

australia



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australia | corporate law

Regulations

The incorporation and regulation of corporations is governed by:

- The Corporations Act 2001 (Commonwealth);
- the common law; and
- legislation dealing with specific issues including restrictive trade practices, consumer protection, employment practices, occupational health and safety, taxation and foreign investment.

Types of Companies

Of the common forms of trading corporations there are:

- Publicly listed corporations which are also regulated by the Australian Stock Exchange (ASX) listing rules;
- Public corporations that choose not to list on the ASE; and
- Proprietary limited corporations.

The difference between the corporations is summarized in the table below:

Issue \ Type	Publicly Listed	Public Not Listed	Proprietary Corporation
Minimum Number of Directors	3	3	1
Minimum Number of Shareholders	1	1	1
Maximum Number of Shareholders	None	None	50
Minimum Number of Company Secretaries	1	1	Secretary Optional
Ability to raise capital from the public	Yes	Yes	No
Auditor	Must be appointed	Must be appointed	Optional
Must Comply with ASX Listing Rules	Yes (Requirement of ASX Listing Rules)	No	No
Independent Directors	Yes (Requirement of ASX Listing Rules)	Optional	Optional

Liability of Shareholders

The liability of shareholders of the above types of company is limited in each instance to the amount paid or agreed to be paid on the shares allotted to the shareholder.

Share Capital

Companies in Australia are not required to have a minimum amount of paid-up capital.

The concept of par values for shares has been removed under the Corporations Act 2001.

Classes of Shares

Shares can be issued as order, preferred or bearer shares.

Corporate Governance

SHAREHOLDERS MEETINGS

Decisions reserved to the Shareholders (see next page).

Powers reserved To Shareholders	Publicly Listed	Public Not Listed	Proprietary Corporation
Increasing Share capital	Yes	Generally Yes but depends on Constitution	Generally Yes but depends on Constitution and any Shareholders Agreement
Changing the Corporate purpose	No	No	No
Reducing share capital	Up to a point, No, but once the point is reached shareholder approval is required	Up to a point, No, but once the point is reached shareholder approval is required	Up to a point, No, but once the point is reached shareholder approval is required
Change of Name	Yes	Yes	Yes
Authority to Bind company	No	No	No
Authority to Bind or require directors to act in a particular manner or refrain from acting	No	No	No
Right to remove directors	Yes	Yes	Yes
Right to transfer shares to third parties	Yes	Yes	Only with approval of the board of directors and (also) usually the other shareholders
Change of Constitution	Yes	Yes	Yes

MINIMUM NUMBER OF SHAREHOLDERS MEETINGS/YEAR

Public companies must convene one shareholders meeting every year.

Proprietary companies may have shareholders meetings as and when required; there is no minimum number to be held in any year.

A Director may request convening a shareholders meeting.

Shareholders may request the board to convene a shareholders meeting and if the minimum number of shareholders so request a meeting must be convened.

DIRECTORS

Appointment of Directors: Directors are appointed by the votes of shareholders.

Powers of Directors: Generally the power of day-to-day control of the company vests in the directors. The directors' power is absolute, save for the right of shareholders to remove directors who they think are not acting in the best interest of the company.

Minimum number of independent Directors: At least one.

Term of appointment: No statutory term, depends on the Constitution of the Companies. Shareholders have reserved powers to seek to remove directors at any time provided certain requirements under the law are met.

Requirements concerning directors' fees: Listed Public Companies must disclose the remuneration paid to directors. Other companies do not have to disclose and generally never disclose the remuneration paid to directors.

Directors' liability: Directors can be personally liable for the debts of companies if they allow the company to incur a debt, the company is liquidated and the court determines that the directors knew or ought reasonably to have known that the company was insolvent at the time the debt was incurred. In serious situations directors can be jailed for this offense.

Annual Accounting Procedures

NECESSARY DOCUMENTS

The Corporations Act 2001 does not specify what documents or information if any a company must have. Directors are under a general duty to ensure that the financial accounts of the company are true and correct at all times.

DEADLINE FOR DELIVERY OF DOCUMENTS

Public companies must file annual returns with copies of accounts within 6 months of the end of the company's financial year. The financial year in Australia is from 1 July each year to the following 30th June. Most listed public companies have to file and hold shareholders meetings by 31 December each year. Some companies have different financial years, as subsidiaries of foreign corporations whose year-end is different than that in Australia. Permission to have a different year-end for a company's financial year must be given by the Australian Taxation Office.

