

The logo for moulislegal, featuring the brand name in a lowercase, sans-serif font inside a white, rounded, teardrop-shaped container.

moulislegal

ESTABLISHING YOUR BUSINESS IN AUSTRALIA

GETTING YOUR BUSINESS STRUCTURE RIGHT FROM THE START

Whether you are just starting your business or want to expand into the Australian market, there are several ways that you can set up your business in Australia.

While the majority of businesses choose to set up a limited liability (or proprietary limited) company, this may not necessarily be the best legal structure for your business. There are many things to consider including how much it will cost to set up and manage compliance, how you will be taxed, and whether you can limit your potential liabilities. That is why it is a good idea to speak to legal, tax and accounting experts before you decide on a business structure.

This guide will help you understand the main business structures you can use and what legal matters you need to consider when setting up and running a business in Australia. As most businesses do use proprietary limited companies, we have also provided a detailed section on how to set up and manage one of these.

The most common ways you can set up your business in Australia include:

- Sole trader
- Partnership
- Joint venture
- Trust
- A private (limited liability) or public company
- Foreign company

SOLE TRADER

A sole trader is the simplest business structure - effectively you operate the business in your own name.

This is a low cost option and is suitable only for very small enterprises. The biggest risk in being a sole trader is that you are personally liable for all the business' obligations and debts. For this reason, this structure is only recommended if your business is unlikely to have any significant liabilities.

PARTNERSHIP

A partnership is where between two and 20 people (or entities) enter into business together with the intention of sharing the profits. The partners jointly share control and management of the business but, as a partnership is not a separate legal entity, all the partners are potentially liable for the debts and obligations of the business if it becomes insolvent. Partnerships are usually used in businesses where new partners may come on board and old partners may want to retire in the future.

When setting up a partnership, it is best to create a partnership agreement that outlines how the partnership will operate. The partnership must also comply with other laws and regulations like the Partnership Act in the state where it operates.

While partnerships do not need to register with ASIC, they can register a business name through ASIC Connect.



JOINT VENTURE

A joint venture is often used when two or more people (or entities) want to enter into business together for a particular project or purpose.

A joint venture can be incorporated or unincorporated. In an incorporated joint venture, the venture operates through a company and each of the members hold shares limiting each shareholder's liability. An unincorporated joint venture operates in a similar way to a partnership (but with less regulation) and each member jointly bears the risks of the joint venture.

When setting up a joint venture, the parties will need to enter into a joint venture agreement which outlines the rights and obligations of the participants.

TRUST

A trust can also operate a business. The trustee will own the property and carry on business on behalf of the beneficiaries of the trust. The beneficiaries are the people who are entitled to the income or assets of the trust. In some circumstances, the trustee may also become liable for the liabilities of the trust, so while an individual can be a trustee we would usually recommend that a company is used instead.

The trustee's duties and obligations are set out in a trust deed and also governed by other laws and regulations. The trust deed will also set out the rights and entitlements of the beneficiaries.



There are several types of trusts but the most common ones are discretionary and unit trusts. A discretionary trust gives the trustee significant discretion on how to distribute the profits to beneficiaries. In a unit trust, each of the beneficiaries holds a specific number of units in the trust, which gives them a right to a fixed proportion of the profits.

COMPANY

Companies in Australia are regulated and governed by the Corporations Act. A company is a separate legal entity that can hold assets and be liable for debts and other obligations. A company has shareholders who receive payments from the profits in the form of dividends. Shareholders generally have limited liability, which means, if the company is unable to pay its debts, the shareholders are not liable for the shortfall.

In Australia, there are two types of commonly used companies for a business – a private (proprietary limited) company and a public (limited) company.

A private company:

- must have at least one, and no more than 50, non-employee shareholders;
- must not offer shares or debentures, or other forms of securities to the public;
- must have at least one director who ordinarily resides in Australia;
- must notify ASIC of any changes to its register of members; and
- must notify ASIC of any changes to its share structure, including any issue or transfer of shares.

A public company:

- must have any number of shareholders;
- can offer shares or debentures to the public in accordance with Australian securities laws;
- must have at least three directors (two of whom ordinarily reside in Australia), and at least one company secretary (who ordinarily resides in Australia);
- must have its accounts audited;

- must prepare annual financial and directors' reports and lodge those reports with ASIC;
- can either be listed on the Australian Stock Exchange (ASX) or on other exchanges; and
- if listed on the ASX, must comply with the ASX Listing Rules.

