

A guide to setting up a business in Australia

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REGISTRATION OF A CORPORATE STRUCTURE

Australian company law

The administration and control of Australia's Corporations Law is centralised with the Australian Securities Investment Commission (ASIC). The individual states and the two territories are now seen as regions for the purpose of the administration of the law with each region having a corresponding law to each of the other regions.

Subsidiary or branch

In establishing operations in Australia, an overseas company may choose between a subsidiary or a branch.

If the proposed branch operations are such as to constitute carrying on a business, it will be necessary to register the overseas company as a foreign company in Australia.

Later in this document we refer to the situation where a foreign controlled "small" subsidiary company can be exempted from accounts preparation and audit requirements if it lodges a request for exemption.

Accordingly the procedures of registering as a foreign company establishing an Australian company are given.

Registration as a foreign company

The Corporations Law requires an overseas company to register under the Corporations Law of a particular state or territory before it commences to carry on a business in Australia. However it should be noted once a company is registered with ASIC in this way, it is able to operate nationally without the need to concern itself with state boundaries.

Registration procedure

The procedure to procure registration of the company is completed by the lodgement of documents of registration (of which further details can be supplied if you proceed). As at 1 September 2011, the fee payable on the lodgement of documents for the registration of a foreign company is \$340.00.

On registration the ASIC is required to issue a certificate of registration to the company in a prescribed form. This certificate is prima facie evidence of the particulars mentioned therein and states the company's Australian Registered Body Number (ARBN) which is required to be quoted on all official company documents, for example correspondence, invoices, cheques, etc.

Registered office

As a registered foreign company in Australia, the company will be required to have a registered office in Australia to which all communication and notices may be addressed. This address should be open and accessible to the public (generally between 9:00 am and 5:00 pm each working day) and also have a representative of the company (i.e. agent or otherwise) present. Azure Group's office is often the registered office for our clients.

Agent

As stated above, a registered foreign company is required to have an agent in Australia. That agent can be any person or company that is a resident of Australia. The agent of the company will be answerable for the doing of all acts required to be done by the company under the Corporations Law and is personally liable to all the penalties imposed on the company for any contravention of the provisions of the Corporations Law unless the Court is satisfied the agent should not be so liable.



Types of companies available in Australia

A company can be incorporated as a proprietary company or a public company.

A proprietary company (commonly referred to as a private company) is limited by shares and includes in its Memorandum or Articles of Association that it may:

- (i) Have no more than 50 shareholders
- (ii) Not engage in any activity that would involve the issue of a prospectus, except share offers to existing shareholders or employees.

There are no requirements at law for restrictions on share transfers. However this can be provided for in the company's articles.

Accounts reporting and audit requirements for a proprietary company depend on whether it is categorised as small or large.

A public company is defined to be a company which is not a proprietary company. Some of the differences between a proprietary and public company are as follows:

- (i) Directors – A proprietary company is required to have at least one director who must ordinarily be a resident in Australia and a public company is required to have at least three directors, of whom two must ordinarily be residents in Australia
- (ii) Accounts and audit requirements differ
- (iii) Only public companies may be listed on the Australian Security Exchange Limited (ASX).

According to the Corporations Act a company can be:

- (i) Unlimited with share capital
- (ii) Limited by shares
- (iii) Limited by guarantee
- (iv) No liability (this only applicable if the company's objects are solely mining or mining related).

In Australia the most common business entity is a company limited by shares. These can be either proprietary or public companies.



ESTABLISHING A COMPANY BY INCORPORATION OR ACQUISITION

Incorporation of proprietary company

To establish a subsidiary through a new incorporation of a propriety company, it is optional to first reserve the proposed name of the company. A proprietary company is formed with at least one initial shareholder.

Acquisition of a Shelf Company

A simple and more convenient method of establishing a corporate structure in Australia is to purchase a "shelf company". This is a company that has been incorporated by businesses, legal or accounting firms which set up businesses for this purpose, (note: they can incorporate a company named specifically for the client) and which has not undertaken any trading activities and therefore has acquired no goodwill, debts or assets. The Memorandum and Articles of Association of these shelf companies are generally drafted deliberately in wide terms and their issued capital (in the case of a proprietary company) is usually \$2.00 fully paid.

