

OVERSEAS COMPANY SET UP GUIDE

OVERSEAS COMPANY OR AUSTRALIAN COMPANY?

This Setup Guide outlines some of the advantages and disadvantages of overseas companies operating in Australia as a branch company, or as an Australian subsidiary company.

If you are doing business in Australia, you must be registered with the Australian Securities and Investment Commission (ASIC). Isolated business activities such as opening a bank account or one off transactions are not carrying on business, but any repetition in and continuity of business activity will require registration.

Overseas companies wishing to operate a branch office will register their overseas company as an Australian Registered Business and will be given an Australian Registered Business Number or **ARBN** (An ARBN is not to be confused with an ABN, the identifier given to Australian businesses by the Australian Taxation Office).

Overseas companies wishing to operate a subsidiary company here will register an Australian company with ASIC, and will be given an Australian Company Number (ACN).

Generally speaking, Australian tax issues are not a critical driver in deciding whether to have a branch office or a subsidiary. Income treatment is substantially similar. Usually commercial factors and your local overseas taxation issues will determine whether you adopt a branch structure (ARBN) or subsidiary structure (ACN) in Australia.

Overseas Company with an ARBN

The main advantages of doing business in Australia as branch of a registered overseas company with an ARBN rather than starting a new Australian subsidiary company are that:

- An Australian company requires at least one Australian resident director/secretary and an Australian registered office address.
- The Australian resident director/secretary of an Australian company may require an indemnity for liability and a letter of comfort that the overseas parent's support will not be withdrawn without prior written notice. A registered overseas company with an ARBN need only retain a local agent, which may be unrelated to the registered overseas company.

An Australian company may incur additional costs in maintaining an additional entity, such as annual ASIC fees (\$212) and accountant's fees for annual financial statements and taxation returns (say \$500 to \$2,000 for a small low activity company).

Overseas Company with an Australian Subsidiary Company with an ACN

On the other hand, the advantages of starting an Australian company are that:

- Once you have arranged an Australian resident director/secretary and registered office address, it may be quicker and cheaper than getting an ARBN. Any Australian agent will charge a fee to accept personal liability for all the overseas company's legal obligations, and will require that you indemnify the agent and possibly require that the Overseas company provide security in favour of your Australian agent;
- It may be convenient as an Australian vehicle to apply for and hold government licences; and
- Liability is generally limited to the Australian operations whereas liability will extend to foreign operations in the case of a registered overseas company.



OVERSEAS COMPANY REGISTRATION (ARBN)

Overseas companies carrying on business in Australia are required to register with the Australian Securities & Investments Commission (“ASIC”).

You will not have to register with ASIC if you are just conducting incidental activities, such as the feasibility of starting a business, appointing an Australian commission agent, holding directors or shareholders meetings in Australia, or investing or isolated transactions spanning less than 31 days.

To register an overseas company with ASIC, you must lodge an application, certified copies of your overseas company certificate of registration and constitution, and appoint a local agent with a street address to accept service of your documents. The documents are lodged with the prescribed fee, currently \$457, and ASIC will issue a Certificate of Registration and 9 digit **Australian Registered Body Number (“ARBN”)** once processed.

After registration you must:

Display Company Name

A registered overseas company must display its name in legible writing in a noticeable location outside every office and place of business, note the overseas country as the place of origin, and notice of the fact that liability is limited (if *limited* is not already at the end of the company’s name) must also be displayed, as well at the phrase *registered office* at the registered office.

Use ARBN

A registered overseas company must display its 9 digit ARBN behind the letters ARBN, where the company name appears, on all public documents, letterheads, cheques drawn by the company and ASIC filings.

Retain a Local Agent

A local agent (which must be an Australian resident individual or Australian company) must be appointed to be responsible and personally liable, for all the overseas company’s obligations under the Corporations Act. Inverses company may have more than one local agent at any one time.

Lodge Financial Statements

A registered overseas company must lodge Form 405 – Statement to verify financial statements of a foreign company each calendar year and at intervals of not more than 15 months.

