



SWAAB

A PRACTICAL GUIDE FOR  
SMEs

A COURTESY GUIDE PREPARED  
BY SWAAB ATTORNEYS

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# Introduction

## WHAT IS AN SME?

'SME' stands for 'small to medium enterprise'. There is no uniform definition of an SME, but 'small' is usually deemed to be a business that employs less than 10 employees and 'medium' is a business with 10 to 199 employees.

## Maximising the value of your business

### BUSINESS STRUCTURE

In Australia the main forms of business structure are:

- a. Sole trader
- b. Partnership
- c. Private company
- d. Cooperative

There are several factors that will influence your decision on how to structure your business. These include:

- The size and nature of your business
- Industry compliance requirements
- Tax protection from liability
- Insurance cover
- Establishment and maintenance costs

### BUSINESS PLANS

A good business plan is like a map. It shows the best path to achieving business goals.

Setting targets forces a business to identify essential key performance indicators.

Creating a business plan sets out the effective use of time and resources. It sets out how to take advantage of business opportunities. And it sets out how to anticipate problems.

### FINANCIAL STATEMENTS

Financial statements are the reporting lifeblood of every business. They help you understand the past performance of your business and guide your decisions on the future of your business.





Your accountant will help you produce the following financial statements in a simplified form:

- Budgets and forecasts;
- Cashflow statements;
- Profit and loss statements; and
- Balance sheets.

There are many financial reporting and accounting software tools that make it easy for you to produce simple and useful financial statements. Take the advice of your accountant when considering your software selection.

## MANAGEMENT STRUCTURE

The staff you will need to run your business will depend a lot on the type and size of your business and the scope of what you are offering. As a general guideline you will need:

- Managers to manage your staff
- Technical staff to develop and build your product or service
- Staff who can manage your finances
- Staff who can market your product
- Staff who can oversee your operations
- Administrative staff.

## EMPLOYEES

People are critical to the success of any business.

Personal and professional development is essential for long term employee satisfaction.

The implementation of a *personal development plan* for your staff is recommended. Personal development plans cover:

- Career objectives of your staff
- Further studies - courses and seminars
- Skills and competencies training
- Mentoring and coaching.

## MARKETING AND SALES

Marketing and sales go hand in hand, but they are two distinct functions within a company. In a small business, both functions may be carried out by the same person.

*Marketing* supports the sales effort, helps to create the lead and paves the way for the sale to be made.

*Selling* is about closing the deal and bringing revenue to the company.

There is a natural flow-on from marketing to sales. This synergy must be understood in order to create effective marketing and sales strategies.

# Governance

## GOOD GOVERNANCE - A ROADMAP FOR GROWTH

### What is corporate governance?

To oversee business and compliance performance, business owners and directors must put in place a system of processes to control and monitor the organisation. The implementation of this system is known as corporate governance.

### Why governance is important for your business

Corporate governance is important for your business for the following reasons:

- a. Good corporate governance sets the foundation for sustainable business growth
- b. Corporate governance is central to risk management and mitigation
- c. Effective corporate governance is necessary to ensure compliance with the rules and regulations of the *Corporations Act* (2001).

### What core governance practices should I be considering for my business?

There is no universal formula for successful corporate governance. Businesses vary in size, complexity and ownership structures. As your small to medium business grows, the structure will need to evolve with your changing business needs.

### Exit strategies

At some point you may choose to exit the business, and/or float your company on the stock exchange. If your plan is to exit you should consider:

- Preparing for an initial public stock offering (IPO), a merger/acquisition with another company or taking on an equity partner
- Enacting a trade sale
- Executing a succession plan and preparing your successor to take over.

### Who is involved in governance?

The people involved in or impacted by governance practices include:

- Business owners;
- Directors and boards;
- Managers;
- Employees;
- Shareholders and/or members; and
- Auditors.



## THE BENEFITS OF A BOARD

### What can a board help me with?

- a. Strategic direction
- b. Meeting performance targets
- c. Compliance with legal and accounting requirements
- d. Controlling risk.

