

PRIVATE COMPANIES: BASIC INFORMATION

Background

Although it very much depends on the particular requirements of the controlling individuals, the **proprietary company limited by shares** (also known as a private company) continues to be popular choice for many commercial ventures. This is for the following reasons (among others):

- **Well understood:** Companies and the legal principles applicable to companies tend to be better understood by laypeople and financiers (as opposed to, for example, discretionary or unit trusts).
- **Well regulated:** Proprietary companies are regulated by the *Corporations Act*. This is a comprehensive act that addresses most if not all of the areas, and offers most if not all of the protections, of similar legislation in foreign jurisdictions.
- **Limited liability:** Subject to various exceptions, utilization of a company for a business venture continues to offer the benefit of limited liability to the persons controlling and owning the company.
- **Legal personality:** A company has the legal capacity and powers of an individual.
- **Income tax:** The corporate tax rate is 30% which compares favourably with the top rate of tax for individuals of 47% (plus 1.5% Medicare Levy). This allows for profits to be reinvested and compounded within a company in a comparatively low taxed environment. (This advantage should be measured against various disadvantages in the taxation of companies).
- **Stamp duty:** If incorporated in Victoria, no stamp duty is payable on the transfer of shares in a proprietary company.

Proprietary companies may not have more than 50 non-employee shareholders and are forbidden from raising monies from the public.

The Process

Before incorporation, it is necessary for various persons (e.g. the first shareholders, directors and company secretary) to consent to their role in the company. Thereafter, a private company can be established within 1 business day by lodgment with the Australian Securities and Investments Commission (**ASIC**) of the appropriate form (containing all required information) and payment of the statutory fee.

The current statutory fee is \$800 (n.b. no GST is payable on this fee).

The Personalities

The relevant personalities in a private company include the following:

- **Shareholders:** In general terms, these are the owners of the company. It is possible to have a single shareholder for a proprietary company. This shareholder must be a legal person (i.e. trusts are not recognized) and may be a foreign person. Shareholders are generally also considered the ultimate controllers of a company as they may (with an appropriate majority vote) dismiss the directors by shareholder vote. Subject to the terms of the company's constitution, shareholders enjoy little or no liability in connection with their role in the company.
- **Directors:** In general terms, these are the controllers of a company. It is possible to have a single director for a Company. This person may or may not be the company secretary (see below). The *Corporations Act* and the common law prescribe minimum obligations and standards for directors – the office of director therefore carries significant responsibility and, potentially, legal risk. Only an individual who is at least 18 years old can be a director. If a company has only 1 director, he/she must ordinarily reside in Australia. If a company has more than 1 director, at least 1 of them must ordinarily reside in Australia.
- **Company Secretary:** Proprietary companies are not required to have a company secretary. Similar residence requirements apply to this office as apply to the office of directors. As the company secretary is an officer, similar responsibilities and requirements are placed on a company secretary as are placed on a director under the *Corporations Act* and the common law.
- **Public Officer:** A person ordinarily resident in Australia must be appointed as the liaison person for the Australian Taxation Office.
- **Constitution:** Although a company may rely on various replaceable rules under the *Corporations Act*, most companies choose to adopt a comprehensive set of rules known as a constitution and choose to displace the replaceable rules entirely.
- **Shares:** Proprietary companies limited by shares obviously have a share capital. There are significant legal obstacles to the return of capital to shareholders. This, combined with a preference for shareholder loan funding, leads in most cases to proprietary companies having a nominal share capital (e.g. a number of shares having a paid up share value of \$1.00 per share) rather than being substantially capitalised. It is possible for a company to have various classes of shares.
- **Australia Company Number (ACN):** This is a unique number that is allocated by ASIC to each company and is required to be displayed on various company documents.
- **Registered Office:** A company must have a registered office in Australia and must inform ASIC of the location of the office. A post office cannot be the registered office of a company.
- **Company Registers:** A company must keep and maintain various registers, including a register of shareholders and charges.

These materials are for general information purposes only and do not constitute legal advice.

Before acting on any views expressed in this publication, careful consideration of the case specific facts should be undertaken by a qualified lawyer.