A shelf company is usually readily available and has the attraction of being able to be transferred to your effective control within a few days. The existing name of the shelf company could be changed, as could any other feature of the company's Memorandum and Articles of Association, after, or at the time of, transfer of control of the company.



ACCOUNTING AND AUDIT REQUIREMENTS

Accounts for Corporations Law

The Corporations Law contains detailed requirements relating to company accounts and audit procedures. These requirements relate only to companies incorporated in Australia.

Public companies

Public companies have comprehensive accounting and audit requirements in line with international accounting and auditing standards. Therefore, it is not appropriate in this memo to cover the specific Corporations Law requirements attached to public companies.

Proprietary companies

The accounting and auditing requirements for a proprietary company depend upon whether the proprietary company is categorised as large or small.

A proprietary company is classified as small if it meets two of the following three criteria:

- (i) Consolidated gross operating revenue is less than \$25 million a year
- (ii) Consolidated gross assets are less than \$12.5 million at year end
- (iii) Number of employees at year end is less than 50 for that entity and all controlled entities.

The proprietary company is otherwise categorised as large.

Large proprietary companies and small proprietary companies controlled by foreign corporations

Large companies incorporated in Australia, and small companies directly controlled by foreign companies not otherwise exempted, are required by the Corporations Law to prepare their accounts in accordance with approved accounting standards. The company is also required to keep such accounting records as correctly record and explain the transactions of the company and from time to time give a true and fair view of the company's accounts.

Small companies

Generally, a small proprietary company is not required to prepare financial statements unless:

- (i) Within 12 months of year end they are requested to do so by shareholders holding five per cent or more of the voting shares in the company; in which case it must comply with the request by the later of two months after the request or four months after the balance date
- (ii) Within seven years after year end they are requested to do so by the ASIC; in which case it must comply with the request by the deadline given under the request.

The appropriate party may also request an audit of the financial statements and may specify the financial statements are to or need not comply with accounting standards.

Registered foreign companies

A registered foreign company is generally not required to prepare financial statements which comply with the provisions of the Corporations Law. If the ASIC is not satisfied those documents sufficiently disclose the company's financial position it can request that complying accounts be prepared in the form stipulated by the ASIC including audited financial statements if necessary.



ASIC lodgement and general meeting requirements

Every company is required to lodge certain notices with the ASIC. In addition to annual returns these include details of any change of officers, registered office, share structure and terms of special resolution of the company, and for the changes in constituent documents etc.

An annual general meeting is only required for both small and large proprietary company when events required by law or the company's constituent documents require it, such as auditor/director appointment or dividend approvals take place. Articles may be appropriately drafted to limit the need to hold general meetings.

Ordinary resolutions can be passed for proprietary companies without physically attending a meeting; a circulated resolution signed in favour by all members is satisfactory, with the meeting held on the date of the last signature.



CORPORATE TAX

For tax purposes, a company will be required to keep sufficient records of its income and expenditure as to enable its assessable income and allowable deductions to be readily ascertained and to retain those records for a period of at least five years.

Finally, the *Income Tax Assessment Act* will require the company to have a fixed accounting period, being a period of 12 months, other than in the first year. The Australian tax accounting year is 1 July to 30 June, although, if it is more convenient and with the permission of the Commissioner, a substituted accounting period may be adopted to comply with its parent company's accounting period.

Income tax

A company is an Australian resident for income purposes if it is:

- (i) Incorporated in Australia
- (ii) Not incorporated in Australia but it carries on business in Australia and either its:
 - central management and control are in Australia
 - shareholders, who are Australian residents, control the voting power.

Company income is taxed at the fixed rate, namely 30 per cent. Taxable income is calculated in the same way, except an Australian company is taxed on income from all sources, whereas a branch is taxed only on Australian sourced income. There are, however, a number of differences in the tax implications of operating through a branch or Australian company which need to be considered.

Payment of dividends (repatriation of profits)

Withholding tax is not payable on profits remitted from a branch. However withholding tax will be payable on profits remitted as dividends from an Australian resident company to its offshore holding company to the extent Australian income tax has not been applied to the profits (i.e. unfranked dividends).

No dividend withholding tax is payable if fully franked dividends (i.e. dividends derived from profits of which Australian corporate tax has been paid) are paid by an Australian subsidiary to its foreign parent. To the extent that dividends are unfranked, dividend withholding tax of 30 per cent (or as reduced under the relevant double tax treaty) is payable on the gross unfranked amount.

