



IR GLOBAL - MEET THE MEMBERS

# Australasia



# IR Global - The Future of Professional Services

IR Global was founded in 2010 and has grown to become the largest practice area exclusive network of advisors in just a few years, this incredible success story has seen the network awarded Band 1 status by Chamber & Partners, recommended by Legal 500 and has been featured in publications such as The Financial Times, Lawyer 360 and Practical Law amongst many others.

The group's founding philosophy was based on bringing the best of the advisory community into a sharing economy; a system, which is ethical, sustainable and provides significant added value to the client.

Businesses today require more than just a traditional lawyer or accountant. IR Global is at the forefront of this transition with members providing strategic support and working closely alongside management teams to help realise their vision. We believe the archaic 'professional service firm' model is dying due to it being insular, expensive and slow. In IR Global, forward thinking clients now have a credible alternative, which is open, cost effective and flexible.

## Our Founding Philosophies

### MULTI-DISCIPLINARY

We work alongside legal, accountancy, financial, corporate finance, transaction support and business intelligence firms, ensuring we can offer complete solutions tailored to the client's requirements.

### NICHE EXPERTISE

In today's marketplace, both local knowledge and specific practice area / sector expertise is needed. We select just one firm, per jurisdiction, per practice area ensuring the very best experts are on hand to assist.

### VETTING PROCESS

Criteria is based on both quality of the firm and the character of the individuals within. It's key that all of our members share a common vision towards mutual success.

### PERSONAL CONTACT

The best relationships are built on trust and we take great efforts to bring our members together via regular events and networking activities. The friendships formed are highly valuable to the members and ensure client referrals are handled with great care.

### CO-OPERATIVE LEADERSHIP

In contrast to authoritarian or directive leadership, our group puts teamwork and self-organisation in the centre. The group has steering committees for 12 practice area and regional working groups who focus on network development, quality controls and increasing client value.

### ETHICAL APPROACH

It is our responsibility to utilise our business network and influence to instigate positive social change. IR founded Sinchi a non-profit that focuses on the preservation of indigenous culture and knowledge and works with different indigenous communities / tribes around the world.

### STRATEGIC PARTNERS

Strength comes via our extended network, if we feel a client's need is better handled by someone else, we are able to call on the assistance of our partners. First priority is to always ensure the client has the right representation whether that be with a member of IR or someone else.



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FOREWORD BY EDITOR, NICK YATES

# Australasia – A Rising Power

## The region of Australasia punches well above its weight in global economic terms.

While not always considered to be in the same league as East Asia, Western Europe and North America; it is quickly increasing its influence, with an expanding population and consistent economic growth.

The region is dominated by Australia and New Zealand, which have a combined gross domestic product (GDP) of more than USD1.7 trillion. The Australian economy alone is forecast to be the 13th largest in the world and the fifth largest in the wider Asian region in 2018.

Perhaps more importantly, though, both economies continue to expand, with Australia experiencing 27 years of consecutive annual economic growth. According to The Benchmark Report 2018, from The Australian Trade and Investment Commission (Austrade), the country is expected to realise average annual real GDP growth of 2.8 per cent between 2018 – 2022. New Zealand (NZ) government organisation, New Zealand Now, says the country's annual GDP growth has averaged 2.1 per cent since March 2010. It topped 3 per cent in 2018 and is expected to reach 3.8 per cent in 2019.

To put that in perspective, the European Union recently downgraded its GDP growth forecast for 2019 to 1.5 per cent.

Aside from economic growth, one of the unique selling points (USPs) of the Australasia region is its closeness to both Western and Asian culture. Initial settlement of both countries over the past three centuries has given their cultures, institutions and legal systems a distinctly Anglo-Saxon feel, while more recent trade and commerce has forged close links with the powerful and fast-growing East Asian economy, which includes China, Japan and South Korea.

As a consequence of this history and development, the region is often seen as a perfect hub for western businesses interested in expanding into Asia. The openness of both countries to foreign direct investment (FDI) and entrepreneurialism only enhances their attractiveness.

As an example, figures from Austrade's Benchmark Report show that ten of the top 12 export markets for Australian goods and services are

within the Asian region. Furthermore, a quarter of Australia's total assets (AUD2.7 trillion), are held within businesses supported by FDI.

Australia presently hosts around AUD3.3 trillion of foreign investment stock, and FDI has recorded consistently strong growth, up 8.6 per cent on average each year since 1997. As a percentage of GDP, Australia's total value of foreign investment stock reached 185 per cent in June 2017 - double that of two decades ago.

The region's openness to investment is well illustrated by the World Bank Report, Doing Business 2018. It ranked New Zealand as the easiest place in the world to do business, based on a number of indicators including starting a business, trading across borders, paying taxes, enforcing contracts and labour market regulation. Australia ranked 14th in the same study.

As a consequence of this openness, the population makeup of both countries has changed dramatically during the last three decades. In 2018, around 30 per cent of Australians were born overseas and 27 per cent speak an Asian or European language.

The influence of Asia in the Australian economy is well illustrated by analysing the trade agreements in place to assist Australian businesses. According to the Australian Department of Foreign Affairs and Trade (DFAT) - as of December 2018, Australia had 10 full free trade agreements (FTAs) in force with 16 World Trade Organization members. The countries covered by these FTAs account for around two-thirds of Australia's total trade. All of those countries are in Asia, except two, namely the USA and Chile.

As of December 31, 2018 the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) added Mexico and Peru to that mix.

Both economies are also well diversified with investment opportunities in a range of different industries and sectors. According to Figure. NZ, the professional, scientific and technical services sector is the largest contributor to New Zealand's economy, worth around NZD21.5 billion in 2017. This reflects the educated nature of the workforce and the FDI opportunities for cutting edge tech businesses. Construction

contributed NZD16.8 billion, while New Zealand's financial and insurance services industry was worth NZD15 billion in 2017, ahead of more traditional sectors such as agriculture that are commonly associated with the country.

The same is true of Australia, where the financial services and insurance sector was the largest contributor to GDP in 2017, worth AUD148 billion, or 9.4 per cent of the entire economy. The professional, scientific and technical services sector contributed AUD115 billion, or 7.3 per cent of the economy.

It is clear that the Australasia region has a wealth of opportunity for investors or entrepreneurs looking to tap into new markets, be that the vibrant domestic markets of Australia and New Zealand or the huge Asian economy.

The following pages contain advice from a range of Australasian professionals on the general topic of doing business in the region. The concise articles printed here, provide in-depth advice on relevant topics such as immigration visas, corporate governance, real estate, intellectual property and company establishment. All the experts are members of the international referral group IR Global and work closely together to make the experience of establishing a presence in Australasia as simple seamless as possible for their clients.

### CONTRIBUTORS

Nicola Tiffen .....	8
Sean Cortis .....	10
Mike McNab .....	12
Richard Ashby .....	14
Dr. Elizabeth Houlihan .....	16
Dr. Paul Warden-Hutton .....	16
James Conomos .....	18
Ross Koffel .....	20
Mark Copeland .....	22
Nick Barwell .....	24
Riccardo Raso .....	24
John Glover .....	26
Bruce Saward .....	28
Geoffrey Shiff .....	30

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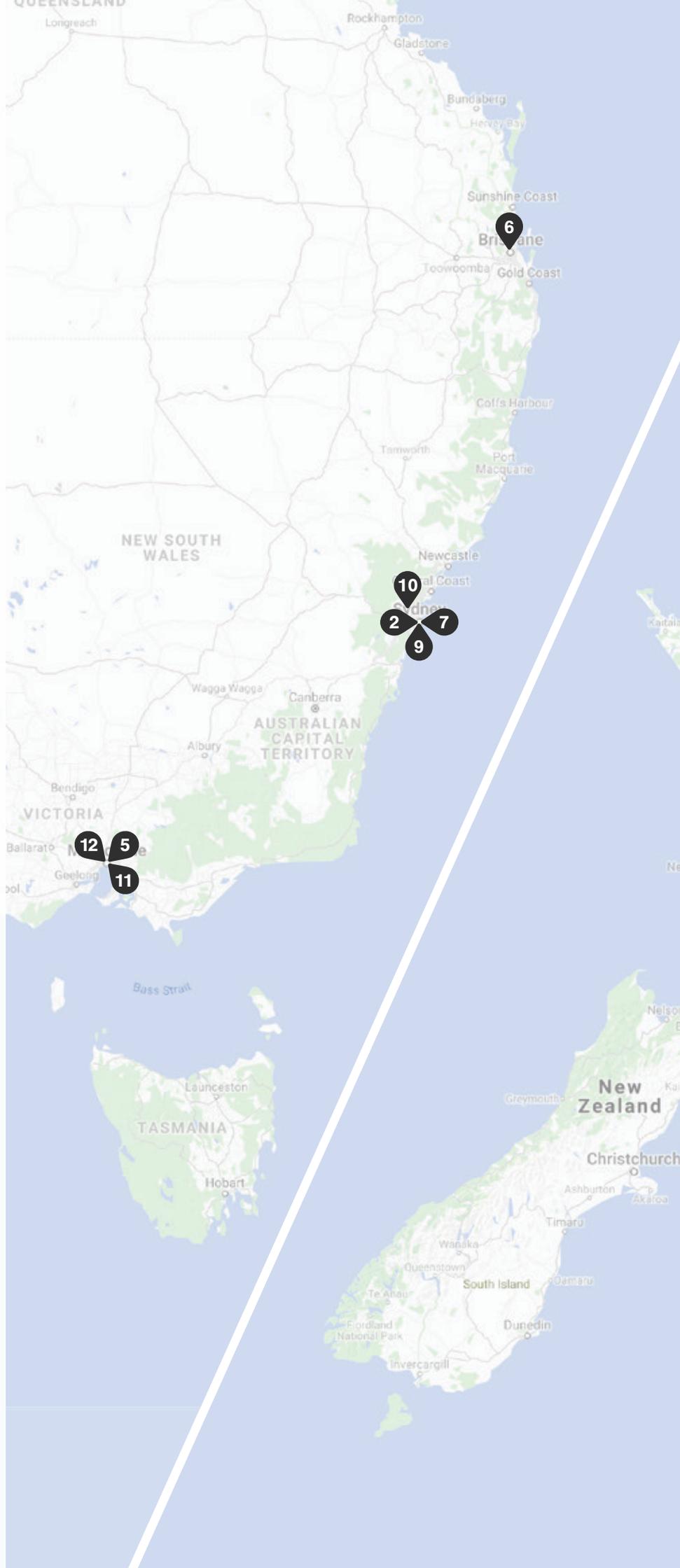
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# Member Firms in Australasia

