

# Registration of Corporate Structure in Australia



# Table of Contents

SECTION	TITLE	PAGE
1.0	<b>Australian Company Law</b>	<u>1</u>
2.0	<b>Subsidiary or Branch</b>	<u>1</u>
3.0	<b>Registration as a Foreign Company</b>	<u>1</u>
	Registration procedure	<u>1</u>
	Registered office	<u>2</u>
	Agent	<u>2</u>
4.0	<b>Types of Companies available in Australia</b>	<u>2</u>
5.0	<b>Establishing a Company by Incorporation or Acquisition</b>	<u>3</u>
	Incorporation of proprietary company	<u>3</u>
	Acquisition of shelf company	<u>3</u>
6.0	<b>Cost and fees</b>	<u>3</u>
	Initial fees and costs	<u>4</u>
	Recurring obligations and fees	<u>4</u>
7.0	<b>Accounting and Auditing Requirements</b>	<u>5</u>
	Accounts for corporations law	<u>5</u>
	Public companies	<u>5</u>
	Proprietary companies	<u>5</u>
	Large companies	<u>6</u>
	Small companies	<u>6</u>
	Registered foreign companies	<u>7</u>
	ASIC lodgement and general meeting requirements	<u>7</u>
	Accounts for tax purposes	<u>8</u>



SECTION	TITLE	PAGE
8.0	<b>Taxation of Subsidiary Compared to a Branch</b>	<u>8</u>
	Repatriation of profits .....	<u>8</u>
	Treatment of tax losses .....	<u>8</u>
	Capital gains .....	<u>9</u>
	Transfer pricing .....	<u>9</u>
9.0	<b>Other fiscal matters</b>	<u>9</u>
	Public Officer .....	<u>9</u>
	Group tax .....	<u>9</u>
	Payroll tax .....	<u>10</u>
	Fringe Benefits Tax .....	<u>10</u>
	Workers compensation .....	<u>10</u>
	Land Tax .....	<u>10</u>
	Superannuation Guarantee Charge .....	<u>10</u>
	Foreign Investment Review Board .....	<u>11</u>
	Tax File Number .....	<u>11</u>
	Tax agent .....	<u>11</u>
	Individual .....	<u>11</u>
10.0	<b>Conclusion</b>	<u>12</u>

## REGISTRATION OF CORPORATE STRUCTURE

### **1.0 AUSTRALIAN COMPANY LAW**

The administration and control of the Corporation Law is centralised with the formation of 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.

### **2.0 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 that 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 and establishing an Australian company are given.

### **3.0 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. It should be noted, however, that 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 lodgement of documents for registration (of which further details can be supplied if you proceed). At present, the fee payable on the lodgement of documents for the registration of a foreign company is \$645.00. A full list of the likely fees and costs involved in establishing a branch office is discussed in section 6.0 to this memorandum.

On registration, the ASIC is required to issue a certificate of registration to the company in a prescribed form. That certificate is prima facie evidence of the particulars mentioned therein and states the company's Australian Registered Body Number (ARBN) which will be required to be quoted on all official company documents, eg. correspondence, invoices, cheques etc. Azure Group's office is often the registered office for our clients.

## **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 and which shall be open and accessible to the public (generally between 9.00am and 5.00pm each working day) and at which a representative of the company (ie. by agent or otherwise) shall be present.

## **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 that the agent should not be so liable.

## **4.0 TYPES OF COMPANIES AVAILABLE IN AUSTRALIA**

**A local company** can be incorporated as either a public or proprietary company.

**A proprietary company** (commonly referred to as a private company) is a company limited by shares and which provides in its Memorandum or Articles of Association:

- i) that it may have no more than fifty shareholders;
- ii) that it may 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. This however can be provided for in the company's articles.

A proprietary company's accounts reporting and audit requirements are based on its categorisation as either 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 resident in Australia and a public company is required to have at least three directors, of whom two must ordinarily be resident in Australia.
- ii) Accounts and audit requirements can differ.

## 5.0 ESTABLISHING A COMPANY BY INCORPORATION OR ACQUISITION

### INCORPORATION OF PROPRIETARY COMPANY

To establish a subsidiary through a new incorporation of a proprietary company, it is optional to first reserve the proposed name of the company. A proprietary company is formed with at least one initial shareholder. That person (or persons if more than one initial shareholder) must comply with the following formalities before the company is registered.

### 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 or 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 to the company.

## 6.0 COST AND FEES AS AT 1 JANUARY 2010

We set out below a table of 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 the 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	\$400.00	-	-
Registration fee on lodgment of incorporation documents (Note (i))	-	\$400.00	-
Costs of preparation 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

### Notes

- i) The registration fee on lodgment of incorporation documents differ depending on the requirements and structure of the company.

## RECURRING OBLIGATIONS AND FEES

- i) Registered Foreign Companies

A registered foreign company is required within 4 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 and 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 that the copies are true copies of the documents required. At present a fee of \$1,000.00 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 its offices, agents, or registered address, cessation of business, etc.

ii) For Proprietary Companies

A proprietary company is required to file an Company Statement for each calendar year at a current fee of \$212.00. 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 solvency at the date the return is signed by its directors.

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

## 7.0 ACCOUNTING AND AUDITING REQUIREMENTS

### ACCOUNTS FOR CORPORATIONS LAW

The Corporations Law contains detailed requirements relating to the company's 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 requirements. 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 less than \$25 million a year
- ii) consolidated gross assets 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.

