



SWAAB

A PRACTICAL GUIDE TO
STARTING UP A BUSINESS

A COURTESY GUIDE PREPARED
BY SWAAB ATTORNEYS

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Business Essentials

Once you have decided to start a new business there are many practical things you need to put in place at the start to establish your business on sound footing.

LEGAL CONSIDERATIONS

- Decide how your business will be legally structured. See the section on Structuring A Business for more detail.
- If you choose to be a sole trader, you can trade using your own name or register a business name with Australian Securities and Investment Commission (ASIC) at www.asic.gov.au.
- If you choose to run your business through a company, you need to establish your company with ASIC
- Register for an Australian Business Number (ABN) with the Australian Taxation Office. You can register on-line for an ABN at the Australian Business Register at www.abr.gov.au.
- Register for the relevant taxes, including GST and PAYG. You may do this the same time as applying for your ABN at the Australian Business Register.
- If you intend to employ employees, obtain information on awards, superannuation policies, workers compensation, PAYG taxes as well as other relevant employment information. There are two industrial relations systems in NSW dealing with employment laws:
 - > the NSW state system - www.industrialrelations.nsw.gov.au ; and
 - > the federal system - www.fairwork.gov.au
- Check on what licences and registrations may be required for your business through the Australian Business Licence and Information Service at www.ablis.business.gov.au Check with your local council regarding zoning, health regulations and whether you need to lodge a Development Application or Building Application to operate the business.
- Develop an Intellectual Property Register for logos, trade marks, patents, copyright, and designs. Contact IP Australia for more information at www.ipaustralia.gov.au.
- Register your Website domain name if you want a strong internet presence. You need a legitimate business or company name (eg. through ASIC), to get a .com.au address. You can search for and register a domain name at www.melbourneit.com.au.
- Draw up your will, especially if you are a sole shareholder/director.

SETTING UP YOUR FINANCES

- Set up a business bank account (if you have registered a business name, you will need to have your Record of Registration of Business Name).





- Discuss your financial position and any loan arrangements with your lender.
- Consider credit arrangements (for instance EFTPOS and credit facilities for your customers).
- Choose your accountant and set up your financial record keeping system.
- Set up a system to monitor financial performance of your business (eg cash flow budget).

OPERATING YOUR BUSINESS

- Consider and identify the benefits and disadvantages of purchasing property, leasing property, or working from home.
- Negotiate and sign any lease/purchase documentation in consultation with your solicitor.
- Arrange for business insurance, including public liability, vehicle, fire, burglary, professional indemnity, directors insurance and sickness.
- Arrange for connection of utility services, such as electricity, water, telephone and gas.
- Purchase business equipment, fittings and furniture.
- Develop an asset register to record all assets owned or leased by the business.
- Order and purchase stationery, tax invoices, letterheads, business cards and record keeping books.
- Arrange for a suitable filing and accounting system.
- Order and purchase trading stock and determine terms of payment, delivery and freight.

PROMOTING YOUR BUSINESS

- Make sure you identify and promote your business at every opportunity (eg. through your stationery, and other promotional material).
- Determine your advertising and marketing needs. Decide on the cost/benefit of using an advertising agency.
- Think about how you could network with other businesses to promote your products or services
- Determine how eBusiness could work for you.
- Develop a marketing plan that will not only sell your products, but also promote your business.

KEEPING PACE

- Make sure you have a well-prepared business plan, one that you review over time as your business develops.
- Join a trade association/Chamber of Commerce.
- Stay up to date with changes in your industry, customer preferences and business regulation system.
- Undertake further training and build professional relationships to build your business capability.

SOME TIPS ON HOW TO AVOID BUSINESS FAILURE

- Don't underestimate the capital you need to start up the business.
- Understand and keep control of your finances - income earned is not the same as cash in hand.
- More volume does not automatically mean more profit - you need to get your pricing right.

Structuring a Business

Australia recognises a number of forms of business entities:

- Sole traders
- Partnerships
- Corporations (including incorporated joint ventures)
- Trusts
- Joint ventures

SOLE TRADER

A person may trade under his or her own name in Australia. If the investor wishes to trade under another name, then a business name must be registered. A sole trader operating a business under his or her own name or a registered business name is personally liable for all obligations of the business.

PARTNERSHIPS

A partnership is an association of two or more individuals or companies that carry on business together with a view to sharing profits. Subject to certain exceptions there cannot be more than 20 partners.

A partnership is not a separate legal entity and is not taxed as a separate taxpayer. The partners pay tax individually on their earnings from the partnership (as well as any other income).

Although not essential, a partnership agreement contains the fundamental terms of the agreement between the partners (if any). The partnership will be governed by the terms of the relevant partnership agreement among the partners, the relevant State Partnership Act and by the common law.

Partnerships are not registered. However, they must register their business name with ASIC if the partners decide not to conduct business in their own names.