IR Global members in Australia and New Zealand are located in key cities throughout the region including Auckland, Sydney, Brisbane, Christchurch and Melbourne consisting of leading legal, accountancy and financial advisers. They are recommended exclusively by practice area thus ensuring that our members have the highest quality niche expertise available to them.

Whether it's an incorporation of a company, understanding visas and immigration, Agribusiness in Australia or New Zealand's tax resident regime,

our Australasia representatives are on hand to provide you with a high-quality service that suits your every business need.

Member firms featured here retain a global support network across 155+ jurisdictions via their IR Global membership, sharing a common vision of working collaboratively to achieve unrivalled results. Please see the full list of Australia and New Zealand member firms below and on the IR Global website: [Australia](https://bit.ly/2SSvt7w) (bit.ly/2SSvt7w) [New Zealand](https://bit.ly/2Efcz5O) (bit.ly/2Efcz5O).



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AUCKLAND AND CHRISTCHURCH

## Nicola Tiffen

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Nicola has over 17 years' experience in immigration law and regularly advises commercial businesses and individuals on a wide range of issues.

She gives practical advice to HR professionals and employers to support their migrant employees with their visas, and to make the process as easy as possible. She also helps employers to obtain immigration accreditation and track employees' visa expiry dates.

Nicola is highly experienced in helping individuals with the immigration process. This includes helping to resolve unusual or difficult immigration problems, including health or character-related issues.

Prior to returning to New Zealand, she worked at a top law firm in London for over eight years, advising a range of international corporates, high net worth individuals, and leading sportspeople in respect of UK immigration.

*Anthony Harper is an award-winning national law firm.*

*For more than 150 years we have helped and advised New Zealand and international clients achieve their goals. Anthony Harper's high performing, internationally ranked solicitors are deeply immersed in our 26 specialist areas.*

*They include partner Nicola Tiffen, who has expertise across a range of immigration related matters including work visas, residence, partnership visas, investor residence applications, employer accreditations, work-to-residence visas, special direction requests, medical or character waiver requests, citizenship applications, appeals to immigration and protection tribunals and entrepreneur work visa and residence applications.*

*As one of the largest law firms in New Zealand we are proud to be able to solve the most complex of problems for our clients, whilst fostering an inclusive work environment and enhancing our local communities.*

*There is a difference. For further information, see [www.anthonyharper.co.nz](http://www.anthonyharper.co.nz).*

## IMMIGRATION LAW

# Understanding Visas: Setting up business operations in New Zealand

Setting up operations in New Zealand (NZ), or transferring employees into the country, will usually require consideration of visa regulations.

There are a number of visa options to consider, depending on circumstance and it may require a tailor-made solution to satisfy all requirements of the business.

## Seconding an employee to temporarily work on client premises

New Zealand's visa system allows for seconding a senior or specialist employee to a substantial NZ company, or a subsidiary of an overseas company, for up to 24 months.

A specialist employee is one who is being transferred to undertake a specialist task, at a senior level. The employee must also have knowledge of the services, equipment, techniques, or management of your business and this knowledge must be required to undertake the specialist task.

The NZ entity does not need to prove that it has tried to find a New Zealander for the position. However, the employee must be needed in NZ for a specific purpose or event, which is time bound. Therefore, the employee cannot be transferred to work for the client on a permanent basis. Also, there must be no risk that a New Zealander would miss out on a work opportunity.

There is also a work visa option for sending an employee to install or service specialised equipment, including IT systems. However, this type of work visa will only be valid for a maximum of three months in any 12-month period. It cannot be extended.

If the situation at your business does not fit into either of these scenarios, or you do not wish to involve your client in the process, it may still be possible to obtain a work visa for the employee.

However, eligibility will depend on the circumstances, such as whether the issue of the work visa would cost a New Zealander a job opportunity and whether the situation justifies the employee being sent to New Zealand.

As with all visa applications, the employee must meet certain health and character requirements.

## Transferring an employee to New Zealand for more than a few months

Your business can transfer an employee to its New Zealand branch, for up to three year years, which can be extended for a further three years. Again, there is no need to undertake a labour market check, however, this type of work visa is also only permitted for a specific, time bound purpose. For example, overseeing New Zealand operations for a few years, or managing training and hand-over to a new manager.

If you wish to permanently transfer an employee to New Zealand, then he or she is likely to require an "Essential Skills" work visa. This can be valid for five years, each time it is issued, and can be renewed indefinitely, depending on the skill level of the job. The New Zealand entity must make a genuine attempt to try to find a New Zealand citizen or resident for the position before applying for the work visa, to meet labour market check requirements. If none are available or readily trainable, then the work visa may be approved. This is very possible, given that New Zealand's unemployment rate is currently at only 3.9 per cent.

The employee may also be eligible to apply for residence, under the Skilled Migrant Category, which would allow the employee and his or her family to permanently reside in New Zealand. Again, your employee must meet health and character requirements.

This will involve obtaining police certificates and having medical checks prior to applying for the visa.

## Moving you and your business to New Zealand

If you are the business owner and wish to move both you and your business to New Zealand, you cannot obtain a work visa. This is because work visas can only be granted to employees. However, the 'Entrepreneur' visa category may be an option, allowing migrants to set up a business in New Zealand. Usually, to obtain such a visa, the business owner needs to invest at least NZD100,000 into the business and must submit a detailed business plan, that explains how the business will benefit the New Zealand economy.

You will need to obtain medical tests and police certificates as part of the application process, and prove your business experience and how you earned the money to invest into and establish the New Zealand business.

## Bringing family

In most circumstances, if a visa is granted for more than six months, the visa holder can bring a de facto partner or legal spouse, as well as any dependent children aged less than 20 years. Of course, the family members must also meet police check and medical requirements. The partner should then be eligible for open work visa, allowing work in any occupation and for any employer, and school aged children should be eligible for student visas.

Please do contact us to discuss your requirements, so we can develop a tailor-made solution.



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## Sean Cortis

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Sean has over 30 years of practice experience with specialised skills in taxation, estate and succession planning, business advisory and family office services. Sean's passion is advising families and their businesses. He balances soft skills on family issues with incisive decision-making on business strategy.

Sean's strong tax and business advisory capability has led to his involvement in a number of innovative consulting and corporate advisory assignments, such as public listings, business sales, debt and equity raisings, valuations, mergers and acquisitions. Sean is an experienced meeting facilitator and is a current panellist for MBA sessions conducted by the Macquarie Graduate School of Management.

Sean is a Fellow of the Institute of Chartered Accountants Australia and New Zealand, a Chartered Tax Advisor and has received TEP designation from the Society of Tax and Estate Practitioners for his experience as a tax and estates practitioner. He has a Bachelor of Commerce in Accounting from The University of New South Wales and has also been awarded a certificate in Fiduciary Governance from the Thunderbird School of Global Management.

*Chapman Eastway is a boutique firm of family and business advisors that has successfully advised clients for over 120 years. The firm specialises in wealth preservation, business advisory, strategy and organisation, family and business governance, international tax and structuring and family office strategy and administration.*

*We create value and meaning from financial data, to identify issues, risks and opportunities for growth and supplement these offerings with a number of services to help improve business performance and create and preserve personal wealth.*

*Our client base is diverse, both in terms of industry spread and geographical location. We have offices in Sydney and Hong Kong and our clients extend throughout Australia and overseas. Our forte is helping each client develop and realise their business vision whilst making the process easy and transparent to navigate.*

**TAX (PRIVATE CLIENT)**

# Agribusiness in Australia: Opportunities for family offices and high net wealth families

Agriculture and agribusiness are a USD250 billion plus sector in the Australian market. Investment opportunities exist in the value-add sector of the food chain, particularly amongst dairy, seafood and wine and these are being pursued by investors from around the globe.

