

DOING BUSINESS IN AUSTRALIA:

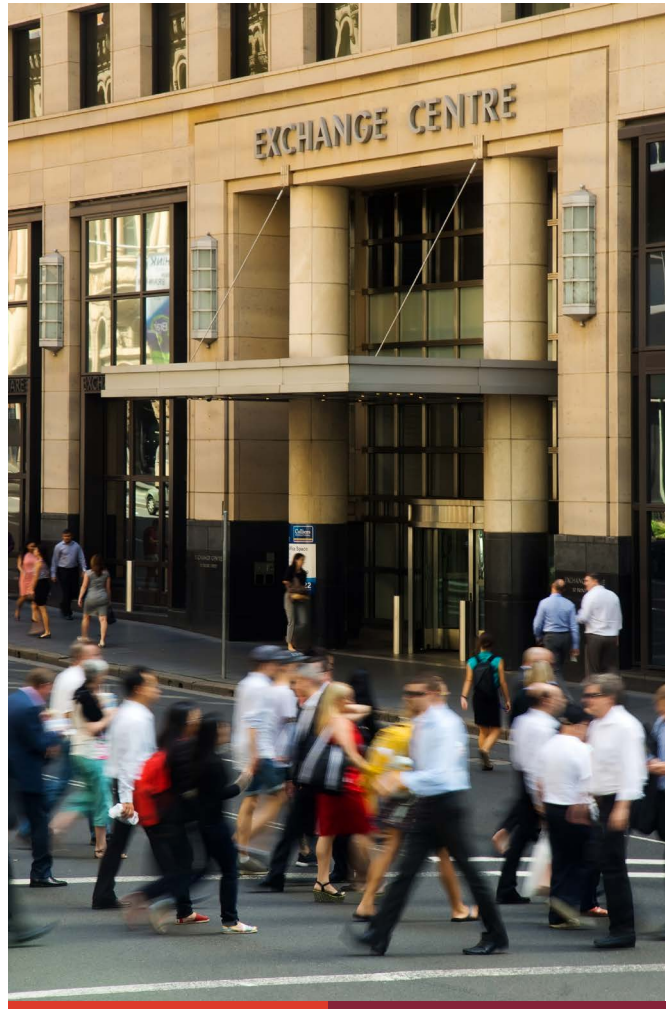
COMPANY LAW

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REGULATORY SCHEME

The Corporations Act 2001 principally regulates companies and their incorporation, the acquisition of shares, securities, and the derivatives industry.

The Corporations Act, together with other major pieces of legislation such as the Australian Securities and Investments Commission Act, the Australian Securities and Investments Commission Guidelines and the Listing Rules of the Australian Stock Exchange Limited, form a uniform regulatory scheme for companies which applies in all Australian states and territories.



AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION (ASIC)

A federal body, the Australian Securities and Investments Commission (ASIC), is responsible for administering the Corporations Act. ASIC has broad-ranging powers and functions (alongside the Australian Stock Exchange (ASX) for publicly listed companies) as the regulator and enforcer of company law and is the principal registry and information source for company matters. ASIC has wide investigative powers under the Australian Securities and Investments Commission Act in order to detect misconduct, gather evidence necessary to bring criminal proceedings, restrain unlawful conduct and also to initiate civil proceedings for offences under the Corporations Act.

COMPANY LAW

INCORPORATION (ALSO CALLED “REGISTRATION”)

A company has a separate legal identity from its shareholders and directors. A company can own property, enter into contracts, and commence legal proceedings in its own name. It is the most common form of business organisation in Australia.

Companies are incorporated under the Corporations Act. Incorporation involves appointing directors (one of whom must be resident in Australia), issuing shares, nominating a registered office in Australia (which can be in any state or territory of Australia) and, where applicable, lodging copies of the company’s constitution (its governing document, if it elects to adopt one) with ASIC. ASIC is required to make certain company records available for public inspection.

Alternatively, companies that are already incorporated but have never traded may be purchased for immediate use. These companies are known as “shelf companies” and are available from the Meritas member firms in Australia. A shelf company generally costs about \$1,000. ASIC is required to make certain company records available for public inspection.