Each partner is *jointly and severally* liable for the debts of the partnership and the liability is unlimited. In the case of limited partnerships, some of the partners' liabilities for the debts of the partnership are limited to a specified sum contributed by



them to the partnership, provided they do not take an active role in running the business of the partnership.

Arrangements between partners will protect partners in their relationship with each other but will not affect third parties with no knowledge of the arrangements.

CORPORATIONS

Corporations are regulated and governed by the *Corporations Act 2001* (Cth) (**Corporations Act**). The liability of shareholders can be limited by shares, by guarantee, or can be unlimited.

Under the Corporations Act, a company can be either a private (proprietary limited) company or a public (limited) company. A public company can be either unlisted or listed on the Australian Stock Exchange (**ASX**).

A private company:

- must have at least 1 and no more than 50 shareholders;
- is prohibited from offering shares or debentures or other forms of securities to the public; and
- must have at least 1 director who is ordinarily resident in Australia.

A public company:

- must have at least 1 shareholder;
- can offer shares or debentures to the public (if securities laws are complied with);
- must have at least 3 directors, 2 of whom must be ordinarily resident in Australia;
- must have at least 1 secretary who is ordinarily resident in Australia;
- must appoint an auditor.

Both private and public companies:

- must have a public officer who is ordinarily resident in Australia and who ensures that the company complies with its obligations under the *Income Tax Assessment Acts* and is answerable to the Australian Taxation Office;
- must have a registered office in Australia where communications can be sent and where one of its secretaries or its agent is present. The company must obtain the occupier's consent to use the premises as its registered address where the company itself does not occupy the premises.

Company directors owe stringent duties to their companies both under statute and common law.

These duties include obligations to:

- act honestly
- exercise due skill, care and diligence
- put the interests of the company ahead of any other person's interest, and
- prevent the company from trading whilst insolvent.

JOINT VENTURES

Two or more individuals or corporations may carry on a business as a joint venture. A joint venture is often formed for a particular project or product.

Joint ventures can be either incorporated or unincorporated. Joint ventures are not recognised as separate legal entities if they are unincorporated and are usually organised for a specific commercial venture.

In an incorporated joint venture, the participants are shareholders of a separate corporate entity formed for the specific purpose of the joint venture. In such a case, the rights and obligations of the different shareholders can either be incorporated into the constitution of the joint venture company or in a separate shareholders' agreement.

A number of incorporated joint ventures have also used a trust structure where the participants are shareholders in a trustee company and the business is carried on by a unit trust constituted under a trust deed. The rights of the parties will generally be set out in a unitholders' and shareholders' agreement.

In an unincorporated joint venture, the rights and obligations of the participants are governed solely under the terms of the joint venture agreement and principles of partnership law and general law.

TRUSTS

Business may be conducted via a trust. The trustee holds title to the assets of the business and conducts the business of the trust on behalf of the beneficiaries. The trustee can be either an individual or a company. The duties owed by the trustees to the beneficiaries are contained in a trust deed, relevant State legislation and the general law. The most common forms are *discretionary trusts* (where the trustees have discretion to distribute profits to the beneficiaries) and *unit trusts* (where the beneficiaries hold their equity capital in the form of units in the trust and receive fixed proportions of the profits). Trusts may be public or private and public trusts may be listed on a stock exchange.

TAX CONSIDERATIONS

Generally companies pay tax independently of their shareholders. Joint ventures/ partnerships and trusts, while separate legal entities, pass their tax liability directly to their participants/beneficiaries. These important tax consequences should be considered carefully before choosing the form of entity through which business will be conducted.

BUSINESS NAMES

If a person carries on business in Australia (other than under their own individual or company name), that person is required to register the business name with the Australian Securities and Investments Commission.



Taxation

TAXES

Different forms of direct and indirect taxes are levied by both the Federal and State Governments, including:

Australian Federal Government

- Income tax
- Fringe benefits tax
- Superannuation tax
- Goods and services tax.

State Governments

- Employer's payroll tax
- Land tax
- Stamp duties
- Gambling taxes
- Motor vehicle taxes.

Local Governments

- Council (land) tax.

CORPORATIONS TAX

Taxable income is determined on the basis of assessable income less allowable deductions. The normal accounting period for Australian income tax purposes is a 12 month period ending 30 June of each year. Companies are taxed at a single specified flat rate, for both ordinary income and capital gains.

A company will need to register for a Tax File Number (used in dealings with the Australian Taxation Office) and an Australian Business Number (which must appear on invoices issued by the company).

All Australian business entities must lodge Business Activity Statements (**BAS**) with the Tax Office. The BAS require detailed accounting information (including relating to GST and PAYG - see below) and must be lodged regularly.

PAY-AS-YOU-GO REGIME

Tax instalments are determined, and collected progressively in the income year, based on income that is derived by an entity.

GOODS AND SERVICES TAX (GST)

GST is a broad-based tax calculated at the rate of 10% on the value of the supply of a broad range of goods, services, rights and other things supplied in, or in connection with, Australia (referred to here as *GST items*).