We are seeing investors ranging from large scale foreign pension funds, to family offices and high net worth families looking at investment in Australian agriculture and agribusiness as an alternate investment class. The sector is starved of capital and the opportunity to invest in the sector is significant, however investors should be wary of the mistakes made by other foreign investors in the last 30 years. Australia is littered with failure by foreigners, because they did not understand the diversity of the sector, the geographical locations or the partners they were working with.

As a result, we have been advising family offices and UHNW families through our CE Capital business, emphasizing the need for necessary due diligence on opportunities and appropriate structuring and financing arrangements.

## Foreign Investment Review Board

Australian law provides thresholds for foreigners where approval must be sought for acquisitions of agricultural land and/or businesses. These thresholds are as follows:

Country	Agricultural Land \$AUD (m)	Agricultural Business \$AUD (m)
New Zealand, USA & Chile	1,134	1,134
Thailand	50	57
All others	15	57

These thresholds are based on the cumulative value of acquisitions for private investors. Therefore, if you are from an unnamed country and you already own AUD 10 million worth of agricultural land in Australia and are seeking to acquire another AUD 10 million parcel of land, approval must be sought first. Approval is required before purchasing and has only really been denied in certain politically sensitive acquisitions.

## Structuring

Due to Australia's tax regime, the return on investment can be severely impacted. Australian tax can vary by up to 37 per cent if the business is incorrectly owned and financed.

Further consideration needs to be given to the mix of debt and equity funding, since, under the thin capitalisation rules, foreign persons or corporations are entitled to debt deductions of up to AUD 2 million without the need to conform with debt-to-equity ratios. This is a significant planning opportunity for foreign investors.

If debt is being provided from a country where Australia has a Double Tax Agreement (DTA), then the tax withheld on the interest deduction is limited to 10 per cent versus tax on profits of up to 30 per cent for corporations and up to 47 per cent for individuals and trust structures.

For persons investing from low to no tax jurisdictions where there is no DTA with Australia, it may be necessary to structure an acquisition by establishing an offshore entity in a jurisdiction like Singapore. This will allow for more favourable tax outcomes, as there is a DTA between Australia and Singapore as opposed to the adverse outcomes that result from investing from a non-DTA country.

## The opportunity

Australia has expanded the countries it has free trade agreements with or trading pacts. For those with offshore distribution looking to leverage the strong 'Australia and New Zealand' brand recognition, the opportunity to partner with Australian businesses has never been better.

Approximately 70 per cent of Australian agricultural enterprises are owned by families, and there is an enormous need for capital to help fund both expansion and family succession. Strong operators in Australia are looking to expand their business, and in doing so are now partnering with other family offices and high net wealth families to joint venture the next growth phase of these operations. We have seen this in our practice of foreign investor and family operators working together to build and grow long-term businesses.

Both parties are benefiting from the arrangement; the investor by partnering with a multi-generational operator that knows the production and operational side therefore de-risking the investment for them; and the operator by benefitting from the provision of long-term patient capital that allows them to work through the cycles in a cyclical industry.

The opportunity for foreign investors to partner in Australia with local producers and agribusinesses by providing capital, gives a significant platform for the industry to grow vertically and beyond simple commodity production. By doing so, the value added offers significant financial reward to both producer and investor. Like all investment opportunities, careful due diligence and structuring is essential.



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## Mike McNab

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Mike has extensive experience and expertise working with clients to improve their businesses. This includes monitoring and enhancing business performance, taxation planning and advisory and structuring. He has been involved locally and internationally with a wide range of small and medium-sized clients advising on strategic management issues.

His team is heavily involved in business performance improvement and monitoring the effectiveness of the implementation of clients' business plans.

Being Xero certified and passionate about the use of technology, Mike is proactive with clients with regards to using technology to monitor and provide feedback on their financial position and on-going business development. Mike's areas of interest are property, health, retail, technology, franchising and international taxation services, including transfer pricing and business structuring and establishment.

He is passionate about helping others achieve their goals and aspirations with the aim of realising their full potential.

*DFK Oswin Griffiths Carlton is a long established chartered accountancy firm, offering accounting and business services to a wide range of both local and international businesses.*

*We believe that all organisations are unique and their business is unique. We tailor our service offerings to meet the specific requirements of your business. We work in partnership with you, offering reliable, professional and on-time financial advice using technology to advance business performance. We also have expertise in business structuring and planning both domestically and internationally and audit and forensic accounting.*

*We have a dedicated team which provides on-going support to our clients in all aspects of their business. We are committed to creating long-term relationships with our clients, offering trusted guidance and support as they work towards achieving and maintaining their financial goals.*

## ACCOUNTING SERVICES

# Developing a Road Map to Success: The importance of trusted advisers

## Driving your business forward

The economic environment is forever changing at a fast pace, with issues such as Brexit, the United States/China trade war and the possible slowdown in the world economy all having an impact in one way or another.

Recognition of how these factors will affect your current business and expansion plans is crucial, as is understanding whether your organisation has the right advisers, both local and/or overseas, to provide your organisation with the support it needs. It is also useful to ensure that you are maintaining current profit levels, are on track with future expansion targets and are empowering your organisation's team to strive for a higher level of achievement.

This is something that is overlooked by most managers/owners, but is crucial to the economic and non-economic success of an organisation. Many organisations operate their businesses without an adequate plan and without the involvement of the right advisers.

## Increasing the chances of success regardless of the economic environment

Having a business plan will provide the road map for success. The business plan will help an organisation to objectively analyse any business opportunity, isolate critical success factors and force the organisation to consider any threats. It will also confirm the demand for the organisation's products/services and provide a detailed road map as to how the organisation will achieve its goals and targets.

Having a sound business plan is only part of the process and sourcing professional advice further enhances the plan. Not only will your business advisers help the organisation complete and implement the plan, they will help the organisation navigate through the maze of complex issues faced when expanding into a new region, developing a new business line or trying to increase their current market share within an existing market.

Many organisations prefer to have their business affairs managed by a trusted adviser, who can co-ordinate the management of the business, implementation plans and monitor progress. This then allows key management to focus on what is most important to the business:

- Obtaining new customers;
- Improving growth; and
- Creating value.

The trusted adviser's role is to make sure that all of the components of the plan are moving in the same direction, providing constant feedback to management and using a variety of tools to monitor both economic and non-economic performance.

## Our role

Having a specialist adviser who understands both the local and overseas economic environments is critical to business performance. DFK Oswin Griffiths Carlton provides general accounting services such as acting as a virtual CFO, providing in-house accounting support, taxation advice and liaising with various government departments, such as the Inland Revenue.

We are heavily involved in working with our business clients in the areas of business performance and improvement by using a variety of tools to monitor financial and non-financial data. Working closely with our clients to provide timely feedback and analysis to be used by them to improve performance in all areas of their business.

Our goal is not only to provide feedback on performance, but to also work with our business clients to attain their goals, in accordance with their business plan, to increase the value of the business/return on investment for business owners and to benchmark business performance against the financial performance of similar businesses to gain a better understanding of overall performance and highlighting areas for improvement.

Our highly dedicated advisory team's main focus is business performance improvement. Working closely with our accounting services team we design and implement a performance plan that is specifically tailored for each organisation to reflect the key areas that management/owners would like to focus on.

Our accounting services team implements the processing part of the performance plan and ensure that the day to day action points are completed. The advisory team then monitors performance and reports to management/owners regarding this and works with them to drive their business forward.

Our focus as a trusted adviser is to work with clients helping them drive their business forward to achieve both their economic and non-economic goals and creating a long lasting professional relationship.



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## Richard Ashby

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Richard has more than 30 years' experience with New Zealand (NZ) taxation, and particularly enjoys dealing with land tax issues and the GST regime.

Having spent the majority of his early career in the investigations unit of the New Zealand Inland Revenue, Richard's passion for tax stuck and he eventually became Gilligan Sheppard's tax partner.

He deals with clients of all types and sizes and provides tax opinions on the appropriate treatment of items of income and expenditure. He also assists clients with IRD risk reviews and audits, and can assist clients who are having difficulties meeting their tax payment obligations to make suitable repayment arrangements with the IRD. Richard also provides cross-border tax advice, both to existing clients looking to expand their operations offshore, and to offshore persons looking to either establish a NZ presence for their business or to relocate themselves personally to NZ more permanently.

*Gilligan Sheppard is a different kind of accounting practice that does more than just accounting. First we listen. Then we provide a no-nonsense, cut to the chase solution that will be tailored to each individual circumstance and need.*

*We're different. We challenge. We consider. Then - we deliver.*

*Gilligan Sheppard takes the time to understand each client and the particular challenges they face moving forward, given what they would like to achieve. We then methodically evaluate the options ahead, vigilantly considering the potential short and long-term outcomes, to ensure that you get the best possible advice.*

*And we deliver that advice in a very simple, straight-talking manner that will always clearly elucidate the decisions that need to be made. Some of our clients have called it a breath of fresh air, which is quite fortunate, because we are not terribly comfortable operating any other way.*

**TAX (ACCOUNTANTS)**

## Sit Back and Relax – New Zealand’s transitional tax resident’s regime

Packing up and moving to another country will often involve multiple decisions, some of which can have material consequences if the wrong choice is made. The process is often made harder, by the numerous emotions that will usually accompany the shift, namely leaving family and friends, learning new cultures and customs and navigating the new location upon arrival.