### How big should my board be?

Your board should be large enough to give you access to diverse skills and experience, yet small enough to operate cohesively and efficiently.

### When do I need to expand my board?

Companies expand their boards for a variety of different reasons. These include:

- a. When raising capital through an initial public offering (IPO)
- b. When transitioning from family to professional management
- c. When moving into a new market
- d. When planning or experiencing significant expansion
- e. To minimise business risks.

### What is the benefit of expanding my board?

Many benefits can be derived if a board expands correctly. These include:

- a. Better business performance
- b. Improved access to capital
- c. Greater focus on management accountability.

### Who will make a good director?

Characteristics of an effective director include:

- a. Experience as a director
- b. Able to dedicate sufficient time to your business
- c. Specialist skills
- d. Track record of success
- e. Brings networking opportunities
- f. Independence and objectivity
- g. Integrity
- h. Good cultural fit.

### How do I find independent board members?

The Australian Institute of Company Directors can assist with finding talented independent directors via their online service, Directorship Opportunities:

[companydirectors.com.au/Member-Services/Directorship-Opportunities](http://companydirectors.com.au/Member-Services/Directorship-Opportunities)

There is no right or wrong way to find independent board members. Often they are found by networking.

### How do I remunerate board members

Remuneration can take the form of cash, equity or a combination of both.

## DUTIES OF THE COMPANY SECRETARY

### Responsibilities - an introduction

A company secretary has a variety of responsibilities and obligations in fulfilling their role, including responsibilities relating to:

- The company registers
- ASIC notifications
- Directors' and members' meetings
- Accounts
- Annual company statements.

### Registers

The company secretary is usually responsible for the establishment and maintenance of the company's registers. The *Corporations Act* requires that the following registers be established:

- Register of members
- Register of debenture holders
- Register of option holders and copies of option documents
- Register of charges.

### ASIC notifications

The company secretary has a responsibility to ensure that the company notifies ASIC of changes affecting the company within the time period prescribed by ASIC for particular notifications. A failure to notify ASIC within the prescribed period could result in the imposition of late lodgement fees.

### Directors and Members meetings

The company secretary has a responsibility to organise directors' and members' meetings and to ensure that all procedures for the convening and conduct of such meetings are in accordance with the company's constitution and the *Corporations Act*.



One of the secretary's most important responsibilities with respect to meetings is the responsibility to prepare minutes of the meeting which accurately record the proceedings and resolutions passed at the meeting.

## Accounts

The company secretary has a responsibility to ensure that the company's accounting records are maintained and distributed in accordance with the *Corporations Act*. The secretary must also:

- a. Ensure that the company keeps financial records
- b. Arrange the preparation of a financial report and directors' report (if required)
- c. Ensure annual financial reporting to members.

## Annual company statement

On a company's "Review Date" (which is usually the date of or shortly after the anniversary of the company's date of incorporation), ASIC will prepare and forward the Annual Company Statement to the registered office. The annual review fee must be paid within two months of the Review Date.

## DIRECTORS' DUTIES

Directors' duties are a series of statutory and common law obligations that are owed by directors to the corporation that employs them.

Common law duties include:

- Duty to act bona fide (in good faith) in the interests of the Company as a whole
- Duty not to act for an improper purpose
- Duty of care and diligence
- Duty to avoid conflicts of interest
- Duty not to disclose confidential information
- Duty not to abuse corporate opportunities.

Statutory duties include:

- Duty of care and diligence
- Duty of good faith
- Duty not to make improper use of position
- Duty not to make improper use of information
- Duty not to trade whilst insolvent
- Duty to disclose material personal interests.

## Company Constitution

A company's internal management may be governed by provisions of the *Corporations Act* which apply to the company as "replaceable rules", by a separate constitution, or by a combination of both.

## Penalties

Where a director knowingly or recklessly breaches a duty, he or she may be guilty of an offence and subject to a criminal or civil penalty, depending on the type and extent of the breach. Typical penalties include:

- a. Fines
- b. Compensation to a corporation for damage resulting from the contravention
- c. Disqualification from managing a corporation.