GST is paid at each step in the supply chain. The liability to pay GST to the Australian Taxation Office is on the supplier or provider of the GST items.

GST will only be payable where the entity (defined to include individuals, companies, partnerships and trusts) making the supply is registered or required to be registered for GST purposes. Generally, an entity will be required to be registered for GST purposes if its annual turnover for the previous 12 month period or projected annual turnover for the next 12 month period in relation to supplies that are "connected with Australia" exceeds a certain threshold. The test for determining whether an entity's supplies are "connected with Australia" is closely linked to the type of supply that the entity makes. Different rules apply based on whether the thing being supplied is goods, real property or something else.

If businesses are registered for GST purposes, in most cases they can claim an input tax credit for certain acquisitions. The input tax credit generally has the effect of offsetting the GST included in the price of GST items they acquire for use in carrying on their business. In this way, the GST is intended to flow through the supply chain to the end consumers who bear the cost of the GST.

Generally, registered entities remit the GST liabilities for their supplies to the ATO on a monthly or quarterly basis. At the same time, registered entities may claim back from the ATO any input tax credits for the GST included in the price of their business purchases.

An entity will make a "taxable importation" and be liable to pay GST where it imports goods into Australia and "enters those goods for home consumption", that is, it identifies itself as the "owner" of the goods to Australian Customs. In most cases, registered importers are entitled to recover an input tax credit for a taxable importation equal to the GST liability.

There are categories of GST-free items including some itemised foods, exports, most health services, most educational services, most childcare services and some non-commercial activities of charities and religious services.

PAY-ROLL TAX

Pay-roll tax is imposed by the various States and Territories on wages paid or payable by an employer to an employee. There is a requirement for employers to register under relevant legislation. Calculation of pay-roll tax is dependent on thresholds and rates, which vary between jurisdictions. Each jurisdiction has differing exceptions and exemptions from pay-roll tax. Payments to individual contractors may also be subject to pay-roll tax under extended definitions in the relevant legislation.

STAMP DUTY

Stamp duty is levied on a varying basis by each of the



Australian States and Territories on a wide range of documents and transactions which may, depending on the relevant State or Territory include transfers of property (including businesses and other business assets), sales of marketable shares which are not quoted on the ASX (including shares and units in unit trusts), leasing and hiring arrangements and secured lending transactions.

Intellectual Property

In Australia, statute law gives protection to trade marks, copyright, patents and designs. The common law gives protection for confidential information and trade secrets and provides remedies for *passing off*¹ goods or services as those of another.

TRADE MARKS

Trade marks may be registered in Australia under the *Trade Marks Act 1995* (Cth), provided the mark is distinctive of your goods or services, and is not similar to an existing registration or application for the same or similar goods. Initial registration is valid for a term of 10 years and is renewable for further terms of 10 years (so that protection can be obtained for an indefinite period, subject to continued use of the mark). The processing of a trade mark application can take up to 12 months but the rights date from the date of filing. Australia is a party to the Paris Convention, which enables an applicant for the registration of a trade mark in Australia to claim an earlier registration date if a trade mark application was made in another convention country no later than 6 months before the Australian application. Australia is also a member of the Madrid Protocol, which can make an application by an overseas owner less administratively complex.

COPYRIGHT

The *Copyright Act 1968* (Cth) grants copyright owners the exclusive right to reproduce, publish, perform, communicate, sell and do other acts in relation to original literary, artistic, musical and dramatic works and sound recordings, films and broadcasts. This Act also protects computer programmes as copyright works. Copyright is not obtained by registration, but arises automatically when an original work is created. In general, copyright lasts for the life of the author plus 70 years. Copyright in literary, dramatic, musical or artistic works lasts for 70 years after the death of the author except where the work was not published, broadcast, performed in public or sold to the public during the author's lifetime, in which case, it is 70 years after the first of these events to occur. Copyright in cinematograph films, television broadcasts and

sound recordings lasts for 70 years after first publication. Because Australia is a signatory to the Berne Copyright Convention, works created in other convention countries will be treated as if they were created in Australia and will receive the protection of Australian copyright law.

PATENTS

Under the *Patents Act 1990* (Cth), the patent holder has the exclusive right to exploit an invention and to prevent others from making, using or selling a patented product or process for a maximum period of 20 years from the date of the patent (normally when the complete specification is filed). Any novel product or process that is capable of industrial or commercial application and which constitutes an inventive improvement over what was known previously is patentable. Australia is a member of the Paris Convention. This convention enables the protection of industrial property patented in another member country provided an Australian application is made within 12 months of the initial application. Australia is also a member of the Patent Co-Operation Treaty, which can extend this period by a further 18 months. Protection is granted from the date of the initial application.

