title system of land registration, in which title or ownership of interests in real estate is created by registration in a central register or record. In general, the registered owner of land on the system cannot have its title challenged or overturned. Landowners can lease land or part of it to another person on terms agreed by the parties. Some longer-term leases may be required to be registered under the Torrens title system.

Each state and territory (except the Northern Territory) imposes an annual land tax payable by the owners of land, although exemptions may apply. Stamp duty is also imposed on the transfer of interests in real estate assessed as a proportion of the value of the land or interest.

## Contact us

If you would like further information on setting up business in Australia, please e-mail our Set up Desk at [new.company@twobirds.com](mailto:new.company@twobirds.com) and we will contact you within 24 hours.

This summary gives general information only as of June 2022 and is not intended to give comprehensive analysis. It should not be used as a substitute for legal or other professional advice, which should be obtained in specific circumstances.



“Bird & Bird have a global reach, can navigate the issues and implications of a course of action in overseas jurisdictions, and help us drive towards strategic aims in complex areas.”

*Chambers, Global 2022*



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