STATUTORY AUDIT

Scope: Public companies must be audited each financial year. The Auditor must report to the shareholders and to the Australian Securities and Investment Commission if any accounting irregularities are uncovered.

Competence: Auditors must be registered. An Auditor once appointed cannot be removed by the company. An Auditor may resign but cannot be removed without the approval of shareholders and then only upon the appointment of a replacement auditor.

australia | tax law

The Australian income tax system is a federal system based on the Income Tax Act and other related acts. The income tax year is 12 months ending 30 June (unless substituted accounting period granted).

Income tax, which is by far the most significant tax levied in Australia, is imposed only by the Commonwealth Government. There are no separate State or Territory income taxes. Instead, the States and Territories raise some of their revenue through other taxes such as pay-roll tax, land tax, stamp duty and financial transactions tax. The balance of their revenue consists mainly of grants from the Commonwealth Government.

In addition to income tax, the Commonwealth Government also imposes a variety of other taxes including fringe benefits tax (on employee benefits), wholesale sales tax (on goods), customs and excise duties, superannuation guarantee surcharge and petroleum resource rent tax.

Local authorities also raise revenue from rates and taxes imposed on landholders living or carrying on business in the local authority area.

Australia does not currently have a value added tax, and has neither wealth, death nor gift taxes.

INCOME TAX

Australia's income tax system is administered by the Australian Taxation Office (ATO), which is headed by the Commissioner of Taxation.

Australian income tax is levied on both the income and the capital gains of all individuals and companies and certain other entities such as limited partnerships and certain trusts. Unlimited partnerships are taxed at the individual partner level.

Broadly, residents of Australia are liable to income tax in respect of their worldwide income, while non-residents are liable to income tax in respect of their income from Australian sources. This broad principle is subject to the provisions of any bilateral double taxation treaty entered into between Australia and almost 40 other countries. Treaties generally follow the OECD Model Convention.

Taxable Income

Income tax is payable in respect of "taxable income," which is calculated by deducting from assessable income all allowable deductions. Taxable income is calculated on an annual basis, with the year of income being a fiscal year ending on 30 June, unless the Commissioner has given permission for the taxpayer to adopt a year of income ending on some other date, which is often the case for Australian subsidiaries of foreign-based entities.

Most expenditure incurred in deriving assessable income is deductible in calculating taxable income, either in the year in which it is incurred, or amortized over a period of years, or at the time of disposal of a capital asset in respect of which a capital gain arises.

State and local taxes are generally allowable deductions in calculating the taxable income upon which federal income tax is levied, unless they form part of the cost of a capital asset, such as stamp duty on the transfer of land.

Losses can be carried forward indefinitely but cannot be carried back. Losses incurred by companies and certain other entities are subject to satisfaction of the majority continuity of ownership rules or, failing that, the same (identical) business rules.

Income Tax Rates

Income tax is levied on both resident and non-resident individuals on a progressive basis, with the highest rate of 47% applicable to taxable income over AUD 50,000. Resident individuals also pay an additional 1.5% of taxable income by way of Medicare levy.

Resident Individuals

Resident individuals whose total taxable income for the year from all sources (regardless of whether it originates in or out of Australia) exceeds the tax-free threshold of AUD 6,000 are required to file an Income Tax Return. Individuals as well as all other taxpayers must have a Tax File Number.

The net tax payable is computed by deducting from the gross tax: any rebates (e.g. for dependents, sole parent, housekeeper, pensioner, zone allowance, low income earner, net medical expenses in excess of AUD 1,250, franking credits etc.) and any other credits (e.g. for foreign taxes).

For taxable incomes over AUD 13,807 for the 2000/01 year an amount for the Medicare Levy must be added equal to 1.5% of the taxpayer's taxable income (unless an exemption or reduction applies). The levy is collected in conjunction with, and in the same way as, income tax.

To arrive at the actual tax payable, the net tax payable will generally need to be adjusted by deducting prepaid tax (whether by tax installment deductions withheld from salary by an employer or by Pay As You Go installments paid).

Individual Tax Rates

Taxable income	Tax payable
AUD 0-6,000	Nil
AUD 6,001-19,999	AUD 0.17 for each AUD 1 in excess of AUD 6,000
AUD 20,000-49,999	AUD 2,380 + AUD 0.30 for each AUD 1 in excess of AUD 20,000
AUD 50,000-59,999	AUD 11,380 + AUD 0.42 for each AUD 1 in excess of AUD 50,000
AUD 60,000 and over	AUD 15,580 + AUD 0.47 for each AUD 1 in excess of AUD 60,000

The taxable income of most companies (resident and non-resident) is taxed at a flat rate of 36%.

