



PrimeGlobal

*An Association of
Independent Accounting Firms*

DOING BUSINESS IN AUSTRALIA





COMPANY FORMATION IN AUSTRALIA

Internationals are encouraged to visit Australia, meet with advisors and have the right conversations before establishing an Australian business footprint.

MAIN FORMS OF COMPANY/BUSINESS IN AUSTRALIA

1. Proprietary (private) companies are often used for private ventures or as subsidiaries of public companies.
2. Proprietary companies: Have up to 50 shareholders (excluding shareholders who are employees).
3. Australian branch relates to a foreign corporation operating in Australia in its own right in the absence of establishing a subsidiary.
4. Public companies are traditionally used for larger public ventures and have no limit to shareholder numbers.

SPECIFIC TAX CONCERNS RELATED TO ESTABLISHING A COMPANY

- Determine whether a Permanent Establishment (PE) exists for the parent.
- Determine the correct profit allocation.
- Consider the implications of Goods & Services Tax (GST).
- Consider the failure to comply penalties and other regulatory requirements.
- Consider the effective repatriation of profits and transfer pricing methodologies.
- Determine the Double Tax Treaty rules.
- Consider harmonizing reporting dates and a Substituted Accounting Period (SAP) application.

LEGAL ISSUES RELATED TO ESTABLISHING A COMPANY

- Consider the need to quarantine liability within the jurisdiction.
- Appoint an Australian Company Public Officer and an Australian resident local Director. Consider the attached implied personal liability for certain tax debts.
- Registration with Australia's corporate regulator, the Australian Securities & Investments Commission (ASIC), is required for private, public and foreign corporations/branches.
- An Australian corporation must have a governing document (constitution).
- The company name must not already exist in Australia. Name availability can be checked online with ASIC.



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LEGAL ISSUES RELATED TO ESTABLISHING A COMPANY *(continued)*

- Reporting rules vary between small and large corporations. Their size is determined by consolidated group data. In order to be classified as a large corporation, two of following three criteria must be met:
 - Less than \$25 million turnover;
 - Less than 50 employees;
 - Less than \$12.5 million gross asset value.
- Once a corporation is classified as large, a statutory annual audit is required.

Private Company

- A Private company requires Proprietary Limited or 'Pty Ltd' at the end of its name.
- Shareholder liability is limited to share capital invested upon wind up.
- The management structure must include:
 - Director(s) at least one director as a minimum requirement and one director must reside in Australia;
 - Company Secretary at least one as a minimum requirement and one must reside in Australia;
 - A Public Officer and must reside in Australia.
- Foreign owned corporations require an annual audit but exemption can be obtained in many circumstances.
- Foreign owned corporations have limited fund raising capability.
- Directors can be held personally responsible for company debts, specifically taxation liability, under certain circumstances.
- There may be audit requirements and in certain cases audit relief may be applied for and made available.
- For Australian companies, a Company Secretary is a preferable appointment but it is not a compulsory requirement.

Public Company

- A public company is required to list 'Limited' or 'Ltd.' at the end of its name.
- Shareholder liability is limited to the share capital invested.





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- The management structure must include a minimum of three 3 directors, two of which must ordinarily reside in Australia.
- Is able to raise funds within specific governing laws.
- Can be listed on the Australian Stock Exchange (ASX).
- For Australian companies, a Company Secretary is a preferable appointment but it is not a compulsory requirement.
- Every corporation in Australia must display its ABN and/or ACN/ ARBN on all company documentation including agreements and invoices.

Australian Branch

- There are stringent Proof of Identity requirements in Australia. Registrations will not be granted if these requirements are not met in full.
- A registered office needs to be established in Australia and a local agent needs to be appointed. This agent is comparable to a director of a corporation and has similar responsibilities.
- An Australian Branch is registered with ASIC as a 'non resident foreign corporation'.
- A corporate identifier is then issued by ASIC and is known as an Australian Registered Body Number (ARBN). Lodgement processing may take between 14 - 28 days.
- Application for Taxation File Number (TFN) and Australian Business Number (ABN) must be made with the Australian Taxation Office (ATO).

CULTURAL CONCERNS RELATED TO ESTABLISHING A COMPANY

- Local business may respond better to a locally incorporated entity under certain circumstances.
- Specific visa requirements must be considered for expatriate staff.
- Have employment contracts vetted by an Australian solicitor before finalisation to protect against unnecessary costs.
- Being an Australian company is often a qualifying criteria in order to be considered as a potential supplier of goods and services to a government body.





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OTHER COUNTRY-SPECIFIC ISSUES RELATED TO ESTABLISHING A COMPANY

Business and tax registrations are required both at federal and state/ territory levels. A company must have a physical site address to include in registrations.

Federal registrations are:

- Australian Securities Commission (ASIC) Australia's corporate regulator;
- Australian Business Number;
- Tax File Number;
- Goods and Services Tax registration;
- Withholding (employer and royalties / license fees).