One important decision revolves around what to do with investments, particularly if the destination jurisdiction has a less favourable tax regime. It may be advisable to restructure or sell assets to avoid potentially more onerous taxation consequences, or simply to wait until you are settled in your new country before you take any action.

Anyone intending to move to New Zealand (NZ), who has not been a NZ tax resident for at least the past ten years, can essentially sit back and relax, wait until all the emotions of the move have passed, and then take time to make some key decisions. The ability to take this approach is all due to NZ’s transitional tax resident’s regime (TTR), which was first introduced in 2006, as a carrot to attract more skilled talent to NZ.

Under TTR, the only foreign-sourced income subject to NZ taxation, for the first 48 months, is that derived either from employment or from the supply of personal services. If, for example, you decide to rent your overseas property out until market conditions improve, the foreign-sourced rental income is exempt from NZ taxation. The same is true of dividends from shares held in foreign companies and interest earned from those foreign bank account deposits. Usually new residents receive a credit against the NZ tax payable, for any foreign income taxes already paid.

TTR is essentially an opt-out regime, which means it automatically applies to new tax residents for a four-year period unless they opt out. The benefits of TTR can only ever be claimed once, so once the regime has applied to you, if you go away from NZ for more than ten years and then return, you do not qualify for TTR again.

### How is a New Zealand tax residency status triggered?

New Zealand (NZ) tax residency rules contain three specific tests for determining whether or not a natural person may be deemed a NZ tax resident. Two of the tests are black and white – they are based purely on a person’s physical presence in NZ. Under the first test, once you have physically spent more than 183 days in NZ in any rolling 12-month period, you will be considered a NZ tax resident from the first day of that presence. Once deemed a NZ tax resident, you then need to be physically absent from NZ for more than 325 days in any rolling 12-month period (the second test), to become a non-resident again.

The third test is a grey area, and also takes precedence over the other two tests. Under the third test, if you have established in NZ, what is referred to as a permanent place of abode (PPOA), you will be deemed a NZ tax resident from the date you establish your NZ PPOA, until the date you cease to have a NZ PPOA, regardless of any physical presence in NZ. The PPOA test essentially examines whether you have a NZ abode available to you, and if so, the closeness of your association to that abode. This concept requires detailed analysis of the person’s factual scenario, before a proper determination can be made.

NZ tax residency is certainly one of the numerous facets of NZ tax law that Gilligan Shepherd advises on, so if NZ is a destination you or your clients are considering, please do not hesitate to contact us for some guidance.



MELBOURNE

## Dr. Elizabeth Houlihan

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Elizabeth, a Principal and Co-founder of the Firm, is a Registered Patent & Trade Mark Attorney in both Australia and New Zealand.

Elizabeth's professional practice specializes in drafting, prosecution and litigation of Chemical, Biochemical and Pharmaceutical matters before the Australian and New Zealand Patent Offices. Elizabeth also practises in the field of Trade Marks before both the Australian and New Zealand Trade Marks Offices and in the field of Designs before the Australian and New Zealand Designs Office.

Based in Melbourne, Australia, Elizabeth is the only Australian and New Zealand Patent & Trade Mark Attorney who is also a Fellow of the Royal Australian Chemical Institute.

MELBOURNE

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Paul, a Principal of the Firm, is a Registered Australian and New Zealand Patent & Trade Mark Attorney with a Masters in Intellectual Property Law. He entered the profession in Australia in 2005.

Paul's practice includes drafting, prosecution and litigation of Engineering, Spectroscopic, Medical Imaging, Sensor-technologies, Clean Technology, Mechanical, Computer Software, Biophysical and Material Science matters and Plant Breeder Rights before the Australian and New Zealand Patent Offices. With his background in applied research, Paul's work covers most technology areas including pneumatics, medical devices, chemical processing, anaesthesia/sleep monitoring devices, safety devices, building materials and business methods.

*At Houlihan<sup>2</sup>, our role is to advise you on how to best and most appropriately protect your creativity and to turn your Intellectual Property into a valuable asset. We are here to assist in the securing and maintenance of your Intellectual Property Rights and also to integrate these with your business goals. As part of your team, our Patent Attorneys and Trade Mark Attorneys will work closely with you to tailor your requirements to fit your individual business needs. This is all done behind a backdrop of our philosophy to value<sup>2</sup> your asset in the most cost-effective way.*

*Our Patent Attorneys and Trade Mark Attorneys are creative thinkers and are able to provide solutions outside the square to any problem. We complement your team by bringing our wealth of experience in Patents, Trade Marks, Designs and other forms of Intellectual Property with a fresh and enthusiastic approach.*

**IP - PATENTS**

# Protecting IP: The era of relying on trade secrets has passed

Protecting Intellectual Property (IP) and trade secrets is critical to survival in a competitive business environment. IP can range from confidential customer details to high-level technical expertise, methods and product information.

There are two main ways to prevent competitors from accessing IP, and they are maintaining trade secrets, or securing a monopoly through obtaining patents and/or registered designs.

A trade secret can be defined as any confidential business information that provides an enterprise with a competitive edge. When deciding on how to protect their IP, many businesses choose to keep trade secrets by default. They are perceived as requiring little upfront cost, since paid employees are relied upon to keep information confidential. For example, The Coca-Cola Company claims to have kept its formula secret for over 130 years by only letting a small group of senior executives know parts of the formula at any given time.

In contrast, patents and registered designs are often regarded as costly liabilities rather than assets. Media reports of patent court battles discourage would-be patent and/or registered design owners from pursuing rights that they do not intend to enforce.

However, contrary to popular belief, maintaining a trade secret can be a complex and costly exercise. Each piece of information needing protection must be identified, labelled, and its storage constantly monitored. Access to that information must be restricted, and adequate security established for both physical and electronic files. Additionally, non-disclosure clauses must be incorporated into all employment, contractor, consultant and vendor/supplier agreements. This incurs costs.

Importantly, trade secret protection only lasts for as long as the information is kept confidential. Once it is made public, trade secret protection ends. Unfortunately, it is only when a trade secret has been disclosed, that many businesses find they cannot prove to a court, when seeking to recover damages, that sufficient steps were taken to protect the trade secret from disclosure.

## Cyber security

Even well-resourced multinational corporates are struggling to protect their confidential information in the digital age. Cyber security threats and data breaches have become commonplace, due to the steady increase in digital commerce. This is particularly the case in the Asia-Pacific region, which is one of the fastest growing regions for digital innovation and commerce. In the top six ASEAN countries, digital commerce is projected to increase from USD5 billion in 2015 to USD90 billion by 2025. The average loss caused to a business due to a data breach has now passed the USD1 million mark.

Despite the exponential increase in malware and Trojan software, the biggest cyber security threat that organisations face today is the human factor. Around 52 per cent of data leakage in organisations worldwide is caused by employees or ex-employees, either through theft or accidental disclosure. This means that not only must organisations defend their confidential Intellectual Property from external acquisition by competitors, but they must guard it internally from misappropriation by their own employees, the very personnel that are relied upon to keep trade secrets secure.

The easiest way for a competitor to gain access to a trade secret is by poaching employees. Once in possession of secret information, a competitor could file patent or design applications for that information, claiming it as their own. The genuine owner may need to defend themselves against a cease and desist letter, attempting to stop them from using their own technology. It is difficult and expensive to prove that a secret invention was stolen.

## What we offer

At Houlihan<sup>2</sup>, we think outside the square. When cleverly deployed, the role of patents and registered designs expands beyond the traditional concept of obtaining a commercial monopoly for licensing/enforcement purposes. In the digital age, patents and registered designs also serve as pre-emptive disclosures of selected information, as protection against data leakage and theft. Provided that applications for patents or registered designs are filed for relevant information before any disclosure or data leakage, the subsequent IP rights will hopefully not be affected by trade secret theft or data breach.



BRISBANE

## James Conomos

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James practises primarily in commercial litigation, dispute resolution and insolvency matters and has acted in and advised various parties in many insolvency administrations, both corporate and individual. He has advised a range of clients including financiers, insolvency practitioners, creditors and regulators.

He has acted in hundreds of litigious matters, in a range of disputes from land valuation, contract disputes, breaches of fiduciary duties, fraud claims, building disputes and debt claims. He has acted in all courts throughout Australia.

James also has considerable experience in asset structuring, corporate and commercial matters including advising directors, shareholders and business owners on a range of commercial disputes.

With a keen interest in writing and delivering papers in his areas of expertise, James has also been active in contributing to law reform in the insolvency area, through his long standing membership in the Insolvency and Reconstruction Law committee of the Business Law Section of the Law Council of Australia.

