

NTAA Corporate

A SHORT GUIDE TO OUR COMPANIES

Setting up a company

ASIC's website sets out part of the process involved when setting up a company, including choosing a company name, determining whether the company will operate under replaceable rules (found throughout the Corporations Act 2001) or a constitution or a combination of both, and obtaining consents for members, and directors, etc.

This can be found at:

http://www.asic.gov.au/asic/asic_infoco.nsf/byheadline/Starting+a+company+or+business?openDocument

Notes on choosing a name:

ASIC will register any company name (subject to a few words they don't like, such as "Bank" or "Donald Bradman") that is not 'identical' to that of another company's name, or a registered business name.

However, it should be remembered that, just because ASIC registers a company name, strangely this doesn't mean they have given you the all-clear to use it. In particular, you should be sure that you will not infringe another entity's trademark or other intellectual property. An especially difficult problem is "passing off" – this is an action that someone can bring if someone effectively trades off someone else's well-known name (whether or not they have a trademark).

There is more about this issue at 'Step 2' of the above the document on ASIC's website.

Our companies are set up with our own constitution. We also complete and lodge the Form 201 (based on your instructions), and then send you a company register, containing the constitution and other important documents.

Note: If you apply for registration and lodge the Form 201 yourself with ASIC, they will only give you the certificate of registration, and you will not receive, for example, a constitution, company register, or directors resolutions.

In deciding whether to set up company, it may be worthwhile comparing the company, as a business, to other structures by referring to the ATO's website at:

<http://www.ato.gov.au/businesses/content.asp?doc=/content/66952.htm&page=4&H4>

Consents

It is very important that the first directors and shareholders of the company consent to hold those positions before the company is set up.

[S.201D](#) of the Corporations Act 2001 provides:

"Consent to act as director

- (1) A company contravenes this subsection if a person does not give the company a signed consent to act as a director of the company before being appointed.
- (2) The company must keep the consent.
- (3) An offence based on subsection (1) or (2) is an offence of strict liability."

[S.204C](#) provides a similar requirement (and penalty) for company secretaries.

Also, [S.120](#) provides that “A person becomes a member, director or company secretary of a company on registration if the person is specified in the application with their consent as a proposed member, director or company secretary of the company.” Shareholders are also required to agree in writing to taking up the shares they apply for – refer [S.117](#) – and a company only adopts a constitution “if each person specified in the application for the company’s registration as a person who consents to become a member agrees in writing to the terms of a constitution before the application is lodged” – refer [S.136](#).

Note that there are also restrictions on who can be a director or secretary of a company.

The constitution

The constitution sets out the relationship between the shareholders (or “members”) of the company, the directors of the company, and the company itself, which is a separate legal entity. Reference should also be made to the [Corporations Act 2001](#) (or found here: http://www.austlii.edu.au/au/legis/cth/consol_act/ca2001172) and associated company law.

Below we have set out some of the important provisions of our constitution, but this summary is meant as a general guide only, and will not substitute for a thorough reading of the constitution.

- The constitution does not contain any reference to “authorised capital” or “nominal capital”, as there is no need. Since 1 July 1998, companies have not been required to include the total amount of share capital and shares that they can issue in their constitutions. This basically means that, unless a company otherwise specifies, its “authorised capital” will effectively be unlimited.
- Similarly, since 1 July 1998 there is now no need to specify the “par value” of a share, and, as a result, there also is no share “premium” (refer [S.254C](#) of the Corporations Act 2001).
- The first shareholders and first directors will be those who have consented to hold those positions as set out in the company’s application for registration (i.e., in the Form 201).
- Existing shareholders have pre-emptive rights (like a “right of first refusal”) to the issue of any new shares unless otherwise approved in a general meeting.
- Directors can issue new shares in different classes and with such different rights as they decide.
- Rights attaching to existing shares can be changed, or existing shares can be divided into different classes, but this requires the written approval of the members holding at least two-thirds of the shares in that class, or a special resolution* at a meeting of the members holding those shares.
- Examples of some types of share classes and of rights that can attach to shares are provided in Schedule 1 to the constitution, but the directors are not limited to these share classes/rights.
- Ordinary shares have the following rights:
 - The right to vote at meetings of the company;
 - The right to dividends declared payable to the holders of ordinary shares; and
 - The right to a proportion of the capital of the company if and when the company is wound up.
- Shareholders must inform the company if they are holding the shares non-beneficially (e.g., if they are holding them as trustee), but the company is only required to recognise the shareholder named in the register of members, and not anyone else who may claim to have a beneficial interest in the shares.
- Shareholders must seek the consent of the directors if they are to use their shares as security for a borrowing, etc.
- Shareholders are generally entitled to a share certificate.

