

Doing Business in Australia – corporate structures



This article discusses the types of corporate structure commonly used by overseas companies setting up business in Australia.

1. Types of companies in Australia

Companies are regulated in Australia by statute and the general law. The Corporations Act 2001 (Cth) (Corporations Act) allows for the registration of four types of companies:

- (a) A company limited by shares;
- (b) A company limited by guarantee;
- (c) A company with unlimited liability; and
- (d) A no liability company (typically used for mining purposes).

When a company is registered under the Corporations Act it is automatically registered as an Australian company. This means that it can conduct business throughout Australia without needing to register in individual State and Territory jurisdictions.

The most common type of company is a company limited by shares, which may be either a proprietary (private) company or a public company. A proprietary company is most common because it has the advantage of being simpler to manage and less expensive to administer.

2. Australian subsidiary company or branch office of foreign company

Foreign companies establishing a business presence in Australia usually:

- (a) Establish or acquire an Australian subsidiary company and carry on business in the name of that Australian company; or
- (b) Establish a branch office of a foreign company and carry on business in the name of that foreign company.

The decision on whether to establish a subsidiary or branch office should depend on not only legal or taxation considerations, but also commercial considerations.

Table 1 (see page 2) sets out the main differences between establishing a company in Australia and a foreign entity doing business through a branch office established in Australia.

3. Limited liability of an Australian company

An Australian company's liability to its creditors is limited to the value of its assets. If an Australian company is not able to pay its debts in full as and when they fall due, (ie become insolvent), its creditors may not be repaid all their debt.

Table 1 – Key differences in business structures

Issue	Australian subsidiary	Branch office
Corporate law issues	<p>Separate legal entity. Company may be a private or public company - usually private company</p> <p>Registered with the Australian Securities & Investments Commission (ASIC) and given a unique identifying number, an Australian Company Number (ACN)</p> <p>Liabilities remain with the subsidiary unless parent company has provided a guarantee or subsidiary has been trading whilst insolvent</p>	<p>Not a separate legal entity</p> <p>Foreign company is registered with the ASIC and given a unique identifying number, an Australian Registered Business Number (ARBN)</p> <p>Liabilities are those of the foreign company</p>
Foreign Investment Review Board	Approval may be required before subsidiary is acquired or established	Approval may be required before assets or shares over A\$100m or certain land can be acquired
Taxation	<p>Will be a resident for Australian tax purposes</p> <p>Will be taxed on all worldwide income wherever sourced</p> <p>Presently tax on all profits at the rate of 30%</p> <p>Must apply for Australian Business Number (ABN), Tax File Number (TFN) and may need to be registered for the Goods and Services Tax (GST)</p>	<p>Double tax agreement may apply. Taxed as if it were a separate entity in Australia.</p> <p>Taxed on profits attributable to an Australian permanent establishment</p> <p>Presently tax on all profits at the rate of 30%</p> <p>Must apply for Australian Business Number (ABN), Tax File Number (TFN).</p>
Debt/Equity	If funded by debt owed to a foreign parent, the ratio of debt to equity cannot exceed 3:1 to qualify for tax deductions for interest paid to parent	If funded by debt owed to a foreign parent, the ratio of debt to equity cannot exceed 3:1 to qualify for tax deductions for interest paid to parent
Ongoing administrative and reporting formalities	Must lodge annual returns and annual financial information if the company is not a 'small proprietary company'	Must lodge annual returns and financial and other corporate information with the ASIC
Exchange controls	Significant cash transactions to be reported	Significant cash transactions to be reported

4. Proprietary company limited by shares

A proprietary company is a private company designed for a relatively small group of shareholders or a single parent company shareholder. It cannot have more than 50 non-employee shareholders and cannot invite the public to subscribe for shares.

Each shareholder contributes capital to the company by subscribing and paying for shares. There are no minimum capital requirements. The paid up capital can be as little as A\$1.00.

Each shareholder's liability is limited to any amount unpaid on shares held by that shareholder. If, for example, there is a single shareholder who pays A\$1.00 for 1 share, then that shareholder has no further liability to the company.

A 'small proprietary company' has less onerous ongoing administrative obligations and is suitable for a foreign company wanting a separate presence in Australia. This

type of company can be used for each of the companies in a group structure.

A proprietary company is a 'small proprietary company' for a financial year if it satisfies at least two of the following paragraphs:

- the consolidated revenue for the financial year of the company and the entities it controls (if any) is less than A\$25 million;
- the value of the consolidated gross assets at the end of the financial year of the company and the entities it controls (if any) is less than \$12.5 million;
- the company and the entities it controls (if any) have fewer than 50, employees at the end of the financial year.