*Established by James Conomos in July 1992, James Conomos Lawyers is a boutique legal firm offering specialist expertise in commercial litigation and insolvency.*

*From humble beginnings, the firm has become one of Australia's leading boutique law firms. Based in modern offices in Brisbane's central business hub, James Conomos Lawyers is a team of high calibre professional staff who take an active role in the legal community, ensuring their expertise is always at the leading edge of their profession.*

*The philosophy of James Conomos Lawyers is the commitment to consistently providing their clients with prompt, personal service, coupled with high quality, cost-effective solutions.*

*And as a boutique firm, their clients notice a level of service that is often difficult to find in other practices. The team at James Conomos Lawyers take the time with clients to really understand what their needs are and provide the best solution overall, rather than merely seeking to represent them as lawyers.*

## INSOLVENCY

# Progressive Reforms – Recent developments in Australian directors' liability

Until recently, Australia had some of the strictest insolvent trading laws in the world.

Those laws were designed to lift the corporate veil, so that those in control of a corporation could be held liable for debts incurred while the corporation is unable to pay its debts as and when they are due. Section 588G of the Corporations Act 2001 imposes a duty on a director to prevent insolvent trading. It is designed to act as a deterrent on directors incurring debts when the corporation is insolvent. It imposes personal liability and, in severe cases, there are criminal sanctions.

While this act still applies, in 2015 the Australian Productivity Commission recommended reforms to Australia's corporate insolvency regime, designed to enable restructuring of economically viable companies with less emphasis on punishing for financial failure.

The recommendations of the commission were to restrict formal company restructuring procedures to those businesses that were capable of being economically viable in the future. They also recommended the introduction of a safe harbour defence to allow directors to explore early restructuring options without liability for insolvent trading, and a restriction on the enforcement of Ipso facto rights in certain circumstances.

These changes have now been legislated and have commenced operation. One of the main reasons for their recommendation and implementation was empirical data suggesting that insolvent trading cases were not so extensive, with those cases that do proceed to trial, often weighted heavily in favour of the liquidator plaintiff as against the defendant director.

Following corporate failure, directors are often penniless and pursuing them is not economic. It is therefore not unsurprising to find that reported cases of insolvent trading are not extensive in the more than 40 years since Australia has had insolvent trading laws, in one form or another.

The commission sought to address the tension between the desirability for strong insolvent trading protection on the one hand and encouraging a business restructure while the corporation is in financial distress on the other.

## Safe harbour reforms

One of the ways they have achieved this is via the implementation of safe harbour reforms. The object of the reforms is to encourage directors to pursue restructuring opportunities that will deliver a better outcome to key stakeholders.

A safe harbour applies from the time the directors, who suspect insolvency, start to develop and implement a course of action that is reasonably likely to lead to a better outcome for the corporation than immediate administration or liquidation. It also operates as an exception to the insolvent trading provisions of the Corporations Act 2001, providing directors protection from any personal liability for debts that are incurred directly or indirectly in connection with the course of action.

Directors can still be liable for insolvent trading if they continue to incur debts while the corporation is insolvent, but safe harbour, if implemented correctly, can provide a defence to insolvent trading, thereby encouraging restructure and turnaround solutions as opposed to liquidation and personal liability.

Safe harbour rules require directors to take an active role in the restructure, while acting honestly and genuinely. They must also use up-to-date financial information to assess the likely outcome of restructure and comply with obligations to pay employee entitlements when they fall due. Meeting all of the company's taxation reporting obligations, while properly maintaining books and records is also a requirement.

Under safe harbour rules, directors must engage with key stakeholders to develop and implement the restructuring plan. Once it becomes clear that a corporation is not viable, the protection of safe harbour will cease. Protections are not absolute and will require extensive advice and planning as well as consultation with key stakeholders. Their object is to encourage a restructure if it is reasonably likely to lead to a better outcome for the corporation.

Safe harbour does not appear to protect against other breaches of the Corporations Act 2001 and a liquidator may well still be entitled to pursue a creditor for an unfair preference, i.e.

where the creditor is paid when the corporation is insolvent and the creditor receives more than they would if the corporation was wound up.

## Ipso facto reforms

These reforms introduce a stay on parties being able to enforce rights against a corporation which goes into administration, has a receiver appointed or enters into a scheme of arrangement. The aim of these reforms is to preserve the going concern value of a corporation by creating a moratorium on enforcement of certain clauses in commercial contracts.

Without these reforms, a restructure may be jeopardised because the going concern value of a corporation can be destroyed by enforcement action. The new provisions introduce a stay on enforcing contractual rights including termination rights where the corporation goes into administration, has a receiver appointed or enters into a scheme of arrangement.

The stay is expressed to be a restriction on the ability to enforce a right that arises by reason of an express provision of a contract, agreement or understanding. The court maintains an overriding discretion to lift a stay, if that is appropriate in the interests of justice.

## Conclusion

The Safe Harbour and Ipso facto reforms are significant changes to the corporate insolvency and restructuring landscape in Australia. They promote or seek to promote maximising the opportunity for preserving a going concern to assist with a corporate restructure in appropriate circumstances. The reforms present a useful step towards dispelling the long-held view that insolvent trading in Australia is focused on punitive outcomes rather than promoting entrepreneurship.



SYDNEY

## Ross Koffel

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Ross Koffel is held in high regard both within the profession and business community in Australia. Having come originally from a business background as proprietor of a multi-national film and advertising company, he brings a unique application of efficiency and practicality to his advice. He is a well-known advocate in the Supreme Court, Court of Appeal and High Court.

Founding Koffels Solicitors & Barristers in 1990, he soon built a reputation for establishing precedent in such diverse areas as; contract law, insolvency, real property and tax. He is a strong and aggressive litigator, and brings this strength to what is now a noted full service firm. His client base includes listed companies, private multi-nationals and high net worth individuals.

Ross is a qualified migration agent (MARN 0006391) and provides advice as to Significant Investor Visas as well as a complete range of business visas.

*Koffels is a full service firm, situated in the central business district of Sydney, with an emphasis on corporate advice, mergers and acquisitions and cross-border transactions. To this end they act for corporate entities, private individuals and not-for-profit enterprises both locally and internationally.*

*The approach to all clients is a holistic one, where a complete overview is emphasised to give total support for the successful outcomes of the client's needs. A pragmatic and practical focus, listening to the client, and then formulating the best options to their given issues are the fundamentals of providing advice.*

*The firm's cross-border experience includes provision of advice throughout Europe, Asia, Africa, North and South America and the Middle East, and has included: tax, set-up, M&A, insolvency, usury, property, estates, employment law and complex property division within high net worth family law disputes. The firm also litigates locally, and additionally globally, including cross-border disputes.*

*Koffels offers a sophisticated service, backed by knowledge, experience, connections and success.*

## CORPORATE

# Australian Corporate Governance: What investors need to be aware of and what applies to them

The Australian Government welcomes productive foreign direct investment, but a good understanding of the Australian corporate governance rules is the key to success when investing in Australia.

## Main legislation and regulatory sources

The Corporations Act 2001 (Cth) (the Act) is the principal legislation regulating companies in Australia, while the Australian Securities and Investment Commission (ASIC) is the principal corporate regulatory agency which registers companies and enforces compliance with the Act.

The Takeovers Panel (Panel) is a peer review body and forum for resolving disputes about a takeover bid and other control transactions, while the Australian Securities Exchange (ASX) is a co-regulator with ASIC which prescribes standards for publicly-listed companies and reserves power to police those standards – the ASX Listing Rules.

ASX Corporate Governance Council (Council) has issued a guide entitled Corporate Governance Principles and Recommendations and the ASX listing rules require that publicly-listed companies disclose in their annual report the extent to which they have followed these principles. Proprietary companies may follow the principles voluntarily.

The Australian Foreign Investment Review Board (FIRB) reviews certain foreign acquisitions of Australian shares and assets to ensure they support Australia's interests, while the Australian Competition and Consumer Commission (ACCC) reviews certain foreign acquisitions under competition and consumer law, where the acquisition could have the effect of substantially lessening competition in the Australian market.

## Corporate governance standards

Investors should pay particular attention to the following rules:

### SHAREHOLDERS

- Shareholders do not per se have any responsibilities in regards to the corporate governance of the companies in which they invest.
- If companies are limited by shares, the liability of shareholders is limited to the amount paid for their shares.
- Shareholders' meetings (AGMs and EGMs) are governed by the Act as well as by the individual company's constitution and any applicable rules (e.g. ASX Listing Rules).
- The Act requires certain types of decisions to be passed by a special resolution, (at least 75 per cent of votes), as compared to an ordinary resolution (simple majority vote).
- Shareholders have no fiduciary duty to the company but they are subject to the statutory oppression prohibitions in the Act.

### DIRECTORS

- The board of directors (Board) manages the company and is responsible for the overall governance and strategic direction of the company.

- Shareholders appoint directors at incorporation. Subsequent appointments may occur at Board level with shareholder approval. The Board may not remove a director of a public company.
- Only natural persons (not companies) of 18 years or over, who have not been disqualified from holding office, may serve as directors.
- The Board is comprised of both executive and non-executive directors.
- A proprietary company must have at least one director that lives in Australia. If the company has crowd-sourced funded shareholders, it must have at least two directors and a majority of these directors must live in Australia. A proprietary company is not required to have a secretary but if it does, they must live in Australia.
- A public company must have at least three directors and one secretary. At least two of the directors and at least one secretary must live in Australia.
- The ASX Listing Rules require that directors be re-elected at least every three years.
- The Board is responsible for appointing senior executives to management positions.
- Directors owe fiduciary duties to the company and its members.
- Directors may be personally liable for breach of their duties, e.g. allowing the company to trade whilst insolvent.