Unless a company is a publicly listed company or a company that is created for a specific reason (e.g. a not-for-profit company), there is no requirement for a company to have a constitution. If a company does not wish to have a constitution, it can use the “replaceable rules” instead. The replaceable rules are in the Corporations Act and are a basic guide for internal management of a company. The “replaceable rules” apply to a company (other than a company where the same person is both the sole director and the sole shareholder) whether or not the company has a constitution, unless they are displaced or modified by the company’s constitution. Where a proprietary company elects to adopt a constitution, the constitution is not required to be lodged with ASIC.

Each company, which is properly incorporated, is registered by ASIC and receives a unique nine-digit Australian Company Number (ACN). The ACN must appear on all of the company’s public documents. If the company has an Australia Business Number (ABN) that consists of the company’s ACN, it may display the ABN in lieu of the ACN. Foreign companies and certain other bodies required to register under the Corporations Act also receive identification numbers known as the Australian Registered Body Number (ARBN).



All companies incorporated under the Corporations Act are able to conduct business in all states and territories of Australia without meeting further registration requirements.

COMPANY LAW

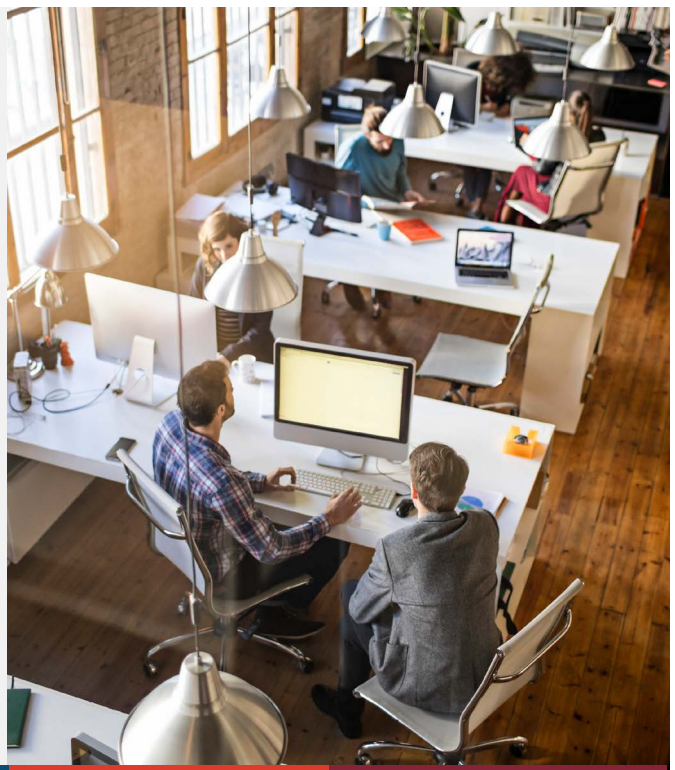
PROPRIETARY COMPANY

A proprietary company is the most commonly used form of company in Australia. It is designed for a relatively small group of shareholders (minimum one shareholder and not exceeding 50 non-employee shareholders). A proprietary company can place restrictions on the sale of its shares.

A proprietary company must have at least one director and one shareholder (who can be the same person). At least one director must ordinarily reside in Australia.

Proprietary companies are further classified as either large or small proprietary companies. To be classified as a small proprietary company, and so qualify for reduced financial reporting requirements, the company must satisfy at least two of the following criteria:

- The company and the entities it controls, if any, must have a consolidated gross operating revenue of less than \$25 million for the financial year;
- The value of its consolidated gross assets and the assets of any entities it controls, if any, total less than \$12.5 million at the end of the financial year;
- The company and any entities it controls, if any, have fewer than 50 employees at the end of the financial year.



CROWD SOURCED FUNDING

A proprietary company is not permitted to raise funds from the public unless the offer is conducted as crowd-sourced funding (CSF). Where a proprietary company is raising fund from the public through CSF (up to \$5 million), the proprietary company must have two directors and where the company has more than two directors, majority of the directors must ordinary reside in Australia.