DESIGNS

The *Designs Act 2003* (Cth) provides for registration of the overall visual appearance of a product. In order to qualify for registration, the design must be new and distinctive. A design can be registered for a period of five years and can be renewed for a further five years. Priority can be claimed for designs filed internationally six months prior to the application date in Australia.

Employment

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

¹ *Passing off* means trading on another's reputation, by stating or implying that your goods and services are those of that other person. Similar protection is given (by statute) under the Competition and Consumer ACT 2010.



Awards are decisions of industrial tribunals which legally bind employers in industries or businesses to which they relate. They prescribe the minimum terms and conditions of employment such as pay, ordinary weekly hours of work, overtime, penalties, allowances, annual leave, paid public holidays, sick leave and other employment matters.

State and Territory laws may also regulate an employee's entitlement to annual leave and long service leave (usually after 10 years of continuous employment), and matters of health and safety in the workplace. In some instances whether State or Federal legislation applies to a particular employer (in relation to a particular aspect of employment law), will depend on the nature of the employing entity. Trading, financial and foreign corporations will generally be covered by Federal legislation whereas other types of legal entity will be regulated in certain areas by State legislation as well as Federal laws in some areas.

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.

WORK 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. Breach of the legislation exposes the employer, and potentially its managers and directors, to quasi-criminal prosecutions and heavy monetary penalties.

EQUAL EMPLOYMENT OPPORTUNITY

Federal and State laws also:

- prohibit unlawful discrimination against employees and job applicants on certain grounds including race, sex, pregnancy, age, sexual preference, politics, religion, trade union membership or disability;
- in some cases make provision for equal opportunity and affirmative action policies in respect of the employment of women (but do not impose quota requirements);

- prohibit sexual harassment and vilification in the workplace; and
- 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. The principle of 'freedom of association' is supported by legislation which prohibits any coercion or unfavorable treatment toward an employee on the grounds of their union membership.

Industrial action will generally be unlawful unless it meets strict requirements which are set out in the *Workplace Relations Act 1996*. Such requirements include the employees first conducting a secret ballot before taking any industrial action. The Australian Industrial Relations Commission must also be involved in the process.



Annexure A - Information Required to Register a Company Limited by Shares

You can use this Annexure to help you collate the information needed to register a company. Fill in the blanks where indicated.

INTRODUCTION

A company is created in Australia when it is registered under the Corporations Act 2001 (Cth). Registration is done by one authority, the Australian Securities and Investments Commission (ASIC). To register a company a person must lodge an application for registration with ASIC (section 117(1)). If ASIC registers the proposed company, ASIC gives it a unique number called an Australian Company Number or ACN (section 118).

All section references in this document are to the *Corporations Act 2001* (Cth) (except those specific references to the *Income Tax Assessment Act 1936* (Cth)).

COMPANY NAME

A company is not required to have a name. It may use its ACN as its name (section 148(1)).

A proposed company may reserve a name with ASIC for two months. ASIC may extend the reservation period if it is requested in writing (section 152).

ASIC will reject a name if it is an already reserved or registered company or business name. ASIC will also reject a name if it is unacceptable for registration under the regulations (section 147).

We will conduct a search to check the availability of the name.

A limited proprietary company must have the words 'Proprietary Limited' (or their abbreviations 'Pty Ltd') at the end of its name (section 148(1)).

A limited public company must have the word 'Limited' (or its abbreviation 'Ltd') at the end of its name (section 148(1)).

Company Name

STATE OF REGISTRATION

When ASIC registers a company, the company is incorporated in Australia (section 119(A)(1)). However the company is also taken to be registered in the state or territory specified in the application for registration of a company (section 119A(2)).

A company's legal capacity and powers do not depend on the state or territory in which it is registered, but a state or territory law may impose obligations, or confer rights or powers on a person by reference to the state or territory in which the company is taken to be registered. For example, a state or territory law may impose stamp duty on transfers of shares in a company taken to be registered in that state or territory.

There is no stamp duty on transfers of shares in a proprietary company registered in Victoria, Tasmania or Western Australia. However, there may be duty on transfers of shares in a proprietary company registered in the other states and territories.

State of registration

MEMBERS

A company must have at least one member (section 114).

The details requested for each member (shareholder) must be included in the application for registration of the company (section 117(2)) and shown in its register of members (section 169).

Present given and family names

Address

Number of shares

Amount paid per share

Amount unpaid per share

Beneficially held or not

DIRECTORS

A proprietary company must have at least one director. That director must ordinarily reside in Australia (section 201A(1)).

A public company must have a least three directors (not counting alternate directors). At least two of those directors must ordinarily reside in Australia (section 201A(2)).

A director must be an individual 18 years or over (section 20113(1)).

A person must give the company a written consent to act as director before being appointed (sections 117(2)(d) and 117(5)). The company must keep the consent.



The personal details requested for each director must be included in the application for registration of the company (section 117(2)).