### FINANCIAL REPORTS

- The Act requires the following entities to prepare financial reports:
  - All disclosing entities
  - Public companies
  - Companies limited by guarantee (except small companies limited by guarantee)
  - All large proprietary companies that are not disclosing entities
  - All registered managed investment schemes
  - Small proprietary companies that are foreign-controlled
  - Small proprietary companies that have one or more crowd-sourced funding shareholders at any time during the year
- Financial reports prepared must comply with Australian Accounting Standards which are in line with the International Financial Reporting Standards (IFRS).

### ASIC ANNUAL REVIEWS

- ASIC runs annual reviews of all companies. For most companies and schemes, their annual review date is the anniversary of their date of registration or incorporation.

For more information about Australian Corporate Governance and the recent and new developments please visit [koffels.com.au/corporate-governance-rules](https://www.koffels.com.au/corporate-governance-rules).



AUCKLAND AND ROTORUA

## Mark Copeland

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Mark is a highly regarded senior commercial lawyer with an enviable track record of more than 20 years practicing across all areas of business and property law.

He and his team have a reputation as first rate legal advisors who are committed to maintaining the highest professional standards and acting in the best interests of all clients.

After many years practicing as a partner in prestigious commercial, boutique law firms in Auckland and Rotorua, Mark established MJC Legal in 2009. In his career he has acted for private individuals, government entities and major international corporations, advising on all aspects of commercial, property and rural laws.

Mark's practice and interests are not limited to large companies or big deals. He is able to bring his expertise and experience to an array of private and corporate clients both in New Zealand and overseas who are seeking high quality legal advice delivered with exceptional service.

*MJC Legal, trading as Mark Copeland Lawyers, is a boutique law firm based in Rotorua, with offices also in Auckland. The firm was established in 2009 and was spurred by Mark Copeland's vision of providing specialist legal services with an absolute focus on meeting client needs.*

*We understand that our clients place their faith in us to reach a desired outcome. To achieve this Mark Copeland Lawyers develops long lasting relationships with clients based on trust, integrity and mutual respect. Our clients and their objectives are at the core of what we do.*

*We partner with our clients to determine the best possible result from each situation and work together to make it happen.*

*Clients come from throughout New Zealand and internationally to work with Mark Copeland Lawyers for legal excellence and first class service.*

*Our mission, vision and values are the foundation of our services and define how we operate as individuals, as a firm and interact with clients.*

## REAL ESTATE AND COMMERCIAL LAW

## New People of the Land: Purchasing residential and rural property in New Zealand

New Zealand, known to the indigenous Maori as Aotearoa or 'The Land of the Long White Cloud', is often noted as one of the most beautiful countries on Earth. New Zealand has also been praised internationally – including by the World Bank and Forbes - for being a country that is great to do business in. It is therefore no surprise that in recent years, foreign interest in New Zealand's property market has surged, with overseas buyers looking to acquire residential homes and farmland for investment.

This upsurge in buying interest has not surprisingly correlated with an increase in the median price of homes in New Zealand. Homes in New Zealand now have an average price tag of NZD550,000. In Auckland – the nation's largest city – the median price is NZD835,000. New Zealand and international media have hyped stories of offshore billionaires buying up vast tracks of land in New Zealand's South Island high country. All of this has caused much disquiet in New Zealand.

This increased international interest in New Zealand property has heightened scrutiny on overseas purchasers, and has led to the New Zealand Government enacting more restrictive regulations concerning who can purchase residential and rural property in this country. In August 2018, legislation was passed that means only New Zealand residents can now purchase residential property in this country. Consequently, an overseas buyer looking to purchase a residential property in New Zealand needs to apply for New Zealand residency first. Those with residency, but who do not reside in New Zealand, need to apply for consent to purchase or build a residential home. There are limited exceptions: Australians and Singaporeans, thanks to existing free trade deals, are exempt from this law change and are still able to buy residential property in New Zealand. Foreign nationals who have already purchased residential property are not retrospectively affected.

There are also some options available to foreign nationals looking to purchase residential property in New Zealand for investment purposes. The majority of these options are focused on large-scale developments. An overseas buyer can buy an apartment off the plans from a developer, as long as the development has an exemption certificate. (An exemption certificate allows the developer to sell up to 60 per cent of the units to overseas buyers.) However, an overseas buyer is not allowed to live in the property – he or she can only hold the property (e.g. apartment) as an investment, or sell it.

Purchasing rural property in New Zealand as a foreign national is subject to scrutiny from the NZ Overseas Investment Office (OIO). The OIO assesses applications from overseas investors, including corporate purchasers – i.e. if an offshore entity is looking to purchase farmland, not as an individual but through a company, the OIO will regard a company as foreign if over 25 per cent of its owners are not New Zealanders.

Under the current Government, the OIO has increased its size, and the vetting process it undertakes before granting overseas investors a green light has become more rigorous. The OIO primarily looks at whether the overseas investment will bring additional benefits to New Zealand, that would not exist if a New Zealand entity purchased the same property. The onus is on the overseas purchaser to show these benefits. These benefits can be varied – e.g. economic, such as providing jobs to the local community, but they need to go beyond the purely economic, including actions such as pledging to commit to environmental protections of the land or maintaining public access to certain areas. The overseas investor must also pass an extensive 'good character' test, involving significant international due diligence on the proposed purchaser.

In summary, while the overseas purchase of rural land in New Zealand has been made more difficult, unlike residential property it has not been (effectively) banned, and with the right assistance purchasing farms and other lifestyle property in New Zealand from overseas is still very possible.

New Zealand Maori refer to themselves as Tangata Whenua, or 'The People of the Land'. This concept is reflected in how seriously New Zealanders treat their commitment to safeguarding the nation's land and environment. Those from overseas looking to purchase land are expected to demonstrate that same level of commitment. The current political climate in our country around foreign ownership of land makes it more important than ever to be supported by expert local advisers during the purchase process. Mark Copeland Lawyers has a wealth of experience in these regards, and we are always available to assist any overseas buyer who wishes to invest in the paradise which is New Zealand!



SYDNEY

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Nick is a Chartered Accountant and has worked in both commercial accounting and public practice across Australia, New Zealand and the United Kingdom since 1998. Experienced in the information technology, finance, communications, property, food manufacturing and retailing industries, Nick works with international business clients to ensure that Australian regulatory obligations are met as well as providing monthly accounting, taxation, internal reporting, payment processing and payroll services.

Nick's strong understanding of cross-border taxation issues enables local compliance with Significant Global Entity (SGE) lodgement requirements including the preparation of transfer pricing documentation and lodgement of local Australian files.

SYDNEY

## Riccardo Raso

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Ric is a Chartered Accountant and has worked in public practice since 1989. He graduated from University of Technology Sydney (UTS) in 1993 with a Bachelor of Business, going on to complete a Masters in Taxation Law with UTS in 1996. Ric was admitted to the Institute of Chartered Accountants in Australia as a Member in 1996 and as a Fellow in 2013. He was also awarded the SMSF Specialist Advisor qualification in 2013. Along with his extensive tax knowledge, Ric assists in structuring business affairs so as to minimise tax, protect financial interests and provide maximum flexibility with respect to wealth building goals.

Ric also acts as resident director, secretary and public officer for a number of Australian subsidiaries of overseas companies and local agent for foreign companies registered in Australia.

*Founded in the CBD of Sydney Australia in 1928, McBurneys provides corporate services, taxation and business advisory services to clients who require personalised, expert and timely advice. With proud traditions and extensive experience, McBurneys has fresh innovative ideas and forward thinking to assist clients navigate the Australian business environment. Being a full-service accounting firm enables McBurneys to operate as a complete local office functions including corporate services, accounting, taxation, payroll and cash management to foreign owned subsidiaries.*

*With 30 professional staff including 5 principals, McBurneys has resources to draw on specialised advice when needed. The highly experienced team of professionals at McBurneys primary aim is to create and protect wealth of businesses and business leaders.*

*As the Australian Corporate Services representative we can assist you to establish and maintain your company and as the Australian Business Advisory representative, we can ensure you are provided with sound Business Advice to help grow and maintain your Australian subsidiary.*

## CORPORATE SERVICES

# Establishing a Company in Australia: Compliance made easy

## Establishment

Australia's strong economy has seen it clock up 27 years without a recession. This, combined with a trusted system of government and close proximity to Asia, makes a strong case for establishing a business in Australia.

Whether it be through an Australian local subsidiary, or a branch of the foreign company, it's important to ensure that an organisation's corporate records are properly maintained as required by the Australian Securities & Investments Commission (ASIC).

Tax is a key consideration in deciding the most appropriate structure from which to conduct a business, and in most cases, formation of a local Australian corporate subsidiary facilitates a straight forward approach to business operations in Australia, helping to reduce the exposure of the overseas parent entity to legal liabilities of the Australian operations. Regulatory institutions, customers, suppliers, and employees alike are more comfortable dealing with a local Australian company which provides for greater administrative ease.