Treatment of tax losses

Losses arising from the Australian operation are trapped in an Australian company but they can be carried forward indefinitely to be offset against future years' profits. A deduction for prior years' losses will be denied where the company cannot satisfy a continuity of ownership test or a same business test.

In a branch, losses arising from the Australian operations are available to be carried forward to be offset against future profits of the branch. Reference should be made to the foreign company's domestic income tax laws as to the availability of tax losses.

Capital gains tax

An Australian company is liable to income tax on profits on the disposal of assets whether the assets are situated in Australia or overseas, whereas a branch is only liable to tax on profits associated with the disposal of "Taxable Australian Assets", that is, those assets used by the foreign company in carrying on a business through a permanent establishment in Australia. Assessable capital gains are included in a company's taxable income and taxed at 30 per cent.

Transfer Pricing

There are strict provisions applying to both Australian companies and branches of foreign companies ensuring dealings between related parties are on commercial terms and conditions.



Debt funding of an Australian company

Interest paid by an Australian company to a foreign non-resident lender entity is subject to an interest withholding tax of 10 per cent. However, if the owner of the non-resident lender has a permanent establishment in Australia and the interest is connected with the permanent establishment, the interest paid would be taxable by assessment in Australia.

Payroll tax

Payroll tax is imposed in all states and territories at rates which may differ depending on the amount of the payroll. Each state has enacted its own legislation, amendments and regulations and therefore the various responsibilities on employers differ as do the entitlements and procedures adopted by each of the various payroll tax collection offices. As at 1 July 2011, the current rate in New South Wales is 5.45 per cent of payroll exceeding the tax free threshold of \$678,000 p.a. This is which is indexed annually in line with the Consumer Price Index.

Fringe benefits tax

An additional tax which is levied by the Commonwealth Government on employers is a tax on the value of non-cash benefits provided to employees. These non cash benefits may include such items as a fully maintained motor vehicle, payment of private telephone bills, the provision of rent accommodation, interest free loans etc.

Fringe benefit tax is currently levied at the rate of 46.5 per cent on the value of the non-cash benefits provided during the 12 month period ending 31 March each year. The tax may generally be payable in quarterly instalments.

Workers' compensation

Every employer in New South Wales is required to carry workers' compensation insurance in order to protect employers and employees from financial hardship in the event of a workplace injury. As soon as the company commences operations in Australia the appropriate workers' compensation insurance should be taken out.



GST

Since 1 July 2000 a goods and services tax (GST) has been in effect in Australia. This GST is effectively a tax of 10 per cent applied to the consumption of most goods, services and property in Australia (including imports). GST is not normally applied to goods or services exported or consumed outside of Australia.

Key points to consider:

- If an entity is carrying on a business and its GST turnover equals or exceeds the annual GST registration turnover threshold it must register for GST. As at 1 July 2011 the GST turnover threshold is \$75,000 p.a. (\$150,000 for non-profit entities).
- A registered entity is legally liable for GST of 10 per cent on the supply of most goods, services or intangibles, except if the supply is 'input taxed', 'GST-free' or 'outside the scope' of GST. Normally GST is part of the contract price and recovered from the recipient at the time of supply by the supplier.
- For imported goods GST equalling 10 per cent of the goods' value is payable, subject to certain exemptions. GST payable also includes the goods' customs value, customs duty and any transportation costs, like insurance, associated with bringing the goods into Australia, to the extent they have not already been included in the customs value. GST from importers is collected by the Australian Customs and Border Protection Service when the goods are imported into Australia, unless the entity has registered for the deferred GST scheme.
- There may be some service importations taxable under a 'reverse charge' rule.
- A GST credit can generally be claimed by for GST paid on items acquired in carrying on a business. However, input tax credits are not available for acquisitions in relation to creating input-taxed supplies, or for any goods or services acquired or imported for private consumption.
- For the suppliers with annual GST turnovers less than \$20 million, GST returns are to be lodged quarterly. Suppliers with GST turnovers of \$20 million or more are to lodge monthly electronically. Suppliers not required to be registered for GST can elect to lodge GST returns annually.