State/ territory registrations are for:

- Payroll taxes;
- Workers compensation insurer.

Other issues to consider:

- Registration to protect trademarks in both Australia and overseas.
- Australian employment agreements must, as a minimum, meet Australia's National Employment Standards (NES) as per the Fair Work Act (Cth) 2009.
- Superannuation /pension contributions for local staff and depending on the specific bilateral agreement that exists can apply to expatriate employees.
- Applications can be made for Research and Development incentives and can be granted subject to meeting certain conditions.





PERMANENT ESTABLISHMENT IN AUSTRALIA: BRANCH OR SUBSIDIARY?

DEFINITION OF A PERMANENT ESTABLISHMENT

Broadly, a Permanent Establishment (PE) exists where business operations are carried on by a foreign resident entity at or through a fixed place of business in Australia.

Australia's recent double tax agreements (DTAs), including the French treaty, provides greater clarity in respect of various treaty articles including the definition of what constitutes a 'permanent establishment' (PE).

The business must have a clear operating base which is a physical address. Location can be a rented business premises, warehouse or even a residence used by the managing director. This highlights that consideration of the PE issue needs specific attention to each situation.

One of the more traditional tests in determining if a PE is in existence is the ability for an entity to sign and finalise contracts in Australia.

The mere presence of employees on the ground doesn't necessarily create a PE. For example, researching the local market or providing sales leads to the head office doesn't necessarily imply a PE exists. Once there are a significant number of employees or where continuous sales commissions are paid, it becomes somewhat a difficult to argue that there is no PE.

Broadly speaking, Australia has traditionally based its definition on the OECD model with some minor changes depending on the specific treaty. In recent times the OECD has issued a draft paper which includes an expansion of the PE concept. Australian Integrity measures which are to commence in January 2016 have some differences to the OECD proposals and as such, businesses with cross border activity should consider the impact of the measures.



MAIN DIFFERENCE BETWEEN A BRANCH AND A SUBSIDIARY

Subsidiary

An Australian subsidiary company is a separate legal entity with limited liability and has its own identity for tax and legal purposes. The Australian subsidiary must have at least one resident director in Australia but the company can be wholly owned by a foreign shareholder.

Registration of a (private) company can usually occur on a same day basis (business ready) and post incorporation documents within a few working days.

A foreign owned registered private company in Australia that is not classified as large is required to lodge financial statements with ASIC at least once each calendar year and at intervals of not more than 15 months. The financial statements required include a profit and loss statement, cash flow statement and a balance sheet. This is known as a '405 Statement' and serves to verify the financial solvency of a foreign company registered in Australia. A lodgment fee of \$1,169 is charged by ASIC.

Branch

A foreign company branch carrying on business in Australia is subject to Australian legislation. A branch office does not have limited liability and is not recognised as having a separate legal identity in the country.

Registration: Registration for a branch office is more complex and time consuming than for a subsidiary company with the company required to disclose both corporate information and supporting documentation to ASIC. The registration of a branch office can take up to 45 days. Using an experienced provider can generally expedite the process.

Reporting: Reporting requirements specify that a branch is required to lodge either parent company accounts or the local branch accounts with ASIC as a matter of public record.

Tax: The entities of corporations are taxed at standard company tax rates currently being 30% regardless of whether it is a branch or subsidiary.

Liability: A company, as either a Pty. Ltd. or Ltd., is limited to the value of the company's assets. This does not apply if the directors continue to trade when they know - or should have known - the company is no longer able to meet its debts when they fall due. This could leave the directors personally liable under certain circumstances. As a branch is not a separate legal entity, the whole assets of a parent are exposed. The local agent may also be personally liable for the company's ASIC and ATO liabilities.



Branch (continued)

Thin Capitalisation: Rules govern the amount of tax deductible debt used to finance an entity's Australian operations. These rules limit interest claimed as a tax deduction. Broadly speaking, a company should be able to fund approximately 75% of its investment in an Australian project by way of debt.

TAX AND ACCOUNTING OBLIGATIONS

Company tax is calculated by the taxpayer under self-assessment and paid on lodgement. In addition, the entity must account for Goods and Services Tax (GST) on a monthly and/or quarterly basis and Pay As You Go (PAYG) tax deducted from employee earnings. The GST and PAYG payments are made on a monthly basis or quarterly Business Activity Statements (BAS) which may also include quarterly pre-payments of income tax and Fringe Benefits Tax (FBT).

Entities will be liable to pay FBT. The year-end reporting date for FBT is 31 March. The benefits subject to FBT may include:

- Motor vehicle
- Entertainment
- Rent and housing payments
- Health Insurance
- And any other benefits paid in lieu of salary payment

REGISTRATION FORMALITIES

- Consider 'Know Your Client' rules as Proof of Identity documentation rules are strict. Incorrect documentation will result in delays.
- Federal Income Tax & Australian Business Number (ABN) registration must be made.
- Australia does not have state based income tax but other state and territory levies such as payroll taxes, insurances, stamp duty and various others may apply, requiring registration.