OTHER FORMS OF COMPANIES

Other forms of companies, including companies limited by guarantee, no-liability and unlimited liability companies, are also available, depending on the purposes for which the companies are required. (A no-liability company is one where the holder of partially paid shares can choose to forfeit the partially paid shares without further liability rather than pay a call in respect of those shares. They can only be used where the principal activity of the company is that of mining or oil exploration.)

COMPANY LAW

DIRECTORS AND OFFICERS

Management and control of a company are vested in the board of directors, who are appointed by the members. Directors of companies conducting business in Australia, and others acting as directors, such as managers, owe certain duties to the company itself, its shareholders as a whole and, in certain circumstances, to other people associated with the company such as the creditors of the company. The directors' duties arise under the general law, the Corporations Act and other legislation, such as statutes governing tax, employment, competition, work health and safety, to name but a few. Of particular importance in Australia is that a person will be considered to be a director even if the person is not validly appointed as a director, such as where the person acts as if they were a director (a de facto director) or where the board generally acts in accordance with the instructions or wishes of that person (a shadow director). The duties to which directors (including non-executive directors) and officers are required to comply under the Corporations Act are:

- To act with the care and diligence of a reasonable person;
- To act in good faith and for a proper purpose;
- To avoid conflicts of interest;
- To avoid improper use of position;
- To avoid improper use of information;
- To avoid insolvent trading; and
- To provide or disclose certain information, including financial information, to its shareholders.

Breaching these duties can have severe consequences, including subjecting directors to criminal or personal financial liability or in some instances to both.

REPORTING REQUIREMENTS AND RECORDS

Companies conducting business in Australia are under various obligations to:

- Keep various records and maintain various registers in respect of their activities
- Maintain their accounts in accordance with generally accepted accounting principles consistently applied in Australia
- Prepare annual financial statements and reports and distribute copies to their shareholders
- Lodge copies of those statements with ASIC and, if applicable, the Australian Stock Exchange (ASX)
- In some cases, prepare consolidated financial statements covering financial aspects of a group of companies
- Procure the preparation of reports by the directors on the company's performance
- For some companies, have their accounts audited regularly by an independent auditor who is a resident in Australia
- Disclose significant matters affecting their performance or prospects to ASIC and, if applicable, the ASX

The extent of the reporting obligations will depend on the size and activities of the company and whether the company is a reporting entity. The recent introduction of major new accounting standards (Australian Accounting Standard Board 9, 15 and 16) will impact on financial reporting for many companies. A discussion of these new standards is beyond the scope of this publication.

COMPANY LAW

AUSTRALIAN STOCK EXCHANGE (ASX)

Public companies may seek to raise funds from the public by listing on the ASX. The ASX quotes the shares of public companies and enables trading of those shares to take place. Listing on the ASX is an option that is also available in certain circumstances to companies incorporated overseas. In order to list on the ASX, companies must meet various stringent financial criteria set out in the ASX Listing Rules and satisfy comprehensive ongoing reporting requirements, in addition to satisfying the requirements of the Corporations Act. Listing can be an expensive process involving the issue of a detailed prospectus to potential investors describing the company's status and prospects. The company must have a minimum of 300 non-affiliated security holders with holdings valued at a minimum of \$2,000 each, and a free float of not less than 20%. The Company must also satisfy either the:

- Profit test (\$1 million aggregated profit from continuing operations over past three years and \$500,000 consolidated profit from continuing operations over the last 12 months, or
- The assets test (\$4 million net tangible assets or a market capitalisation of \$15 million)

A company that does not seek listing on the ASX is not subject to any minimum capital requirements and can be structured in various ways to suit the financing requirements of the shareholders.

Over the last decade, a number of specialist and "second board" exchanges have been set up in Australia, including:

- National Stock Exchange of Australia (NSX)
- Chi-X Australia
- Asia Pacific Stock Exchange (APX)

Whilst the ASX remains the largest exchange in Australia, listings on the other exchanges continue to grow. The emerging exchanges offer listing options that target small-to-medium enterprises. These exchanges also provide opportunities for trading of other tradeable rights, such as water licenses.