## THE BENEFITS OF AN ADVISORY BOARD - MENTORING FOR GROWTH

### What is an advisory board?

An advisory board is a select group of independent people who provide advice and support to owners or directors of a business. They provide non-binding strategic advice to organisations and the group is generally informal in nature. Compared to a board of directors, an advisory board can have greater flexibility in its structure and management.

### Why establish an advisory board?

An advisory board enables the owners or managers of the business to have access to an independent view and a safe forum to discuss issues of major significance.

### When would a small or medium business need an advisory board?

An advisory board can be a valuable resource in many circumstances including:

- A phase of rapid growth of the company
- Where a company needs to raise funds
- Where a company wants to build strategic partnerships
- Where a company has to make major decisions and/or implement changes in direction, including entry into new markets, launch of new products and geographic expansion.

### Benefits of an advisory board

- Harness the skills and knowledge of directors and advisers who have practical experience in growing a business
- Enhances the company's reputation and credibility in the marketplace
- Increases consumer and investor confidence
- Attracts superior employees by demonstrating a commitment to company growth
- Creates a potential source of members for the main board as the company grows.



## Selecting an advisory board

Selecting advisory board members is a very important task. A number of questions emerge from the process. Perhaps the three key questions you will need to ask are:

- a. Why am I doing this?
- b. What input do I need?
- c. How can this person supplement/complement our existing skills?

Essentially there is no single answer. Each owner/director has to consider the particular needs of the business at that time to ensure members of an advisory board add value to the company.

## Meetings

Advisory board meetings are typically held between six to eight times a year, however this differs from business to business.

## Compensation

At the simplest level a daily fee is standard compensation. If there is more to the role than occasional meetings, it may be appropriate to negotiate a monthly or annual retainer for access and assistance between meetings.

# Advisers

Business advisers play an important role in ensuring the viability and prosperity of any business. Essential business advisers include:

- a. Lawyers
- b. Accountants
- c. Bankers.
- d. Financial planners.

Building long lasting relationships with your advisers is essential for the success of any business.

# Employees

## Terms of employment

In Australia, the terms and conditions under which employees perform work are governed by:

- Federal awards, State or Territory awards
- registered workplace agreements (such as enterprise agreements)

- express and implied terms of a common law contract of employment
- Federal and State or Territory legislation governing employment terms and working conditions, including legislation regulating annual leave and long service leave entitlements.

## Compulsory superannuation

Under Federal legislation, employers are required to make certain minimum superannuation contributions on behalf of their employees.

## Workers compensation

State laws currently regulate the obligations of an employer to rehabilitate and provide workers' compensation payments to employees suffering from a work-related injury or illness. Depending on the system applicable in the State where the worker was engaged or the work is performed, employers are generally required to keep and maintain insurance cover for their workforce.

## Occupational health and safety

State laws impose strict obligations on employers to consult with employees and maintain a safe workplace to ensure the health, safety and welfare of their employees and other people in the workplace.

## Equal employment opportunity, discrimination and harassment

Federal and State laws also:

- Prohibit unlawful discrimination against employees and job applicants
- In some cases make provision for equal opportunity and affirmative action policies
- Prohibit harassment
- Render employers vicariously liable for the unlawful conduct of their employees.

## Industrial disputes and union coverage

In Australia, union membership is optional for employees and no employee should be treated unfavorably for joining a particular union.

Industrial action will generally be unlawful unless it meets strict requirements which are set out in the *Fair Work Act 2009*.

## Employee Workplace Rights and rights in relation to termination

Depending on their circumstances, employees whose employment is terminated, may be able to make claims for unfair dismissal against their former employer and seek reinstatement, damages or both. Employers therefore need to give careful consideration to whether and how they terminate staff.



# Property

## Buying/Selling

Some SMEs own property, including the premises at which the business is carried on. Often an entity related to the operating entity will own the premises, and will lease the premises to the business. Advantages of owning the premises include the ability to avoid unexpected rent increases, security of having a place from which to operate your business, capital growth in your investment and improvements to the property will be owned by the property owner.