There is no separate branch profits tax for non-resident companies.

Treatment of Dividends

Australia no longer has a classical system for corporate taxation. An imputation system for the taxation of company dividends operates in Australia, with resident individual shareholders being entitled to a credit (but no refund) for Australian tax paid by a company. Dividends which attract the credit are called "franked dividends." Other dividends are called "unfranked dividends."

Excess franking credit entitlements cannot be carried forward or carried back.

Withholding Tax

Certain income (interest, dividends and royalties) paid to non-residents may be subject to Australian withholding tax, irrespective of source. Withholding tax is a first and final tax imposed on the payee but collected from the payer of the income to which it applies.

The withholding tax is subject to treaty limitations but generally ranges between 10% (interest and royalties) and 30% for dividends (15% for treaty dividends). No withholding tax is payable in respect of fully franked dividends paid by a resident company to a non-resident shareholder.

Capital Gains and Losses

Capital gains derived on the disposal of assets acquired or deemed to have been acquired on or after 20 September 1985 are subject to tax in Australia. Subject to minor concessions for individual taxpayers, the capital gain is included in assessable income and taxed at the same rate as any other income derived by the taxpayer.

In calculating the capital gain derived on the disposal of an asset, the cost of the asset is indexed for inflation over the period during which it has been held by the taxpayer.

Capital losses can only be offset against capital gains, either in the current year of income or in a future year of income. Capital losses cannot be carried back.

For non-residents, there are special rules which limit the operation of the capital gains provisions to certain specified types of assets. Gains on other types of assets are generally not taxable. As usual, these provisions are subject to the terms of any relevant double taxation treaty.

Intra-Company Group Relief

Generally dividends paid by one resident company to another, although representing assessable income, are not taxable due to rebate provisions. Care must be exercised by the Australian dividend recipient to ensure otherwise allowable deductions are not offset against effectively tax-free dividend income. Resident companies which are 100% related may transfer losses if they elect to do so. There is no consolidated tax return as such.

Roll-over relief is available for 100% related companies (including non-resident companies in certain circumstances) whereby tax on capital gains may be deferred.

Income Tax Issues for Foreign Investors

Australia has thin capitalization rules which disallow excess interest deductions where the debt to equity ratio of non-financial institutions owned by non-residents exceeds 2:1. For financial institutions, the permitted ratio is 6:1.

Australia has transfer pricing rules which apply to international transactions. The rules apply not only to related parties but also to unrelated parties.

Australia has unusual rules that prevent a foreign investor replacing equity with debt in specific cases involving the sale of in-house assets.

Payments to non-residents under hire-purchase agreements are treated as the payment of royalties subject to withholding tax, rather than as a sale and loan arrangement.

OTHER IMPORTANT TAXES

Fringe benefits tax is imposed on a range of benefits provided by an employer to their employees. The rate is 48.5% of the grossed-up value of the benefit. Both the cost of the benefit and the fringe benefits tax are deductible in calculating taxable income.

Sales tax is imposed on certain goods (but not services) which are either manufactured in Australia or imported into Australia. Where applicable, the rate ranges from 12% to 45%.

Pay-roll tax is imposed by the States and Territories on wages paid by employers to employees. The rate varies between the States and Territories, but ranges between 3.95% and 7%.

Stamp duty is also imposed by the States and Territories on a range of written instruments and also on some transactions. The rate varies between the States and Territories and also depends upon the type of transaction or the type of property transferred by the written instrument. For example, in relation to transfers of land, duty of up to 5.5% of the value of the land may be imposed. Transfers of shares are taxed at lower rates (between 0.3% and 0.6%), except where the underlying assets consist primarily of land, where the land rate applies.

Land tax is imposed on the unimproved capital value of land owned in the six States and the Australian Capital Territory.

australia | foreign investment

Registration with Government Authorities

Foreign investment activities in Australia are regulated at the Commonwealth level by the Treasurer, as advised by the Foreign Investment Review Board (FIRB) and the Department of Treasury, pursuant to the Foreign Acquisitions and Takeovers Act, 1975 and policy guidelines.

In general foreign investment is encouraged and while notification is required rarely is the power to refuse the investment made by the Treasurer.