A person's address for the purpose of the application or a notice is their usual residential address unless they have an alternative address substituted for their usual residential address (section 2051)(1). An alternative address may be substituted if the person's name or residential address is not on the electoral roll for a reason permitted under the *Commonwealth Electoral Act 1918* (Cth). The alternative address must be in Australia and be one where documents can be served on the person (section 2051)(2)).

Present given and family names

Former given and family names

Usual address

Date of birth

Place of birth

SECRETARY

A proprietary company is not required to have a secretary. However, if it does have one or more secretaries, at least one of them must ordinarily reside in Australia (section 204A(1)). A sole director proprietary company should have a secretary (which can be the same person) to ensure it is legally able to execute documents (section 127).

A public company must have at least one secretary. At least one of them must ordinarily reside in Australia (section 204A(2)).

A secretary must be an individual 18 years or over (section 204B(1)).

A person must give the company a written consent to act as secretary before being appointed (sections 117(2)(e) and 117(5)). The company must keep the consent.

The personal details requested for a secretary must be included in the application for registration of the company (section 117(2)).

A person's address for the purpose of the application or a notice is their usual residential address unless they may have an alternative address substituted for their usual residential address (section 205D(1)). An alternative address may be substituted if the person's name or residential address is not on the electoral roll for a reason permitted under the *Commonwealth Electoral Act 1918* (Cth). The alternative address must be in Australia and be one where documents can be served on the person (section 205D(2)).

Present given and family names

Former given and family names

Usual address

Date of birth

Place of birth

PUBLIC OFFICER

The public officer of a company is answerable for doing all things the company must do for tax related purposes.

It is not necessary to specify the public officer in the application for registration of a company, but for convenience it is often better to see to the matter at the same time. Under section 252 of the *Income Tax Assessment Act 1936* (Cth), a company must appoint a public officer within three months after the company starts to carry on business or derive income in Australia.

The public officer must be:

- a. 18 years or over;
- b. ordinarily resident in Australia, or if the company has its principal place of business or income-producing activity in an external Territory, ordinarily a resident of the Territory or of Australia; and
- c. capable of understanding the nature of the appointment.

The company must always have a public officer.

The appointment of a public officer only takes effect when notice is given to the Commissioner of Taxation.

Present given and family names

Address for service

Date of birth

AUDITORS

This section is optional. It is not necessary to specify an auditor in the application for registration of a company.

A proprietary company does not have to appoint an auditor. However, if it is controlled by a foreign company for all or part of a financial year and it is not consolidated for that period in, any financial statements for the year lodged with ASIC (section 292(2)), it should appoint an auditor because it will have to lodge an audited financial report for the period. The directors may appoint an auditor if one is not appointed by the company in a general meeting (section 325).

A public company must appoint an auditor within one month after the date it is incorporated. The directors may appoint



the auditor in that time if one has not been appointed by the company in a general meeting (section 327(1)).

A company may only appoint an auditor if the auditor has given written consent to the company before the appointment (section 327(7)).

Auditor's name

Auditor's address

REGISTERED OFFICE

A company must have a registered office in Australia (section 142(1)).

If a company does not occupy the premises at the address of the registered office, it must have the written consent of the occupier to use those premises as its registered office (section 143(1)).

The registered office of a public company must be open to the public:

- a. each business day from at least 10.00am to 12.00 noon and from at least 2.00pm to 4.00pm; or
- b. at least three hours chosen by the company between 9.00am and 5.00pm each business day (section 145(1)).

If the company chooses its own opening hours, the hours must be notified to ASIC.

Address of registered office

Office opening hours

Occupier (if not company)

PRINCIPAL PLACE OF BUSINESS

An application for registration of a company must state the address of the company's principal place of business if it is not the same address as the registered office (section 117 (2)).

Address of principal place of business

ULTIMATE HOLDING COMPANY

If, on registration, the company will have an ultimate holding company, the application for registration of the company must specify the name of the ultimate holding company, the ultimate holding company's ABN, ACN or ARBN (if registered in Australia) and the place at which the ultimate holding

company was incorporated or formed (if not registered in Australia) (section 117(2)).

A body will be the ultimate holding company of a proposed company, if:

- a. it will be the holding company of the proposed company; and
- b. it itself is not a subsidiary of another company (section 9).

Company name

ABN, ACN and ARBN

Place of incorporation

TRADE MARK SEARCH AND REGISTRATION

You may wish to consider obtaining a Trade Mark search before registering this company, as the company name may infringe another person's trade mark.

Please advise if you require Trade Mark registration for this name.

AUSTRALIAN BUSINESS NUMBER

Please advise if you require assistance obtaining an Australian Business Number.



Annexure B - Company Secretarial Obligations

CHANGES IN PARTICULARS

The Company must give ASIC notice of certain changes that may occur within the Company. The most common changes are those involving directors, secretaries and the registered office. However, changes involving the constitution and the company name may also occur from time to time.

A proprietary company is also required to notify ASIC of any change to its register of members and any change to any ultimate holding company.