If you have IPO aspirations, it is possible to convert from a private limited company to a public company (and vice versa) in the future.

Foreign company

A foreign company can carry on business in Australia, either through an Australian branch or by establishing a subsidiary.

If you conduct business through an Australian branch there are several things to be aware of:

- you must register as a foreign company with ASIC;
- it is recommended that you reserve your company's name in Australia. This can be done on ASIC's website;

- at least one local agent must be appointed to act on behalf of the company. The agent must either be an Australian company or a person who ordinarily resides in Australia, and be authorised to accept the service of process and communications on the foreign company's behalf;
- the foreign company must have a registered office in Australia; and
- the foreign company must comply with certain reporting requirements under the Corporations Act.

Before you set up a branch it is worth considering whether your foreign company is actually "carrying on business" in Australia. If you only maintain a bank account, collect debts, invest funds or hold property in Australia then you may be able to establish a representative office instead.

If you are running a business it may make sense to set up a company that is a subsidiary of your foreign business. This would be set up in a similar way to other proprietary limited companies.



SETTING UP YOUR NEW BUSINESS AS A PROPRIETARY LIMITED COMPANY

The majority of businesses in Australia choose to set up as a proprietary limited company. This is because it has several advantages over other structures, such as:



- shareholders have limited liability;
- a company is relatively simple to set up and familiar to investors;
- all assets are contained within a single entity and the shares are easy to dispose of on exit;
- it has less formal reporting requirements than public companies or foreign registered companies;
- there is no need to hold an annual general meeting; and
- its accounts don't require auditing until certain financial thresholds are met.

This six-step guide will help you set up your own proprietary limited company.

1. Decide on a company and business name

Finding the right name for your company is not just about coming up with a creative name. There are several issues to consider before you settle on a name. These include:

- the name must not be identical to an existing registered name. You can check if a name is available on the ASIC website. It is also a good idea to reserve a company name with ASIC before registering the company. This can be reserved for up to two months;
- the company name must only contain characters

and terms which are appropriate and acceptable. Generally, this means they cannot contain words that are offensive or misleading. A list of acceptable characters can be found on the ASIC website. A proprietary company name must always end in "pty ltd", "proprietary limited" or a combination of the two;

- your name should not be similar to a registered trade mark or existing business name. If it is, action may be taken against you and you may be liable for damages or need to change your company name. You can check this by conducting a trade mark search; and
- if you intend to trade under a different name to the registered company name, then you will also need to register that business name.

2. Determine how your company will operate

Companies operate under a set of rules that outline how the company will be managed and what the company, its directors and shareholders can and cannot do. In Australia, you can either write your own rules in a document called a constitution, or use rules that are set out in the Corporations Act (these are called replaceable rules). If you use the replaceable rules, as the name suggests, these can be replaced by a constitution at a later date.

While it is not mandatory to create your own company constitution we recommend that you do. A well written company constitution allows you to clearly document things that are specific to your company like share or management arrangements, or how shareholders can exit.

3. Understand your rights and obligations as an officeholder

There are many administrative obligations in the Corporations Act and the company constitution that directors and other officeholders must comply with. These include:

- making sure the company details are kept up to date;
- paying the necessary lodgement and annual review fees to ASIC; and
- maintaining the company records.

Directors and other officeholders also have important legal obligations and duties under the Corporations Act and general law. The most significant duties are to:

- exercise care and diligence;
- act in good faith in the best interests of the company and for a proper purpose;
- avoid conflicts of interests between the company and their personal interests; and
- prevent the company trading whilst insolvent.

There are harsh penalties and even criminal charges for officeholders that do not meet their obligations and duties. You can find more information about these duties and obligations on the newsletter section of our website.

4. Get the consent of key people

Directors, other officeholders and each shareholder need to give their written consent to be part of the company. At the time you set up the company, each director and secretary must be over 18, and you must have at least one shareholder.

If your registered office is not owned or leased by the company (for example, you may be using your accountant's office), you will also need to obtain the written consent of the owner or occupier of that address.

Each of these written consents must be kept as part of the company records. At this time you will also need to set up a member registry that records the details of the members (or shareholders) of your company.

5. Register the company

There are two ways to register your company:

- i. using a private service provider; or
- ii. lodging an application directly with ASIC.

We recommend that you ask your solicitor to assist with this process.

After your application is processed, ASIC will issue you with an Australian Company Number (ACN). ASIC will also provide you with a corporate key, which is a unique number (like your company's PIN number). The corporate key is used to create an online ASIC account, which will enable you to maintain and keep your company's details up to date.