The scheme of the Act is to require compulsory notification of certain proposed acquisitions of Australian assets, and to make other proposed or completed acquisitions and arrangements subject to prohibition or divestiture after they have been examined and found to be contrary to the National interest (without requiring notification).

Compulsory notification applies to acquisitions by foreign interests of:

- Substantial shareholdings in certain Australian companies; and
- Certain interests in Australian urban land.

Failure to notify the Treasurer before entering into an agreement to acquire these interests is an offense punishable by severe fines and, in the case of individuals, imprisonment.

Other arrangements which are examinable but not compulsorily notifiable involving foreign interest include the acquisitions of assets of certain Australian businesses.

Acquisitions and arrangements, whether compulsorily notifiable or not, can be prohibited by order of the Treasurer if they are considered contrary to the

National interest. If they are completed they can be ordered to be unwound and divestiture to occur. For this reason many transactions which are not compulsorily notifiable are in fact submitted for prior approval.

The Treasurer is required to reach and notify his decision in the Commonwealth Gazette within 40 days of notification. There is a provision for interim prohibition orders to be made, to give the Treasurer a further 90 days to consider the position and obtain additional advice.

There are exemptions from notification requirements such as:

- Acquisitions of companies and business whose total assets do not exceed AUD 5 million (about EUR 2.94 million), or AUD 3 million (about EUR 1.76 million) where more than half the assets are attributable to rural land.
- In the case of interests in Australian urban land, acquisitions of non residential commercial property valued at less than AUD 5 million.

Note that the Foreign Investment Regulatory Scheme also covers the acquisition of shareholdings of 15% or more in Australian companies that have total assets valued at AUD 5 million or more (AUD 3 million or more if more than 50% of the assets are in form of rural land).

Section 19 of the Act provides that where an acquisition of assets would have the effect of giving a foreign person control of the business, the Treasurer may allow the acquisition, allow it only with conditions or prohibit it.

A "foreign person" under Section 19(1) is a foreign corporation in which a natural person (or two or more natural persons) not ordinarily resident in Australia hold a controlling interest (that is, 15% of the voting power of the corporation). Section 4(3) extends the scope of Section 19 so that it also applies to Australian corporations or trusts controlled by non residents.

Strictly, Section 19 only applies when the acquisition of assets would result in a foreign person gaining control of an Australian business carried on solely by a prescribed corporation. A prescribed corporation is defined in Section 13.

However, Section 19 is extended by Sections 4(4) and 4(5) to cover an Australian business carried on by persons other than a prescribed corporation. The reason for these sections is a constitutional issue, which has not been tested. Therefore, on the face of it, in the purchase of any Australian business valued at over AUD 5 million (or AUD 3 million with land), Section 19 applies. Note that Section 13A provides for exempt corporations.

For the purposes of Section 19 an Australian business is taken to be controlled by foreign persons if the Treasurer is satisfied that the persons (with or without associates) are in a position to determine the policy of the business: Section 19(7)(a).

There is no requirement under the Act to notify the Treasurer of any acquisition of assets. However, the Act is predicated on the assumption that notification can take place, as Section 25 provides protection for notified transactions against later divestiture orders.

Approval of the sale of an asset may not be withheld unless the Treasurer is satisfied that:

- (a) the person who is going to purchase the asset is foreign; and
- (b) it would be against the National interests for that person to control the business concerned.

Position of Interests in Australian Urban Land

Sections 21A and 21(6) apply to acquisitions of interests in Australian urban land by a foreign person. Australian urban land is land in Australia that is not used wholly or exclusively for carrying on business of primary production (see Section 5(1) and 12A).

Under Section 26A any such acquisitions are subject to compulsory notification and relate to the prohibition and divestiture powers in Section 21A. Note the threshold that under Section 13B the Act does not apply if the land value is less

than AUD 3 million (about EUR 1.76 million); for the purposes of the thresholds, the consideration payable for the assets is taken to be the value of the assets.

Therefore, under Section 26A compulsory notification applies to a foreign person with the intention to enter into an agreement under which the person will acquire an interest in Australian urban land. It is an offense to fail to give 40 days' notice to the Treasurer of the proposal to enter into an agreement. Penalties are a fine up to AUD 250,000 (about EUR 147,059) for corporations and a fine of AUD 50,000 (about EUR 29,412) for individuals or imprisonment for up to 2 years or both.