Companies and their officers are governed in Australia under the Corporations Act 2001. The governance requirements for operating an Australian company include;

- the appointment of at least one resident Australian director.
- nomination of a registered office in Australia.
- maintenance of the corporate register detailing the office holders, shareholders and corporate charges, along with the maintenance of minutes of directors and shareholders.

In addition to the above requirements, the Taxation Legislation which is administered by the Australian Taxation Office (ATO) also includes the requirement for the appointment of a resident Public Officer, to be responsible for the tax affairs of the company.

## Bank accounts

Opening a bank account in Australia has become increasingly difficult following the introduction of AML/CTF legislation. Where a company is owned by a foreign person or

corporation, or has foreign directors, significant challenges can be faced in trying to quickly establish a company bank account. Foreign persons and corporations will need to be identified by the bank, at best through the need for notarised identity documents, or by presenting themselves with their identity documents at the local Australian branch.

So too, initial tax registrations, including Australian Tax File (TFN) numbers and an Australian Business Number (ABN). Goods and Services Tax (GST) can be significantly delayed where foreign persons are directors of those companies as the foreign directors will need to be identified with the ATO.

## Ongoing compliance

Once a company has been established, the ongoing compliance requirements include;

- the directors passing an annual resolution positively confirming the solvency of the company.
- lodgement of audited financial statements with ASIC, unless an exemption applies (see below).
- the maintenance of company registers including directors and members' minutes and resolutions.
- Notification to ASIC of any changes to the company details including address of the company, details of the ultimate holding company and details of the directors and shareholders,

It is important that any required changes to company information are identified and lodged within the relevant time periods so as to ensure that the company is compliant with the regulations of the Corporations Act 2001 and to avoid late lodgement penalties.

Foreign-owned companies are required to lodge audited financial statements with ASIC unless they qualify as small, and apply for the exemption allowed under ASIC Corporations (Foreign-Controlled Company Reports) Instrument 2017/204. The requirement to prepare and have audited financial statements can be burdensome and expensive and, accordingly, where possible, we generally recommend the

exemption be obtained (even where you may otherwise choose to audit the financial statements).

A company's registered office is the official location for communications and notices. A document may be served on a company by delivering it at, or mailing it to, the company's registered office. The office must be open to the public between the hours of 10am and 4pm each business day. It is important that any changes to a company's registered address are updated with ASIC on a timely basis to ensure that any notice served on the company at the registered address is appropriately delivered so as to avoid significant fines, penalties and in the case of company's directors, personal liabilities.

Following the recent introduction of legislation dealing with Significant Global Entities (defined as groups with over AUD1billion in turnover), there have been significant changes in the reporting obligations and substantial increases in the potential penalties handed to Australian subsidiaries for failure to comply. It is important that you are kept informed of such changes in Australian legislation to ensure you don't inadvertently become subject to penalties for failure to comply.

## What we can offer

McBurneys are not only able to assist you to establish your subsidiary, but are able to act as resident director and public officer for your company. Please contact us should you wish to discuss how we can assist you or your clients.

McBurneys provide corporate secretarial services to some of the world's leading multinational companies. We can help work around some of the regulatory hurdles and in many cases can have your company up and running with all taxation registrations and bank accounts within 24-48 hours.



SYDNEY

## John Glover

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John Glover is the owner and operator of three companies - Pendragon Management, OZ Migration and Your Australian Business. Between the three companies, plus the external skill sets that they work with, John has the ability to advise and help individuals and companies to set up and work in Australia.

John left school at 18, and now has over 38 years of business experience. He worked in various industries and has owned and operated his own companies since 1989. John is fully aware of the value of a great team giving great service in order to have a great company. Having moved to Australia in 1991 and owned and operated Pendragon since 1998, the experience and knowledge within the team is second to none when it comes to moving and starting up in Australia.

*The Pendragon Management Group assists many international businesses wanting to start, build or expand into Australia with ready-made and tailored packages. We have a qualified team of professionals waiting to provide you with the key services required for a soft landing in the vibrant Australian market place, and enabling speed to market.*

*Our support network of on-the-ground professionals is geared to ensure not only traction into the market, but creates a nurturing environment of business incubation.*

*We are an independent, privately-owned, Australian entity incorporated in 1998 that has no affiliation with any government department, however we have relationships with all the relevant government departments as well as the relevant corporate and commercial networks throughout Australia.*

## COMPANY FORMATIONS

# Asian Opportunities: Australia's attractiveness as a place to do business

Australia has experienced more than 20 consecutive years of growth within a society and culture that is very similar to countries like the UK, Canada, USA and Ireland. It is the only nation to rank in the top five of the world's most resilient economies since 2008, and its real gross domestic product (GDP) growth is expected to outperform that of every other major advanced economy in 2018.

Australia is also conveniently located next to many of Asia's highest growth economies and has a network of free trade agreements with Asian nations, as well as many residents with an Asian background. As a result, Australia has real potential to double or triple its growth rates during the next few years.

Opportunities exist for businesses to expand to Australia, South East Asia and the Pacific Rim – which is a mega-region accounting for 36 per cent of the world's GDP. Exports to Australia from the UK alone grew by more than 60 per cent in the last five years to more than GBP10 billion, and there are massive opportunities in oil and gas, ports, infrastructure, ICT, education, financial and business services industries.

Having arrived from the UK myself as a migrant in 1991, I had to make my way in the Australian business world without any guidance. I now run three successful operations here in Australia 'Pendragon Management' a salary management and visa company, 'OZ Migration' a pure visa/migration company and 'Your Australian Business', which is a company that assists new businesses to set up in Australia.

Making Australia a launch pad for doing business in Asia, is an excellent strategy for Western businesses. We always recommend that businesses assess the most efficient and economical way of entering the market place, ranging from setting up a full blown

office, to sending out an individual (scout) to test the water. Just make sure you engage a good Australian team on the ground who know your business and how it works here in Australia.

## What should companies considering an Australian operation be aware of?

There are various ways for you or your organisation to start trading in Australia. The main visa options to consider are the Business Innovation and Investment Visa, the Business Talent Visa and the Temporary Skill Shortage Visa.

## Business Innovation and Investment Visa

The Business Innovation and Investment Visa is the one most companies or entrepreneurs look at, allowing them to own and manage a business in Australia, conduct business and investment activity in Australia or undertake entrepreneurial activity in Australia. Basic eligibility involves being nominated by an eligible government organisation, being invited to apply for the visa, and meeting the stream requirements.

The Business Innovation Stream is a temporary visa for people with business skills. It lets you operate a new or existing business in Australia. The Investor Stream is a temporary visa requires you to invest AUD1.5 million in an Australian state or territory and maintain business and investment activity in Australia. The Significant Investor Stream is for people who invest AUD5 million in Australian investments that meet certain requirements and maintain business and investment activity in Australia. The Premium Investor Stream is for people who are nominated by Austrade and who invest AUD15 million in Australia,

while the Entrepreneur Stream lets you carry out entrepreneurial activities in Australia. Further details on this visa and all streams can be provided by our team in Australia.

## Business Talent Visa

The Business Talent Visa provides immediate permanent residency for high-calibre business owners. It is designed for successful business people who aim to have a major management role in establishing or developing a business in Australia, or for people who have obtained at least AUD1 million in funding from an Australian venture capital firm to be used in an Australian project. Applicants must be less than 55 years of age (unless approved by the relevant State Governments if your proposed business will be of exceptional benefit to Australia).

## Temporary Skills Shortage Visa

Don't under estimate using this visa to get some key personnel over to set up your company. This temporary visa lets an employer sponsor a suitably skilled worker to fill a position they can't find a suitably skilled Australian to fill. Basic eligibility includes that you must be nominated for a skilled position by an approved sponsor, have the right skills and qualifications to do the job, and meet the relevant English language requirements. It also allows an overseas entity to sponsor someone to work in Australia as their representative. The occupation must be on the Skilled List and the stream is determined by the occupation.

## Labour agreement stream

This visa is for skilled workers nominated by an employer with a labour agreement.

Further details on all visas are available at [immi.homeaffairs.gov.au](http://immi.homeaffairs.gov.au).



MELBOURNE

## Bruce Saward

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Bruce is the managing partner of Saward Dawson and works in the Business Advisory and Consulting teams. He has a special interest in business planning, mergers and acquisitions and building better businesses. Bruce has extensive experience as an auditor, tax agent and business adviser. He is always looking for solutions and strategies that drive value for his clients.

Bruce is passionate about helping businesses grow and improve. He is well versed in the use of technology in business and believes that every business needs to have good, robust and well documented systems to grow and thrive. Bruce is solutions oriented and likes to stand back and ensure that the right strategies are in place to deliver the desired outcomes. Tax planning and business structuring are an important part of delivering solutions and this is a key part of Bruce's work with clients.