Notice of any changes are typically given to ASIC online or using forms issued by ASIC. We are happy to help you make the relevant notifications.

ANNUAL GENERAL MEETING

The Company must hold an annual general meeting:

- a. at least once in every calendar year; and
- b. within five months after the end of its financial year.

GENERAL MEETINGS

All meetings of members other than the annual general meeting are called general meetings.

Under the *Corporations Act 2001* (Cth) and the Company's constitution, certain matters can only be dealt with at a general meeting of members. For example, a general meeting is required to change a company's name or constitution.

The *Corporations Act 2001* (Cth) and the Company's constitution also set out procedures for calling and conducting general meetings. The Company must follow those procedures.

DIRECTORS' MEETINGS

Directors' meetings should be held on a regular basis and when needed. Directors' meetings must be held to authorise the fixing of the Company's common seal, if it has one (in accordance with the constitution). To appoint a new office holder and to accept the resignation of an office holder. General meetings of members (including annual general meetings) are usually convened by the directors.

The Company's constitution sets out procedures for convening and conducting directors' meetings. The Company must follow those procedures.

COMPANY STATEMENT - EXTRACT OF PARTICULARS

A company is no longer required to lodge an annual return with ASIC.

Instead, ASIC issues a company with a Company Statement - Extract of Particulars and a review fee invoice within two weeks of its review date. A company's review date is usually the anniversary of its registration or incorporation. A Company Statement sets out the company's particulars as recorded on ASIC's database, like the names and addresses of each director and company secretary, the address of the registered office and member details.

If the details set out in the Company Statement are correct, the company does not have to lodge any documents with ASIC and the company is only required to pay the review fee.

However, if the company has notified ASIC of changes to its details but those changes are not reflected in the Company Statement, the company must notify ASIC of the corrections within 28 days of issue of the Company Statement. The response must be in the form prescribed by ASIC. We are happy to supply this to you or prepare it for you.

If any of the details on the Company Statement are incorrect and those changes have not been previously notified to ASIC or ASIC requests additional information, you must notify ASIC of the details within 28 days of issue of the Company Statement. The response must be in the form prescribed by ASIC. Again we are happy to supply this to you or prepare it for you.

Late penalty fees apply if the review fee invoice or the corrections to the Company Statement or additional information is not lodged with ASIC in the required time.

ACCOUNTS

The Company must keep written financial records that:

- a. correctly record and explain its transactions and financial position and performance; and
- b. would enable true and fair financial statements to be prepared and audited.

A large proprietary company must prepare a financial report and a directors' report. A company is a large proprietary company if it satisfies at least two of the following:

- a. consolidated gross operating revenue of \$25 million or more;
- b. value of consolidated gross assets of \$12.5 million or more; or
- c. the company and any entities it controls have 50 or more employees.

A small proprietary company (one that is not a large proprietary company) does not have to prepare a financial report and a director's report unless it is foreign controlled and not included in any financial statements lodged with



ASIC, or is directed by shareholders or ASIC in certain circumstances.

A public company must prepare a financial report for each year.

The financial report for a financial year consists of:

- a. the financial statements for the year (the profit and loss statement, balance sheet, statement of cash flows and, if required, consolidated financial statements);
- b. disclosures and notes required by the regulations and accounting standards;
- c. the directors' declaration about the financial statements and notes.

The directors' declaration (made in accordance with a resolution of the directors) is a declaration:

- a. that the financial statements and notes:
 - i.) comply with accounting standards;
 - ii.) are in accordance with the *Corporations Act 2001* (Cth); and
 - iii.) give a true and fair view; and
- b. whether, in the director's opinion, there are reasonable grounds to believe that the company will be able to pay its debts as and when they became due and payable.

The financial report must be audited and an auditors' report obtained.

The directors' report contains general information concerning the operations and the likely future developments in the Company's operations and the expected results from those operations. It also contains specific information like dividends for distribution, names of directors and indemnities and insurance premiums.

The financial report, auditor's report and directors' report must be sent to members and lodged with ASIC.

AUDITOR

A proprietary company will need to appoint an auditor if it must prepare an audited financial report. The directors may appoint an auditor if one has not been appointed by the company in general meeting.

A public company must appoint an auditor.

If an auditor has not been appointed by the Company at a general meeting within one month after the date it is incorporated, the directors must appoint an auditor within this one month time limit. Any auditor appointed by the directors holds office until the first annual general meeting of the company, at which the members may confirm the appointment or appoint new auditors.

An auditor whose appointment is confirmed, or who is appointed, at the first annual general meeting, holds this office until the auditor dies, resigns or is removed from office.

An auditor must give written consent to a company before being appointed. If you would like us to obtain the consent from a firm of auditors, please let us know.

INTERESTED DIRECTORS

The directors must give notice of any material personal interest in a matter that relates to the affairs of the Company. Any disclosures made by a director must be minuted at a directors' meeting.