The requirements for large and small proprietary companies are explained in more detail below.

## **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 as from time to time give a true and fair view of the company's accounts.

The director(s) are required to cause a profit and loss statement and a balance sheet to be prepared, audited by an external auditor, distributed to members, and lodged with the ASIC within four months of balance date together with the auditor's report. The Corporations Law sets out a number of matters which are required to be contained in the accounts to ensure true and fair accounts are prepared. (In certain circumstances former exempt proprietary companies which are classified as large will not be required to lodge audited accounts).

If audited financial statements would impose an unreasonable burden on the company (due to such matters as costs outweighing benefits or practical difficulties etc) the ASIC may relieve the large proprietary company of this requirement upon application. We understand relief will be granted only in exceptional or rare circumstances.

## **SMALL COMPANIES**

### ***Generally***

A small proprietary company **is not** required to prepare financial statements unless:

Within 12 months of year end requested to do so by shareholder's holding 5% 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 4 months after balance date.

- i) Within 7 years after year end is 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 that the financial statements are to or need not comply with Accounting Standards.

### ***Foreign Controlled Exemption***

A small proprietary company, controlled by a foreign company for all or part of its reporting period may request to be exempted to prepare audited financial statements.

### ***Accounting Records***

In the circumstances where formal accounts are not required the directors are still required to maintain accurate accounting records in order to explain the company's financial transactions and financial position to enable accounts to be prepared if required. The accounts format is at the discretion of the director(s). Accounts will be necessary for tax and management purposes particularly to evidence ability to meet debts as and when they fall due.

## **REGISTERED FOREIGN COMPANIES**

A registered foreign company is generally not required to prepare financial statements which comply with the provisions of the Australian Corporations law if the ASIC is not satisfied that 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 changes in constituent documents etc.

An Annual General Meeting is only required for both small and large proprietary companies 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 meeting held on the date of last signature.

## **ACCOUNTS FOR TAXATION PURPOSES**

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 5 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 normal 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.

### **8.0 TAXATION OF A SUBSIDIARY COMPARED TO A BRANCH**

A subsidiary is taxed at the same rate as a branch, namely 30%. Taxable income is calculated in the same way, except that 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.

#### **REPATRIATION OF PROFITS (ie. PAYMENT OF DIVIDENDS)**

The basic distinction between a branch and a company is that no withholding tax is payable on profits remitted from a branch whereas profits from an Australian resident company remitted to its offshore holding company as dividends will be subject to withholding tax to the extent to which those profits have not borne company income tax in Australia.

#### **TREATMENT OF TAX LOSSES**

Losses arising from the Australian operation are trapped in an Australian company but 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.

Shares held by a foreign company in an Australian proprietary company are Taxable Australian Assets and, accordingly, gains or losses on their disposal will be brought within the Australian capital gains tax provisions.

## **CAPITAL GAINS**

An Australian company is liable to income tax on profits on disposal of assets whether the assets are situated in Australia or overseas, whereas a branch is only liable to tax on profits on 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%.

Shares held by a foreign company in an Australian proprietary company are Taxable Australian Assets and, accordingly, gains or losses on their disposal will be brought within the Australian capital gains tax provisions.

## **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.

## **9.0 OTHER FISCAL MATTERS**

### **PUBLIC OFFICER**

Every company carrying on business in Australia is required to have at all times a Public Officer who is required to be appointed within three (3) months of the company's commencing to carry on business in Australia or of its 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 as are 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 salary being paid to them. Group tax deducted from employees' salaries is required to be paid to the Australian Taxation Office. The company must first register as a group employer.

## **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. The current rate in NSW is 6% of payroll exceeding the tax free threshold of \$638,000 at 1 July 2009 p.a. 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 free accommodation, interest free loans etc.

Fringe benefits tax is currently levied at the rate of 46.5% on the value of the non-cash benefits provided during a 12 month period ending 31 March each year. The tax may generally be payable by quarterly installments.

## **WORKER'S 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.

## **LAND TAX**

Land owners in New South Wales are liable for land tax where as at 31 December in any year they own land where the taxable value of land is \$368,000 or taxable more for the 2009 calendar year. The adjusted value is determined based upon values provided by the New South Wales Valuer General.

## **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.

A decorative graphic in the top-left corner showing a white maze with a blue keyhole-shaped opening.

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

The 2009 SGC is levied at 9% for employers' base year payroll.

### **FOREIGN INVESTMENT REVIEW BOARD (FIRB)**

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

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

### **TAX FILE NUMBER**

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

The company must apply to the Tax Office for a tax file number on the appropriate form and supply a copy of the Certificate of Incorporation of the company 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 Tax Office on the appropriate form. We would attend to this matter at your direction.

### **INDIVIDUALS**

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. Application may 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.

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



## 10.0 CONCLUSION

The above is only a summary of the matters requiring your consideration in respect of the proposed operations in Australia. It is recommended that you seek further detailed and specific advice before proceeding on either a branch or company course.

**If you would like to discuss any of the above, please feel free to contact Azure Group on:**  
**[ourteam@azuregroup.com.au](mailto:ourteam@azuregroup.com.au); or **1300 4 AZURE (1300 429 873)****

*The enclosed memorandum is of a general nature only and is not intended to address the circumstances of any particular individual or entities nor does it constitute advice from Azure Group that you may rely upon.*