FOREIGN INVESTMENT IN AUSTRALIA

Foreign Investment Review Board (FIRB)

The Foreign Investment Review Board (FIRB) assesses proposals by foreign entities to invest in Australia and makes recommendations to the Government on their approval under the Government's Foreign Investment Policy and also if they comply with the *Foreign Acquisitions and Takeovers Act 1975*.

Foreign individuals

A foreign person is defined as:

- A natural person, not ordinarily resident in Australia
- A corporation in which a natural person not ordinarily resident in Australia or a foreign corporation holds a controlling interest
- A corporation in which two or more persons, who are either a natural person not ordinarily resident in Australia or a foreign corporation, holds an aggregate controlling interest
- A trustee of a trust estate in which a natural person not ordinarily resident in Australia or a foreign corporation, holds a substantial interest
- The trustee of a trust estate in which two or more persons, who are either a natural person not ordinarily resident in Australia or a foreign corporation, hold an aggregate substantial interest.

Controlling (substantial) foreign interest

A controlling (or substantial) foreign interest exists when a single foreign person (and any associates) holds 15 per cent or more of the ownership or voting rights or where several foreign persons (or any associates) hold a combined ownership or voting rights of 40 per cent or more of any corporation, business or trust.

Investments requiring FIRB approval

You should be aware that under the *Foreign Acquisition and Takeovers Act 1975* foreign individuals or foreign owned companies must seek approval from the FIRB before purchasing significant interest in urban real estate, certain shares of Australian owned private companies, or shares in foreign companies which own Australian assets.

It is important you seek advice on the above prior to entering into any transactions.



IMMIGRATION

Foreign companies carrying on a business in Australia can sponsor individuals on a Temporary Business Visa (subclass 457 visa) to come and work in Australia. These individuals can be employed in a specified position within the company for a period of up to four years.

To be a sponsor of a subclass 457 visa holder your business must meet the following criteria:

- Apply in the correct manner to become a standard business sponsor and have completed the correct form and paid the correct fee
- Be lawfully carrying on a business in or outside of Australia
- If you are lawfully carrying on a business in Australia and have been trading for 12 months or more you must meet the prescribed training benchmark. If you have been trading for less than 12 months, you must have an auditable plan to meet the prescribed benchmark
- If you are lawfully carrying on a business in Australia you must provide written evidence you have a strong record of, or demonstrate you have a commitment to, employing local labour and non-discriminatory employment practices
- If you are lawfully carrying on a business overseas but not in Australia, you must be seeking to be approved as a standard business sponsor with the intention of sponsoring a person with a subclass 457 visa to either:
 - Establish, or assist in establishing, on your behalf, a business operation in Australia with overseas connections
 - Fulfil, or assist in fulfilling, your contractual obligation
- There is no adverse information known to the Department of Immigration about you, or a person who is associated with you. The Department may disregard any adverse information if it is satisfied it is reasonable to do so.

Companies carrying on a business in Australia may also sponsor individuals for permanent residence where the nominated position of the applicant is highly skilled and is permanent full time.



OTHER RELATED MATTERS

Public officer

Every company carrying on a business in Australia is required to have at all times a public officer who is required to be appointed within three months of the company commencing to carrying on a business in Australia or of it first deriving income in Australia. The public officer must be a natural person, over 18 years of age, who ordinarily resides in Australia. The public officer of a company is answerable for the doing of all such things required to be done by the company under the Income Tax Legislation.

Group tax (PAYG withheld tax)

Under the *Income Tax Assessment Act* an employer is required to withhold and subsequently remit to the Australian Taxation Office the appropriate income tax payable by employees on the remuneration being paid to them. Group tax deducted from employee's salaries is required to be paid to the Australian Taxation Office. The company must first register as a group employer.

Superannuation guarantee charge (SGC)

A tax is imposed by the Government on employers who do not provide a prescribed minimum level of support for employees. The minimum level of support is expressed as a percentage of each employee's salary.

To avoid liability for the charge, employers are required to contribute the prescribed minimum level of superannuation support for their employees within a specified period. The required level of contribution will be measured annually.

The 2011 SGC is levied at nine per cent for an employer's base year payroll.

Tax file number

A tax file number is issued by the Australian Tax Office (ATO) to each taxpayer to enable the ATO to match information it receives about income earned by taxpayers with details disclosed in their tax returns.

The company must apply to the ATO for a tax file number on the appropriate form and supply a copy of the Certificate of Incorporation for identification purposes.