Registration of a proprietary company is simple and quick. The requirements for registration are:

- A company name.

- (b) A registered office within Australia where all communications and notices may be sent.
- (c) Directors - there can be any number of directors (including foreign directors) but there must be at least one director who is ordinarily resident in Australia. Each director must have consented to act as director and be over the age of 18 years.
- (d) A company secretary - there must be at least one person ordinarily resident in Australia to act as company secretary. The secretary must have consented to act as secretary and be a person over the age of 18 years.
- (e) At least one shareholder, but no more than 50 non-employee shareholders, who has consented to be a shareholder.
- (f) The number of shares to be issued on registration and the amount of capital to be subscribed by the initial shareholder or shareholders. As advised, there is no minimum capital requirement.
- (g) Registration can occur within 24 hours of this information being available and each company costs about A\$1,200 (inclusive of government charges).

5. Foreign corporation carrying on business through a branch office

A foreign corporation carrying on business through a branch office must register as a foreign company with the ASIC. The registration requirements are:

- (a) The company's name must be available to registration.
- (b) Complete and lodge the relevant application form and documents, including a certified copy of the company's certificate of incorporation (or a document of similar effect), constitution and financial statements.
- (c) Have a registered office in Australia.
- (d) Appoint a local agent to represent the company in making sure it complies with its legislative requirements in Australia.

6. Other business vehicle structures

6.1 Partnerships

A partnership in Australia is the relationship which exists between persons carrying on business in common with a view to profit. Partnerships are regulated by State statutes and the general law of contract, agency and trust law,

A partnership is not a separate legal entity:

- (a) Each partner is the agent of the other partner and may make contracts, undertake obligations and dispose of partnership property on behalf of the partnership in the ordinary course of the partnership business.
- (b) Each partner is personally liable, jointly and severally

for the liabilities of the partnership and for the misconduct of other partners in the course of the partnership business.

- (c) The liability of each partner is unlimited except in the case of limited partnerships.
- (d) The property of the partnership is owned by the partners personally.
- (e) The partnership must submit an annual tax return disclosing its income, outgoings and distribution of profits to partners although it is the partners individually who must pay tax on their share of partnership profits and not the partnership as a whole.
- (f) If the partnership carries on business other than under the names of the partners, the business name must be registered in each relevant State and Territory.

A form of limited partnership may be formed, although it is uncommon. A limited partnership must have at least one limited partner (a partner whose liability is limited) and one general partner (a partner whose liability is unlimited). A limited partnership is taxed as a company and is not a common structure.

Partnerships can be created by either a formal agreement (partnership deed/agreement) or by conduct. There is no formal registration requirement. Partnerships have a great deal of flexibility and offer confidentiality, as they are not required to make public disclosures.

6.2 Joint Ventures

You may participate in joint ventures with other Australian businesses to carry out commercial activities. Joint ventures are primarily used on a 'project by project basis' rather than to carry on continuous business. The joint venture will be governed by the terms of the joint venture agreement between the parties as well as by common law and contract law.

Like a partnership, each joint venturer is taxed separately. But, unlike a partnership:

- (a) A joint venture is not carried out with a view to profit, rather the intention of the joint venture is typically to share the product or output of the venture or to share costs.
- (b) Joint venturers are not agents and are not liable for the acts of the other joint venturers.

6.3 Registration, licenses and permits

Apart from the usual tax registrations applicable to all trading companies, namely:

- (a) An Australian Business Number (ABN).
 - (b) An Australian Tax File Number (TFN).
 - (c) Goods and Services Tax (GST) registration,
- there are no specific registrations, licences or permits that are required to establish a company.

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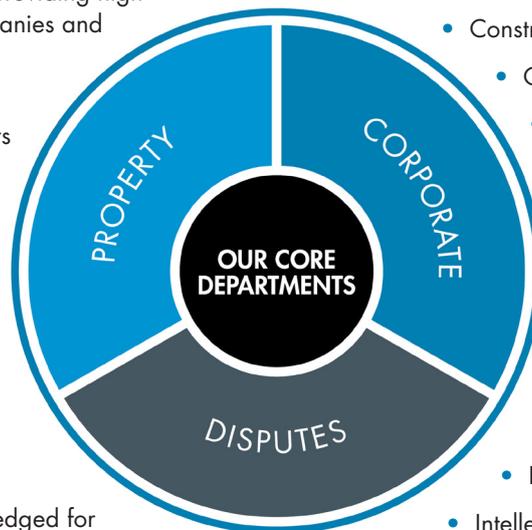
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