*Saward Dawson is a long-established firm of chartered accountants with a team of more than 70 people. There is great depth of specialisation and experience in the team, enabling a diverse service offering covering the broad areas of audit & assurance, business advisory & tax and wealth management. The firm is based in Melbourne's Eastern suburbs in Blackburn which is a central location for servicing all of Melbourne. Saward Dawson has been in its local municipality for more than 35 years.*

*Saward Dawson serves a wide range of clients with operations or parent companies in other geographies, so is well acquainted with the issues and challenges of doing business in a global context. The team is focused on delivering professional services that provide real value and results for clients. Saward Dawson is solutions-oriented and strives for excellence in everything it does.*

## BUSINESS ESTABLISHMENT

# Accessing Australia – Practical issues to consider

Commencing or acquiring a business operation in a new country requires a great deal of planning and analysis. Once the decision has been made, the practical issues need to be dealt with. This is where having trusted advisers in the new country is crucial.

When commencing business operations in Australia there are many things that need to be considered. Whether you are purchasing or establishing a business, you need to consider the crucial due diligence issues (legal, financial and tax), the way the purchase is structured (share or asset purchase) and the associated tax and legal considerations.

Top ten considerations

**1. Legal structure:** Will you form a local company or operate as a branch? If you are acquiring an existing entity who should hold the shares?

**2. Local director or agent:** Australia companies require a local resident director, and if you are operating as a branch of a foreign company you need a local agent. Do you have someone who can fill this role or do you need a professional adviser to take on this role?

**3. Tax implications:** What will be the tax implications of the structure and how can the tax outcome be optimised? Key issues include:

- a. Transfer pricing policy and documentation
- b. Thin capitalisation (debt and equity levels)
- c. Withholding tax on interest and royalties
- d. If operating as a branch, do you have a permanent establishment

**4. Visa issues:** If you will be placing key people in Australia you will need to ensure that all of the relevant visa issues are dealt with well in advance.

**5. Funding requirements and exchange risk:** Getting the right mix of debt and equity and the right balance of local and overseas funding is important in order to optimise the outcomes and manage exchange and asset risk.

**6. Registrations:** In order to commence business, you need to obtain an Australian Business Number and a Tax File Number. Other registrations include GST, state-based payroll tax and worker compensation insurance schemes. If you are importing goods you may benefit from registering for deferred GST arrangements on imported goods. Consideration should be given to whether Foreign Investment Review Board (FIRB) approval is required.

**7. Intellectual property registrations:** Protection of intellectual property is a vital part of doing business globally and the need for registration of IP in Australia should be considered.

**8. Employment:** Employing people is one of the more involved but also one of the most important areas to manage well:

- a. Initial considerations include ascertaining whether an Industrial Award will apply to your employees, nominating a default superannuation fund for employees, having suitable employment contracts and ensuring you have the correct procedures in place for new employees.
- b. You will need to determine whether you have the resources to process payroll or whether you require assistance.
- c. There are strict timeframes for the payment of employee withholding tax and superannuation so systems need to be implemented to ensure these payment timeframes are met.
- d. Australian tax rules tax employers on the value of benefits provided to employees (e.g. housing, vehicles and health insurance).

**9. Financial reporting:** Having efficient and effective accounting processes are vital in order to monitor the performance of a business from another location. Large companies with experience in other countries will usually have standard reporting packs. Smaller companies starting their global expansion will need to develop appropriate reporting systems. Cloud based accounting packages make global access to accounting data something that is now accessible to all sized companies.

**10. Audit and corporate filings:** Most small companies operating in Australia are likely to be eligible for relief from the requirement to audit and file financial statements.

The above list is not exhaustive, but covers the major and most common issues relevant to most business entities. An overseas entity wishing to expand into Australia that engages an IR Global firm can be assured that the expertise to address all of the issues associated with doing business in Australia is accessible within the network of firms that regularly collaborate.



MELBOURNE

## Geoffrey Shiff

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Geoffrey is a highly experienced lawyer in Melbourne who has acted as a principal of respected law firms in central Melbourne for many years. After initially practising in real estate development and banking and finance matters, he has developed complementary M&A, commercial, technology, intellectual property and media and entertainment law practices.

Geoffrey believes that the key to the firm's success is the building and maintenance of trusted personal relationships with its clients and the mentorship provided to young lawyers, which has resulted in long term client and associate loyalty. A current area of interest for Geoffrey and the firm is the development of the firm's indigenous business practice, an area where it has established significant presence and expertise.

*Shiff & Company has its modern office in the heart of the bustling café district in the lanes of the Melbourne central business district. Partners Geoffrey Shiff, Julia Adams and Michael Levy together with a loyal and highly skilled team of lawyers, paralegals and assistants, have developed a reputation for providing prompt, innovative and highly personalised legal services at a reasonable cost, in the firm's practice areas.*

*Developing close personal relationships with its clients and regarded as a trusted adviser, it also offers a range of private client legal services. The firm has a culture of working closely alongside its clients and other professional advisers as a team, bringing complementary skills to problem solving and transaction work. This supportive approach translates to practice growth and efficiencies.*

## MERGERS & ACQUISITIONS

# Smoothing the Path: M&A transactions in Australia

M&A legal work in Australia covers a vast range of business transactions of all shapes and sizes.

During 2018 there was a substantial increase in inbound, domestic and outbound Australian M&A activity, increasing by almost 80 per cent to USD155.9billion by early December according to published data.

Materials, energy and power and healthcare are the sectors attracting most overseas attention, together with high growth technology. Deals involving targeted Australian Stock Exchange-listed companies last year include KKR's offer for accounting software MYOB, Affinity Equity Partners' acquisition of Scottish Pacific and Pacific Equity Partners' acquisition of Life-Healthcare. In addition, there is considerable M&A activity of a smaller value, with overseas companies active in the services and manufacturing areas, as well as considerable investment in agribusiness.

Most of the M&A transactions that Shiff & Company are retained to assist with are of a value that do not involve the Australian government approvals. However, there are many large transactions involving intending offshore purchasers that do require approval by the Australian Commonwealth Government Foreign Investment Review Board (FIRB), which considers whether large offshore acquisitions are in the national interest.

## The FIRB regime

The FIRB regime is set out in the Foreign Acquisitions and Takeovers Act 1975 (Cth) (FIRB Act) and regulations supported by guidance notes and policies published by the Australian Treasury. The FIRB Act and regulations are intended to protect the control of only large scale infrastructure such as pipelines and telecommunications and mining and agricultural businesses.

The FIRB examines certain specified foreign investment proposals and advises the Australian Treasurer on national interest implications. FIRB can issue approvals of proposals that are submitted to it.

The FIRB Act defines 'foreign persons' generally as an individual that is not ordinarily resident in Australia, a foreign government or foreign government investor, a corporation, trustee of a

trust or a general partner of a limited partnership where a foreign person holds a substantial interest of at least 20 per cent. It also includes a corporation, trustee of a trust or a general partner of a limited partnership in which two or more foreign persons hold an aggregate substantial interest of at least 40 per cent.

## Real estate

It should be noted that regulation placed on the acquisition of Australian real estate, both residential and agricultural has substantially increased over the past few years. The thresholds for obtaining approvals by the FIRB for such real estate have been lowered considerably. In 2018 the threshold for purchase of agricultural land by foreign purchasers was reduced from AUD252million to AUD15million. Sellers are now required to advertise farm holdings for 30 days before foreigners can purchase. Foreign buyers can also be blocked by the Australian Treasurer and there are comprehensive and strict FIRB guidelines to assess whether a bona fide agricultural business is being acquired.

Last year the Prime Minister rejected a bid by a majority Chinese-owned consortium for the large outback cattle holdings of S Kidman & Co.

In November 2018, the Commonwealth government, after review by the FIRB which expressed concerns, rejected a AUD13 billion bid by a Hong Kong company, CK Group, to buy the Australian APA Group and its dominant gas pipeline network. The Commonwealth Treasurer announced that the bid was not in the national interest.

## Transaction types

There are regulated threshold investment levels and government policies that apply to each of the types of transactions that are briefly described below:

- Australian Entities and Business (Not Land Rich or Agricultural): There is special regulation of sensitive industries such as media and financial sector companies.

- Australian Land and Land Rich Entities: There are various categories and thresholds for newly built and existing residential real estate, commercial and agricultural land and policies pertaining to each.
- Agriculture: There are strict and comprehensive FIRB regulations and policies for agricultural land and agribusiness.
- Mining: Acquisitions of interests in mining tenements and land associated with oil and gas production will be notifiable as an acquisition of an interest in Australian land.

The Australian competition regulator, the Australian Competition and Consumer Commission (ACCC), also provides approval for certain substantial local acquisitions and mergers that may be deemed to lessen competition.

By way of a recent example, in a recent proposed local transaction, the ACCC raised concerns relating to the proposed acquisition by waste company Bingo Industries Limited, an ASX listed company, of Dial-a-Dump, a Sydney company that provides waste processing and land fill services to the building and demolition industries. The ACCC considered whether the divestment by Bingo of a Sydney waste treatment plant would be sufficient to address potential competition issues.

## What we offer

Most of Shiff & Company's work is on behalf of local and offshore companies that seek to grow by acquisition or divestment of local or international businesses.

The firm provides a full range of M&A legal services and assists in the conduct of all aspects of legal due diligence (including IP), negotiation of deal term sheets and the drafting and review of transaction documents through to the closing of the transaction. It also provides advice in relation to government foreign investment regulation and assists with deal structuring, negotiation and review of finance facility agreements and preparation and review of finance securities.

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