MINUTES

The Company must keep minute books in which it records resolutions of the directors and members and proceedings of their meetings. Minutes must be recorded within one month of the relevant meeting, and signed within a reasonable time by the chair of the meeting or the next meeting.

Minutes that are recorded and signed are evidence of the proceedings, resolutions or declarations to which they relate, unless the contrary is proved.

A company must keep its minute books at:

- a. its registered office;
- b. its principal place of business in Australia; or
- c. another place approved by ASIC.

REGISTERS

Under the *Corporations Act 2001* (Cth) a company must keep and maintain the following registers:

- a. register of members;
- b. register of debenture holders;
- c. register of option holders and copies of option documents (if the Company grants options over unissued shares or interests); and
- d. register of charges/ security interests.

The registers must be kept at:

- a. the company's registered office;
- b. the company's principal place of business in Australia;
- c. a place in Australia where the work involved in maintaining the register is done; or
- d. another place in Australia approved by ASIC.

The company must give notice to ASIC within seven days



of any change in address where the company registers are being kept.

A member of a company, a registered option holder or a registered debenture holder may inspect a register without charge. Other people may inspect the register on the payment of any fee required by the company.

The company must give a person a copy of the register within seven days, if the person has asked the company for a copy and pays the required fee.

We attach a summary of the details a company must include in its registers and books (see Annexure C).

facie evidence of the title of the member to the shares. If, however, the certificate has been improperly issued, the company can cancel the certificate.

MAINTAINING COMPANY RECORDS

The Company's officers are responsible for maintaining all aspects of the Company's statutory records.

FORM OF REGISTERS AND BOOKS

The Company may keep or prepare its registers and books:

- a. by making entries in a bound or looseleaf book;
- b. in a computer but the matters recorded must be able to be reproduced in writing at any time; and
- c. in any other manner approved by ASIC.

The Company must take all reasonable precautions to guard against damage to, destruction of or falsification of any of the registers. While section 1306 of the *Corporations Act 2001* (Cth) allows the use of looseleaf books, in a recent court case Young J expressed the opinion that a springback folder of minutes with unnumbered sheets and which is not adequately safeguarded probably does not comply with section 1306(3).

SHARE CERTIFICATES

A company must complete, have ready for delivery and (unless otherwise instructed) deliver to the new holder a certificate for shares issued or transferred within:

- a. two months of the issue, unless the conditions of allotment provide otherwise; or
- b. one month after the transfer is lodged with the company.

The certificate must state:

- a. the name of the company and the fact that it is registered under the *Corporations Act 2001* (Cth);
- b. the class of shares; and
- c. the amount (if any) unpaid on the shares.

A certificate specifying shares held by a member is prima



Annexure C - Company Registers and Books

REGISTER OF MEMBERS

The register of members of a company limited by shares must contain the following information about each member:

- a. the member's name and address;
- b. the date of which the entry of the member's name is made in the register;
- c. the date on which every allotment of shares take place;
- d. the number of shares in each allotment;
- e. the shares held;
- f. the class of shares;
- g. the share numbers, if any, or share certificate numbers, if any, of the shares;
- h. the amount paid on the shares;
- i. whether or not the shares are fully paid; and
- j. the amount unpaid on the shares.

If a company has more than 50 members, the company must include in the register an up to date index of members' names.

A company's register of members (except a listed company) must indicate whether the shares held by a member are held beneficially or non-beneficially.

A register of members must also show the name and details of each person who stopped being a member of the company within the last seven years and the date on which the person stopped being a member.

REGISTER OF OPTION HOLDERS

A company's register of option holders must contain the following information about each holder of options over unissued shares in a company:

- a. the option holder's name and address;
- b. the date on which the entry of the option holder's name in the register is made;
- c. the date of grant of the options;
- d. the number and description of the shares over which the options are granted;
- e. the period during which the options may be exercised or the time when the options may be exercised;

- f. any event that must happen before the options can be exercised;
- g. any consideration for the grant of the options; and
- h. any consideration for the exercise of the options or the method by which that consideration is to be determined.

The register must be updated whenever options are exercised or expired. Information about the grant of an option must be entered into the register within 14 days after the grant of an option. Where an option is transferred the company is only required to amend the register if the person transferring the option gives the company written notice of the transfer.

The company must keep with the register a copy of every document that grants an option over unissued shares in the company.

REGISTER OF DEBENTURE HOLDERS

A company's register of debenture holders must contain the following information about each holder of a debenture:

- a. the debenture holder's name and address; and
- b. the amount of debentures held.

REGISTER OF CHARGES

A company must keep a register of the charges/ security interests created on the property of the company. The register must contain the following information about each charge/ security interest:

- a. the date of the creation of the charge/ security interest or the acquisition of the property subject to the charge/ security interest;
- b. a short description of the liability secured by the charge/ security interest;
- c. a short description of the property charged/ secured;
- d. the name of the chargee/ secured party; and
- e. the name of the person whom the company believes to be the holder of the charge.