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AUSTRALIAN SUBSIDIARY COMPANY REGISTRATION (ACN)

Proprietary Limited Company Registration with an ACN

Most overseas companies will register an Australian proprietary limited or subsidiary company. A proprietary limited company has less regulatory obligations than a public (or limited company) but is restricted to a maximum of 50 non-employee shareholders. This will not be a problem if the proprietary limited company is to be a wholly owned subsidiary of an overseas company.

ASIC will register a proprietary limited company and will give it an **Australian Company Number (ACN)**. You will need to specify:

- A registered office address in Australia (an accountant or solicitor will do so for a fee);
- Share structure – usually the sole member is the overseas parent;

Directors and Secretary.

The company must have at least one director and at least one secretary, which can be the same person. Directors and secretaries must be over 18 years of age. At least one director and one secretary must be an Australian resident. ASIC restricts certain person (such as undischarged bankrupts or criminals) from being company officeholders. Officeholders should get legal advice about their duties and liabilities before appointment.

Ongoing obligations Include:

Company Name Display

The company's full name and its ACN must be displayed at all offices and business premises (including its registered office). The ACN must be displayed on public documents, all cheques and documents lodged with ASIC.

Registers

The company must maintain a register of shareholders and a register of charges stored at the registered office, principal place of business or other place approved by ASIC. This register should be supplied by your shelf company supplier.

Annual Return

The company must lodge an annual return with ASIC together with the annual fee (currently \$243) providing information as to the company's directors and secretary, shares and options, shareholders, and addresses of the registered office and principal place of business. A form is sent to your nominated address each year by ASIC with payment details.

Annual Financial Reports.

ASIC requires all proprietary limited companies to maintain financial records prepared in accordance with the accounting standards, and there may be additional requirements depending on the company's size. In any case all proprietary companies need to maintain sufficient financial records for compliance with other laws (e.g. Tax laws).

Notification of Changes.

The company must notify ASIC within the specified time period if the company issues shares, changes the location of a register, registered office or principal place of business, appoints or retires directors or secretaries, changes the company name or creates charges. There are penalties for late notification.

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AUSTRALIAN BRANCH VS SUBSIDIARY COMPARATIVE TABLE

	BRANCH – ARBN	SUBSIDIARY – ACN
Registration	<p>Parent company must register as a foreign corporation carrying on business in Australia</p> <p>Parent company must lodge the prescribed ASIC form 402 to obtain an Australian Registered Body number ("ARBN").</p> <p>Slow: ARBN may take up to 4 to 6 weeks.</p>	<p>Must register an Australian company</p> <p>May lodge ASIC form 201 in order to obtain Australian Company Number ("ACN").</p> <p>Quick: Easier to purchase shelf company which can be obtained within 1 day.</p>
Reservation of name	<p>Parent company may reserve its name for up to 2 months by lodging ASIC form 410 together with the relevant fee (currently \$45).</p>	<p>A company name may be reserved for up to 2 months by lodging ASIC form 410 together with the relevant fee (currently \$45).</p>
Shareholders	<p>No additional shareholders.</p>	<p>Minimum one. Likely to be parent company.</p>
Officers	<p>No additional officers required.</p> <p>Appointment of local agent required.</p>	<p>Minimum 1 Director who is a resident of Australia, and 1 Secretary who is a resident of Australia. The Director and Secretary may be the same person.</p>
Annual Return	<p>Annual Return ASIC Form 406 only required if overseas company is exempt from lodging financial statements.</p>	<p>Annual Return required for subsidiary.</p>
Liability	<p>Liability extends to foreign operation.</p>	<p>Liability is generally limited to the Australian subsidiary</p>
Statutory audit:	<p>A statutory audit is not required for a Branch.</p> <p>A registered overseas company must lodge Form 405 – Statement to verify financial statements of a foreign company each calendar year and at intervals of not more than 15 months.</p>	<p>Foreign controlled company must prepare and lodge audited accounts unless:</p> <ul style="list-style-type: none"> • it seeks an exemption and lodges ASIC form 384 in the three month period prior to commencement of the financial year to be audited; or • the foreign parent company is registered and lodges consolidated financial statements (including those of the Australian company) with ASIC.