STOCK	BID	OFFER	LAST	VOL
MDLAX	0.006	0.007	0.000	0
MDS FINC	0.002	0.003	0.003	3M
MDVAX	0.000	0.000	0.000	0
MEC RES	0.022	0.023	0.023	1T
MEDIBANK	2.430	2.440	2.440	4M
** SEE-MEDB.A.A	0.000	0.000	0.000	0
MEDICAL AUS	0.105	0.120	0.105	10T
MEDICALDEV	2.400	2.450	2.400	40T
MEDIGARD	0.075	0.090	0.090	52T
MEDTECH	0.195	0.200	0.180	36T
MEDUSA	0.830	0.835	0.830	6HT
MELB IT	1.305	1.320	1.305	0
MED AUSTR				

CROWD-SOURCED FUNDING

Australia has also recently introduced legislation that allows start-up and small businesses to raise equity capital through crowd-sourced funding. In short, the legislation provides a mechanism (an online platform) that will enable eligible companies to raise capital by offering securities (only new ordinary shares) in the company to a large number of investors, including retail investors, without a detailed and extensive disclosure document (generally referred to as a prospectus).

COMPANY LAW

MANAGED INVESTMENT SCHEMES

The Corporations Act regulates managed investment schemes that are defined to include any arrangement where an operator manages an investment made by one or more passive investors, other than through the issue of shares or other securities in a company. These provisions aim to protect the interests of the passive investors who do not have day-to-day control over the operation of the scheme in which they invest.

To register a management investment scheme, the operator or manager must be an Australian public company that has an Australian financial services licence, authorising it, amongst other things, to operate the registered scheme. The operator's or manager's constitution must make adequate provisions for matters prescribed in the Corporations Act and have a compliance plan setting out the measures the operator or manager will need to apply to ensure it complies with the Corporations Act and its constitution.

There is substantial cost involved in setting up, registering and running a licensed managed investment scheme. That cost is generally only warranted where there are substantial funds under management.

There are a number of exemptions from the managed investment scheme rules. These include exemptions for smallscale schemes and schemes that only have sophisticated investors. These exemptions have strict limits to their application. If a specific exemption does not apply, then the full managed investment scheme provisions apply.

ACQUISITION OF BUSINESSES

A business may be acquired in one of two principal ways:

- Its assets can be acquired (in which case the company itself is not acquired; or)
- The shares of the company which owns the business can be acquired

Each of these methods has its own advantages, depending on the outcome that is sought.

Complex rules apply in relation to public companies. For instance, special take-over laws apply once a party has acquired a 20% interest in:

- A listed company; or
- An unlisted company with more than 50 members.

In addition, taxation and stamp duty consequences (discussed under TAXATION) must be carefully considered. Note in some jurisdictions stamp duty, which is a state tax, is simply called duty.

ABOUT BENNETT & PHILP

Established in 1984, Bennett & Philp is a mid-tier law firm based in the heart of Brisbane offering end-to-end legal solutions for both business and individual clients. Our team offers a broad range of services us to support both Australian and international clients across every stage of business and life.

AREAS OF PRACTICE

We provide personalised service across six core areas of specialisation:



Business Advisory
Services



Disputes & Litigation



Intellectual
Property



Property & Real
Estate



Compensation
Law



Wills & Estates

WHY CHOOSE BENNETT & PHILP?

WE ARE RIGHT-SIZED

Large enough to deliver comprehensive legal services across the business life cycle. Small enough to care about every client as individuals.

Service excellence still means something to us. It's what differentiates us from some of the larger players in the legal services industry.

WE GENUINELY CARE

As a client of Bennett & Philp, you're more than just a number in our practice management system. We're your trusted partners, always on hand with the right advice when it matters.

We care about the growth of your business; and meeting your individual needs. As a law firm with the full range of business advisory and personal legal services, we can support you across every stage of life and business.

WE ARE A ONE-STOP-SHOP

Many firms don't offer both personal and professional services, which means engaging multiple providers to get the solutions you need. Not just a waste of your time; it means important issues can slip through the cracks.

We have trusted partners delivering complementary financial and personal services, so we can connect you with the right providers when you need them.

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