## Leasing

The alternative to purchasing land is leasing. Small to medium enterprises commonly lease their business premises for various commercial reasons. Advantages of leasing include flexibility (for example, if your business grows, you can move to a larger premises upon the expiry of the lease), the fact that you do not need substantial capital to secure a premises (compared to purchasing a property) and the fact of often having less responsibility for the building (in terms of damage to the property or repairs and maintenance).

# IP protection

## Business Names

The Business Names Registration Act 2011 (Cth) requires registration of a business name if it is not the name of the company, partners or sole trader using it. The aim is to protect consumers from dealing with entities which remain legally anonymous. Registering a business name does not give the registrant exclusive rights to use the name. To properly protect the goodwill in the business name, you should consider registering a trade mark in relation to relevant classes of goods or services.

## Trade marks

Trade marks are registered in Australia under the *Trade Marks Act 1995* (Cth). The Trade Marks Act specifies that trade marks must distinguish a person's goods or services and not conflict with prior trade mark applications or registrations made in Australia by another person. A trade mark gives the owner an exclusive right to use the mark in relation to the nominated classes of goods or services.

## Copyright

Creators and owners of original literary, artistic, musical and dramatic works as well as sound, film and television broadcasts can reproduce, publish, perform, communicate and do other acts under Australia's *Copyright Act 1968* (Cth).

## Patents

Holders of standard patents in Australia are protected for 20 years. Patents may be granted for any novel and inventive and useful product or process which is capable of industrial or commercial application and which is superior to previous know-how.

## Designs

Design registration protects the visual appearance of manufactured products. Registered designs can be valuable commercial assets and steps can be taken to enforce design rights. Australia's *Designs Act 2003* (Cth) covers the registration of new and distinctive designs for products.

# Technology and computers - buying versus leasing

Central to most SMEs is the question of how to finance the technological requirements of the business.

Each business has circumstances that may make one option more attractive than the other. Management philosophy towards buying and retaining assets, the degree to which changes in technology affect the business and the company's financial position all affect the approach your business will take.

# Debt collection

## Process

A creditor is entitled to pursue a debtor at law immediately after the expiry of the contractual period for payment. A wide range of arrangements, agreements, compromises, set offs and other solutions can be implemented to recover a bad debt and can be negotiated between the parties.

## Handling disputes and complaints

If you are involved in a dispute or a complaint has been made about your business, you should first try to resolve the matter internally. All businesses should have an internal dispute resolution scheme that sets out the business procedure in dealing with complaints and disputes.

At the very least your scheme should set out:

- how you will deal with complaints or disputes from the very start (i.e. who will manage the complaint and how they will do it)



- the internal negotiation methods, focusing on joint decision making and reaching practical solutions
- where to go if you are unable to solve the issue internally, meaning that a pre-established relationship with a legal practitioner is essential.

## Compliance with the law

### *Competition and Consumer Act (2010)*

The *Competition and Consumer Act* (2010) introduced a wave of reforms designed to create unified national consumer laws to apply to consumer transactions in all Australian jurisdictions.

Businesses need to regularly conduct reviews of their business-consumer agreements, standard form terms and conditions and document retention policies and procedures to ensure that they are in compliance with the law at all times.

## Financing and growing your business

There are two forms of finance used to fund expansion of a business:

- a. Debt financing - a loan is obtained from a financial institution on either a secured or unsecured basis
- b. Equity financing - the business obtains funds through by the issue of new shares. When new shareholders are introduced, a shareholders agreement should be prepared, to govern the relationship between the shareholders (or the existing agreement should be amended).

## CONTACT US

The corporate team at Swaab Attorneys is committed to working with companies to help them meet their ambitions. If we can help you with any of the issues raised in this Guide, please contact Alistair Jaque. We would be very pleased to discuss any issues with you.



Alistair Jaque  
PARTNER

T 61 2 9233 5544  
E [afj@swaab.com.au](mailto:afj@swaab.com.au)

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