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OTHER REGULATORY AND BUSINESS REQUIREMENTS

Overseas companies operating in Australia have other regulatory and business requirements. You should get legal advice about these. Clark McNamara Lawyers can provide that advice.

Anti-Money Laundering	AUSTRAC regulates registration and monitors businesses with responsibility to report suspicious cash transactions and threshold matters.
Business Name Registration	If the registered overseas company or new company carries on business in an Australian State (other than under its company name), it is required to register the business name with the relevant Australian State Government department. The approximate cost is \$110 per state.
Business Structures and Asset Protection	Trusts, Joint Ventures, Partnerships and Shareholder Agreements.
Competition Laws	The ACCC regulates the Australian Consumer Law and business conduct.
Consumer Protection and Product Liability	Australia has state and federal laws that protect consumers
Contract Law	While contract law is similar in the Australian States and Territories, there are still significant State specific rules.
Financial Services	If the company provides financial services there are a number of additional requirements such as holding an Australian Financial Services Licence (AFSL) and the associated additional reporting requirements. ASIC may provide exemptions for registered overseas companies
Foreign Investment	The Foreign Investment Review Board regulates foreign investment
Fundraising and Takeovers	The Australian Corporations Act and ASIC regulate fundraising and takeovers
Immigration	Workers in Australia must have a valid Australian Visa with Work Rights. Eligible Business Owners can get permanent residency. You should get advice from a registered Migration Agent.
Leasing and Property Transactions	Each state and territory has its own property and environment laws.
Privacy, Data Protection and SPAM	The Australia Privacy Act and the Spam Act regulate Data use
Security Interests, Charges and Retention of Title	Australia has a statutory scheme to register security interests in most goods. If you do not register you lose priority over your goods if your customer goes into liquidation
State Taxes	Each Australian State has its own Stamp Duty, Payroll Tax and Land Tax
Trade Marks, IP and Technology	Use of your overseas trade names may trigger claims in Australia
Workplace/Employment	Most Australian staff are covered by the Federal Fair Work Act, and there are federal and state discrimination and health and safety laws.

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COMPARISON OF TAXATION AND REGULATIONS ISSUES

	BRANCH – ARBN	SUBSIDIARY – ACN
How is it Taxed in Australia?	Subject to Australian income tax on income sourced in Australia.	Subject to Australian income tax on income from worldwide sources.
Applicable Rate of Australian Tax?	Corporate tax rate is 30%.	Corporate tax rate is 30%.
How are Repatriated Profits Taxed?	Distribution of profit does not constitute a dividend therefore no withholding tax is applicable.	Distribution of profit will constitute a dividend but withholding tax of 30% will only apply if paid out of untaxed profits. This rate is reduced under Australia's various double tax treaties.
How are Losses Treated?	<p>Available for carry forward indefinitely provided certain conditions are satisfied.</p> <p>Unavailable for offset against profits of related Australian entities.</p>	<p>Available for carry forward indefinitely provided certain conditions are satisfied.</p> <p>Available for offset against profits of related resident Australian companies, provided the companies have elected to be members of the same tax consolidated group.</p>
How are Capital Gains Treated?	Capital gains on branch assets are subject to tax.	<p>Generally, residents are subject to tax on capital gains in respect of their worldwide transactions.</p> <p>An exemption (reduction) is available in respect of shares in foreign subsidiaries that operate an active business.</p>
Are there any Funding Restrictions?	Thin capitalisation rules apply.	Thin capitalisation rules apply.

Clark McNamara LAWYERS

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OVERSEAS COMPANIES DOING BUSINESS IN AUSTRALIA

NEED FURTHER INFORMATION?

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