You will also need to apply for an Australian Business Number (ABN), tax file number (TFN) and register for any relevant taxes, including Goods and Services Tax (GST), Pay As You Go (PAYG) withholding, and Fringe Benefits Tax (FBT). You should discuss these registrations with your accountant or taxation specialist.



6. Make sure you have everything in place

Now that you have registered your company with ASIC you should have in place:

- a registered company name (and possibly business name);
- an ACN and ABN;
- your company constitution;
- your tax registrations (including TFN, GST, and PAYG);
- your directors and other officeholders, all of whom understand their duties and obligations; and
- all necessary company records, which must be maintained and updated throughout the life of the company.

Your company is now almost ready to go. To get your business up and running successfully you will also need some other key documents like shareholder agreements, employment contracts and IP assignments to get existing IP into the company. You also need to think about how you are going to protect your new IP going forward and how you will interact with your customers and suppliers. To find out more, please visit [our website](#).

USEFUL RESOURCES AND LINKS

- The [Corporations Act 2001 \(Cth\)](#) is the principal legislation regulating companies in Australia. It regulates everything from how to form and operate companies, to the duties of officers, takeovers and even fundraising.
- The [Australian Business Licence and Information Service](#) can be used to search by industry and location to identify relevant licensing requirements for your business.
- The regulatory resources on the [Australian Securities and Investment Commission's](#) website provides regulated entities (including company structured start-ups) a variety of useful resources and publications about ASIC's functions, how it interprets the relevant laws, and the guiding principles that underpin how it operates.
- The [Australian Business Register](#) is the place to register your own Australian Business Name and Number, and provides details on tax and resources to assist with developing a business.
- The [Australian Government Business](#) website is a useful starting point for those not familiar with doing business in Australia. It provides basic information and guidance for those new to establishing and running a business in Australia.
- The new [Business Registration Service](#) online service portal can be used to streamline the process of setting up a business in Australia. This portal allows you to apply for key business registrations, including company name, ABN, and tax registrations. In the future, it will also be available to superannuation funds.
- The [Australian Taxation Office](#) website provides important information to help start-ups understand their tax and superannuation obligations.
- [IP Australia](#) is the "one-stop-shop" for all the IP needs of a new business, including IP searches, trade mark registrations, patent protection and registration, design registration and protection, and resources to help you understand how to enforce and protect your IP rights, commercialise the IP, and take that IP abroad.
- The Information Commissioner's [draft consultation guide to Big Data and the Privacy Principles](#) may

also be relevant if your start-up uses or collects Big Data. The Office of the Australian Information Commissioner has developed this draft guide to help companies to understand how they can continue to comply with their privacy obligations when undertaking Big Data activities.

- The [Australian Competition and Consumer Commission's](#) website contains important information for start-ups to understand the way competition and consumer law is regulated in Australia. There are a number of publications and resources on areas relevant for start-ups, including the Unfair Contract Terms regime, guidelines for advertising and promotional activities that are compliant with the Australian Consumer Law, and regulations around anti-competitive behaviour.

Links to these sites are available on [our website](#).

PLEASE TAKE THE FOLLOWING INTO ACCOUNT:

We want to help businesses understand the common legal issues they are likely to face when establishing and growing their business. This document is intended to provide general information only. It is not to be regarded as comprehensive legal advice as different issues apply, depending on the circumstances of your business.

The legal framework identified in this document represents a general overview of the position in Australia, and is by no means an exhaustive resource. The information contained in this document is accurate as of the day it was posted. The laws may have changed since this date. Accordingly, we advise against using this document as a substitute for taking legal advice in any situation. Moulis Legal is not responsible for any actions or claims arising on the basis of this information.

If you have any questions or concerns about this document, we recommend that you seek legal advice before proceeding further.



We are Australia-based commercial + international legal advisors. We are client-centric, fully committed, focused on success, and service-driven.

CANBERRA

6/2 Brindabella Circuit
Canberra International Airport
ACT 2609

BRISBANE

PO Box 1282
Milton
QLD 4064

MELBOURNE

Level 39, 385 Bourke Street
Melbourne
VIC 3000

AUSTRALIA

T +61 2 6163 1000
F +61 2 6162 0606
E info@moulislegal.com

CURRENT AS AT 28 MAY 2018

COPYRIGHT © 2018 MOULIS LEGAL | ALL RIGHTS RESERVED