Effect of Notification Under Section 25

When the Treasurer is given notification of an acquisition or a proposed acquisition, Section 25 imposes time limits within which the Treasurer must act. Where notification is given of a proposal, examination will normally be carried out in two stages:

- Preliminary examination which must be completed within 30 days of receipt of notification: Section 25(2) and (3). Preliminary examination may result in the quick clearance of the proposal. Preliminary examination may also result in an interim order prohibiting implementation of the proposal for a period of up to 90 days.
- Detailed examination will follow an interim order and must be completed within 90 days: Section 25(3). Detailed investigation will conclude with the clearance of the proposal (possibly subject to conditions) or with a prohibition order being made under the relevant provision.
- Conditions must be notified to the person within 10 days of the Treasurer's decision. If the Treasurer raises no objections to a proposal or if he allows it subject to conditions, the proposal can then go ahead without the potential of a later order for divestiture: Section 25(2) and (3).

australia | labor law

Labor laws in Australia are protective of employees. In most States and Territories court actions are relatively inexpensive for employees to take action against employers.

The laws in Australia have some unusual protections, for instance concerning holiday pay. In many States, employees are paid a bonus ("loading") while on leave to compensate them for the additional costs incurred while being on holidays!

When considering establishing a business in Australia, it is essential to obtain detailed advice on the employment practices in the particular industry and location in which the business is to operate.

Employment Contracts

CLASSES

Employees under employed under individual contracts although there are State and Federal Awards which specify that employees in particular industries are entitled to and MUST receive minimum standards of pay, hours of employment, health care, and periods of leave.

COST OF DISMISSAL AND WRONGFUL DISMISSAL

Employers have the right to dismiss employees they do not need. If employees are dismissed for reasons of technological, geographical or economic redundancy, Federal and State Legislation exists. For instance, Section 170CM of the Workplace Relations Act 1996 (Cth) requires employers dismissing an employee to give minimum notice as follows:

Period of continuous service

Less than 1 year

More than 1 year but less than 3

More than 3 years but less than 5

More than 5 years

Period of Notice

At least 1 week

At least 2 weeks

At least 3 weeks

At least 4 weeks

If the employee is over 45 years of age and has at least 2 years continuous service with the employer, the employee is entitled to a further week.

It should be noted that the provisions of the Act are minimum entitlements only. To determine whether a greater period of reasonable notice is required, the courts also look at factors including the age of the employee, the circumstances of the termination, the employee's performance in the position, and qualifications and prospects of finding comparable alternative employment quickly.

If you wish to terminate an employee you should provide at least the minimum under the Act and seek legal advice as to whether or not further notice is required.

The law does not prevent an employer from terminating an employee without notice if the employee is guilty of serious misconduct.

EMPLOYMENT CONTRACTS FOR DIRECTORS

There is no special regime for directors to be employed by the companies of which they are directors.

australia | real estate**Types of Ownership**

Land may be held by individuals or companies. Provided notification is made, foreign individuals and companies can also purchase land in Australia.

Land acquired is held in fee simple. Subject to Government's having reserved the right to acquire land, land once purchased is the sole and absolute property of the purchaser.

Land Register

Generally ownership of land in Australia is recorded by the Torrens registration system. All land has a specific lot and plan number and the name of the owner is disclosed in the register. The register is authoritative as to who the owner of land is at a given time.

Transfer Formalities

Land is transferred by sale, gift or transfer upon death. For the transfer to be valid at law, it must be noted in the appropriate State or Territory Department of Lands registry.

Mortgages

Mortgages are created and also recorded in the register pertaining to the land.

Mortgages can also arise without being registered although the level of security in such cases can be affected by the failure of the mortgagee to register the security interest in the land. In some cases, the mortgagee's security interest could be lost due to the failure to register the mortgage.

Restrictions on Acquisition

There are notification procedures to follow but in general there are no restrictions on foreign individuals or companies purchasing or holding land in Australia.

Construction and Use Restrictions

The permitted use of land is controlled by the third tier of government in Australia, the Local Council. When looking to purchase land, purchasers are advised to obtain the latest zoning certificate to ensure that the land can be used for the desired purpose of the purchaser.

Development cannot take place on land until the Local Council gives development consent to the proposal. The length of time it takes to obtain Development Consent following the lodging of a Development Application depends upon each State and Territory and each Local Council.

Leases

Land in Australia can be leased. The usual types of leases are leases for a term, leases at will and periodic leases.

Leases for a term greater than 5 years (inclusive of any option to renew) should be placed upon the register of the land.

No government permission is required for a land owner to grant a lease to a lessee.