- The constitution sets out the process that must be followed if a shareholder wishes to transfer their shares. They will generally be required to give the company a written Transfer Notice (e.g., they must generally give the notice to the company secretary), and the other shareholders will then have pre-emptive rights to acquire those shares before the shares are offered to anyone outside the company. The directors reserve the right to refuse to register the transfer (subject, of course, to their fiduciary duties as well as other requirements of company law, such as oppression laws).
- Exceptions to the transfer requirements may apply where a shareholder dies, or where a shareholder wishes to transfer their shares to, for example, a close family member or a trust.
- Directors may call a shareholders' meeting, and in some circumstances the shareholders may call a meeting. Shareholders meetings normally allow the shareholders to vote upon certain aspects of company business, and may include the appointment or removal of directors or auditors.
- Shareholders must be given at least 21 days' written notice of a shareholders' meeting, unless the requirements for allowing a shorter notice period are met (refer [S.249H\(2\)](#) of the Corporations Act 2001).
- General notice requirements are set out in the constitution.
- Quorum at a shareholders meeting (i.e., the minimum numbers of shareholder that must attend for the meeting to be a valid meeting and for decisions to be binding) is 2 shareholders, unless there is only one shareholder, and meetings may be adjourned if quorum is not reached.
- Shareholders' meetings must have a chairperson, and, if votes on a resolution during the meeting are equal, the chairperson of the meeting has a second, or casting, vote.
- Meetings can be held using whatever technology allows all of the shareholders to participate.
- Resolutions of the members can sometimes be passed without having a meeting if *all* of the shareholders sign the written resolution (or copies of it), or if there is only one shareholder.
- Unless otherwise determined by the shareholders in a shareholders meeting, the maximum number of directors is 7. A director does not need to hold shares.
- The directors have the power to appoint additional directors, but it is generally only the shareholders in a meeting who can remove a director, unless, for example, the director dies, resigns, becomes bankrupt, or mentally unsound.
- The directors generally manage the business of the company, and may hold meetings to do so (this would be recommended for serious matters and/or where the company is a trustee company).
- The quorum for a directors' meeting is 2 directors, unless there is only one director, and meetings may be adjourned if quorum is not reached.
- Directors meetings must have a chairperson, and, if votes on a resolution during the meeting are equal, the chairperson of the meeting has a second, or casting, vote.
- Meetings can be held using other technology provided all of the directors have consented.
- Resolutions of the directors can sometimes be passed without having a meeting if *all* of the directors sign the written resolution (or copies of it), or if there is only one director.
- The directors are required to keep minutes of all meetings and other resolutions passed by the directors and/or shareholders.
- The directors are required to keep a company register, containing registers of certain information such as a register of members, and a register of option holders.

- Individual directors are not prohibited from participating in company business even if they may have a conflict of interest, however, they are required to disclose the nature of that interest.
- The constitution sets out how the company may execute documents (note, the Corporations Act 2001 no longer requires companies to execute documents with a common seal – refer S.127 of that Act, but the company may still be required to do so if, for example, the directors or shareholders have resolved that all documents must be executed using a common seal).
- The directors are also responsible for keeping accounting records, and declaring and paying dividends (if any).
- The constitution includes a “Division 7A agreement” which regulates the repayment of any loans made by the company to shareholders so that the loans comply with Division 7A of the ITAA 1936, and are not deemed to be dividends.
- The constitution includes a clause that allows the company to be a “special purpose company” if it acts solely as the trustee of a regulated superannuation fund, provided certain criteria are met.

**Note: A special resolution requires the approval of at least 75% of the shareholders entitled to vote at a general meeting, and notice of the meeting and the proposed special resolution must be given to all shareholders in accordance with the notice provisions of the constitution. For more on special resolutions, see:*

http://www.asic.gov.au/asic/ASIC_PUB.NSF/byid/6DBA5403D048C966CA256CE1007F6C59?opendocument.

After the company is set up

The directors and shareholders will need to keep on top of a number of things after the company has been set up.

Refer to http://www.asic.gov.au/asic/asic_infoco.nsf/byheadline/Home+Page?openDocument for a list of topics that ASIC has compiled dealing with “Running a company”.

We can help you if any changes happen to the company that must be notified to ASIC, such as changes to the shareholders, or shareholdings, changes to directors, or changes to the company’s name. Refer to the Company changes form.

Also, all companies are required by the ATO and the taxation legislation (as opposed to ASIC and the company legislation) to nominate a “Public officer”^{*} – refer [S.252](#) of the ITAA 1936. This will ordinarily be done on the company’s application for an ABN, but if the company is not applying for an ABN, it may still be necessary for the company to notify the ATO of the company’s Public Officer, within three months after the company commences to carry on business or derive income in Australia – contact the ATO for how to do this.

^{*} The Public Officer is basically the company’s main contact person for the ATO. The Public Officer may also be answerable to the ATO for the actions of the company.