Tax agent

If the company intends to use the services of a tax agent in Australia, notification of appointment of the tax agent must be supplied to the ATO on the appropriate form. We would attend to this matter at your direction.

Notification of appointment of a tax agent must be supplied to the ATO on the appropriate form if an agent is appointed.

Individual's tax

Personnel involved in the Australian operation who are subject to Australian Income Tax Legislation will be required to lodge income tax returns in Australia. Accordingly, the individuals concerned should apply for an Australian tax file number. Applications can be made at post offices and tax offices. Proof of identity must be established and we can advise what is most appropriate in individual circumstances.



COSTS AND FEES AS AT 1 SEPTEMBER 2011

Set out below are the likely initial and recurring fees and estimated costs for registering a foreign company in Australia, incorporating a proprietary company under the Corporations Law and purchasing a proprietary company as a shelf company.

Initial fees and costs

Item	Registration as a foreign company	Incorporating a proprietary company	Acquiring a shelf company
Registration fee as a foreign company in Australia	\$426.00	-	-
Registration fee on lodgement of incorporation documents*	-	\$426.00	-
Costs of registration of necessary documents, including agent's costs (if necessary) and lodging thereof as required at cost	\$4,000.00**	\$3,750.00**	\$3,750.00**

*The registration fee on lodgement of incorporation documents differ depending on the requirements and structure of the company.

**Includes tax advice on suitability of a branch or a company in Australia (\$1,500 value)

Recurring obligations and fees

1. For registered foreign companies

A registered foreign company is required within two months of the subsidiary's financial year end to lodge with the ASIC:

- a. A copy of its balance sheet made up to the end of its last financial year
- b. A copy of its profit and loss account for the last financial year.

In such a form, containing such particulars and including copies of such documents as it is required to be prepared by the laws of its place or origin. The documents are to be accompanied by a statement in writing in prescribed form (ASIC Form 405) verifying the copies are true copies of the documents required. At present a fee of \$1,063.00 is payable on lodging these documents with the ASIC.

Certain other obligations are imposed on registered foreign companies, principally in notifying the ASIC of any change in its filed particulars, such as offices, agents, registered address, cessation of business, etc.

2. For proprietary companies

A proprietary company is required to file a Company Statement for each calendar year at a current fee of \$226.50. The Company Statement contains a list of members and office holders as well as a statement containing prescribed information by the directors including a declaration of insolvency at the date the return is signed by its directors.

Similarly, filing obligations arise in respect to changes in offices, registered address, constituent documents, etc.



ABOUT AZURE GROUP

Azure Group is a leading Australian chartered accounting and advisory firm and was established in 2002 by Michael Derin. Azure Group's vision is to deliver a premium level accounting service to fast growing and entrepreneurial small-medium businesses.

We recognise businesses require a value added service and hands-on involvement from their accountant and the availability of professionally qualified accounting staff. Our goal is to deliver successful solutions by playing an active role in the development, implementation and ongoing support of clients' business strategies.

Azure Group delivers an innovative in-house accounting service with a consolidated approach that streamlines your accounting systems and procedures. Our strength is in drawing on our internal technical and commercial expertise to help your business to:

- Monitor current and future cash flows and manage costs
- Manage increasing volumes of complex tax compliance and corporate governance obligations
- Make the right decisions at the right time, facilitated by:
 - (i) Accurate and timely financial information
 - (ii) Financial planning and strategy.

Azure Group's services offer short and long term benefits through a combination of cost savings, elimination of current inefficiencies and introduction of valuable expertise and systems to your business.

Our Clients

Azure Group has delivered the total service solution to organisations:

- Needing technical expertise to provide accurate information to compete against competitors
- In their growth or start up phase
- Australian subsidiaries of international corporations
- Wanting to reduce accounting costs by simplifying their systems and processes
- Suffering the consequences of a high turnover of inefficient or inexperienced accounting staff.

The Azure Group team

The team at Azure Group combines senior hands-on commercial skills and chartered accounting technical skills to deliver expert solutions. Our team includes qualified professionals who maintain ongoing technical training to keep up to date with changes in tax, accounting and statutory laws or standards.

Azure Group is a registered tax agent and a registered Australian Securities Investment Commission agent.

For further information visit our website, www.azuregroup.com.au