A company must keep with the register a copy of every document relating to a charge/ security interest on property of the company. The register must be open for inspection by creditors or members of the company without charge.

A company must send a copy of the register to any person who requests a copy, within 21 days.



Annexure D - Registered Foreign Company - Ongoing Obligations Under the *Corporations Act 2001* (Cth)

FOREIGN COMPANIES

A company or similar entity incorporated outside Australia may not carry on business in Australia unless it has registered under the Corporations Act.

The following requirements must be met:

- at least 1 local agent must be appointed to act on behalf of the company;
- the local agent must be either an Australian company or a natural person resident in Australia;
- the local agent must be authorised to accept the service of process and communications on the company's behalf;
- the foreign company must have a registered office in Australia; and
- the foreign company must comply with certain reporting provisions imposed by the Corporations Act.

A foreign company is not required to register merely because it maintains a bank account, collects debts, invests its funds or holds property in Australia.

If a foreign company does not wish to register in Australia it may be possible to establish a representative office to engage only in activities which do not amount to carrying on a business. Alternatively a subsidiary company can be established in Australia.

When a body is registered it will be issued with an Australian Company Number by ASIC. If a body is registered as a branch office of a foreign company, it will be issued with an Australian Registered Body Number by ASIC.

FINANCIAL STATEMENTS

Under the *Corporations Act 2001* (Cth), a registered foreign company must, at least once in every calendar year and at intervals of not more than 15 months, lodge with the

Australian Securities and Investments Commission (**ASIC**):

- a. a copy of its balance sheet made up to the end of its last financial year;
- b. a copy of its cashflow statement for its last financial year;
- c. a copy of its profit and loss statement for its last financial year; and
- d. a statement in writing verifying that the copies lodged are true copies of the financial statements (ASIC form 405).

The financial statements lodged with the ASIC must be in such form and contain such particulars and include copies of such documents as the registered foreign company is required to prepare by the law for the time being applicable in its place of origin.

If ASIC considers that the financial statements lodged with it do not sufficiently disclose the company's financial position, ASIC may ask the company to lodge further financial statements (including audited financial statements) containing any information and documents required by ASIC.

CHANGE IN AUSTRALIAN REGISTERED OFFICE AND OFFICE HOURS

A registered foreign company must give ASIC written notice of a change in the situation of its registered office in Australia or the hours of its registered office in Australia within seven days after the change.

CHANGE IN REGISTERED OFFICE OR PRINCIPAL PLACE OF BUSINESS IN PLACE OF ORIGIN

A registered foreign company must give ASIC written notice of a change of location of its registered office in its place of origin within one month after the change.

If the registered foreign company does not have a registered office in its place of origin, it must give ASIC written notice of a change of location of its principal place of business in its place of origin.

CHANGE OF NAME

A registered foreign company must give ASIC written notice of a change to its name within 14 days after the change.



CHANGE TO CONSTITUTION

A registered foreign company must give ASIC written notice of a change to its constitution (or any other constituting document lodged with ASIC) within one month after the change.

DIRECTORS

A registered foreign company must give ASIC written notice of the following changes within one month after the change:

- a. a change in its directors; and
- b. a change in the powers of any directors who are resident in Australia and members of any Australian board of directors of the registered foreign company.

In the past, ASIC has insisted that the notification obligation extends to changes to the residential addresses of directors. It is therefore prudent, to give notice of these changes as they happen.

Although the *Corporations Act 2001* (Cth) only requires a registered foreign company to give ASIC written notice of a change in its directors within one month of the change, ASIC, for the purposes of its record keeping, requests and encourages registered foreign companies to also give it written notice of a change in the residential address of a director within 1 month after the change.

CHANGE IN LOCAL AGENT

A registered foreign company must give ASIC written notice of the following changes within one month after the change:

- a. a change in its local agent; and
- b. a change in the name or address of its local agent.

BRANCH REGISTER OF MEMBERS KEPT IN AUSTRALIA

A foreign company may keep a branch register of members in Australia. It must give ASIC written notice of the following within 14 days of each occurring:

- a. beginning to keep a branch register of members in Australia;
- b. changing the place where its branch register of members in Australia is kept; or
- c. discontinuing its branch register in Australia.

STOPPING BUSINESS IN AUSTRALIA

If a registered foreign company stops carrying on business in

Australia, it must give ASIC written notice of the fact within seven days.

APPOINTMENT OF LIQUIDATOR

If a registered foreign company commences to be wound up, or is dissolved or deregistered in its place of origin, each person who was a local agent on the day when the winding up proceedings began must, within one month after that day cause to be lodged with ASIC notice of that fact and, when a liquidator is appointed, notice of the appointment.

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.



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This Guide is only intended to give an overview of the issues involved. It is not intended to be fully comprehensive or to be a substitute for legal advice.