STANDARD LEGAL OBLIGATIONS AND FORMALITIES FOR A BRANCH

Reports of the foreign company's annual accounts must be filed.



HOW TO HIRE MY FIRST EMPLOYEE IN AUSTRALIA

MAIN LEGAL STEPS TO FOLLOW TO HIRE A FIRST EMPLOYEE

To hire a first employee, an entity needs to:

- Harmonise employment contracts from head office to Australian law. If no contract exists then have a contract prepared by a suitably qualified legal representative to ensure contracts meet the requirements of the Fair Work Act (Cth) 2009.
- Ascertain the employee's (tax) residency status.
- Determine appropriate visa category where appropriate.
- Ascertain whether there are specific registered agreements, awards or legislation applicable to the particular occupation or trade of the employee.
- The employer must select a SuperStream provider.
- The employer must collect a Tax File Number (TFN) and superannuation details.
- The employer should consider requesting an employee to provide National Police Certificate (CrimCheck), particularly if the employee is to be employed in a position of trust.
- Conduct thorough check of employee's previous employment references.
- Determine if a bilateral social security agreement exists with Australia and head office jurisdiction.
- An employee sponsored from overseas to work in Australia on a 457 Visa or similar is not eligible for government health insurance (Medicare). The employer is required to provide private health insurance cover for that employee as a condition of their visa.

There are three types of employees:

1. Full-time employees who work 35-38 ordinary hours per week.
2. Part-time employees who work a set number of hours and/or days per week.
3. Casual employees who are employed on an at-call basis. However, if they continually work for more than 19 hours per week, they will be deemed to be a part-time employee and therefore eligible for entitlements.



DESIGN AND CONTENTS OF AN EMPLOYMENT CONTRACT

The employment contract should contain the following:

- A statement of duties outlining the tasks and responsibilities that will be, but not limited to, those outlined in the job description and will include all other reasonable tasks as requested.
- Probationary Period statement that stipulates the appointment may be subject to a probationary period of up to six (6) months from the commencement date.
- Disclosure of Pre-Existing Injury or Disease for WorkCover Claim which may affect an employee's right to claim compensation for any recurrence or aggravation of that injury or disease under state or territory legislation. For example, in the state of Victoria the relevant legislation is the Accident Compensation Act 1985.
- Hours of Work including, for example, office opening hours.
- Principal and/or and non-principal Location of Work.
- Continuity statement which provides for reasonable variations for the position.
- Remuneration statement which must specify the basis of the salary package. In some specific registered agreements, awards or legislation, there may be a 17.5% leave loading applicable to annual leave entitlements. This entitlement, if applicable, must be disclosed.
- Performance and Salary Review statement indicates when reviews would be expected to occur.
- Superannuation contributions by the employer are currently set at 9.5% of ordinary remuneration. The employer must nominate a default superannuation fund but the employee has the right by law to nominate their own superannuation fund. Check to see if bilateral social security agreements with host country will provide relief.
- Leave Entitlements must include:
 - o Annual Leave. It is a statutory requirement to pay four weeks annual leave. In some registered agreements, awards or legislation, this entitlement may exceed four weeks. For part-time employees, this entitlement is calculated on a pro-rata basis.
 - o Sick & Carer's Leave. Full-time employees are entitled to two weeks (10 business days) paid leave for illness or injury, or to provide care or support to a member in an employee's immediate family or household. All employees, including casual employees are entitled to two days unpaid carer's leave.
 - o Compassionate & Bereavement Leave. Employees are entitled to a total of two days paid leave on the death or life-threatening illness of or injury to a member of the employee's household or immediate family.



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- o Parental Leave. Employees who have worked for their employer at least 12 months are entitled to 12 months of unpaid parental leave when a child is born or adopted . They can also request an additional 12 months of leave. Employees who have taken parental leave don't have to work for another 12 months before they can take another period of parental leave with that same employer.
- o Long Service Leave. Entitlements differ between states and territories. Generally, employees are eligible for 2 months leave after 10 years of continuous tenure. This entitlement can be taken after seven years of service on a pro-rata basis.
- o Public Holidays. Employees receive different entitlements if they work on a public holiday. An employee will be normally paid if they would otherwise work on a day that is deemed a public holiday. Public holidays differ between states and territories.
- Termination. There are strict rules and regulations on the unfair dismissal of employees. The contract must clearly state the grounds of the basis of the dismissal and notice periods are required.
- Other clauses to protect the entity and its entitlements may be required.
- Overriding Clause. The employment contract cannot override the legislative requirements under Fair Work Act 2009 and the ten minimum entitlements of National Employment Standards (NES) as set out in Part 2-2 of the Fair Work Act 2009.

The 10 minimum entitlements of the NES are:

1. Maximum weekly hours
2. Requests for flexible working arrangements
3. Parental leave and related entitlements
4. Annual leave
5. Personal careers leave and compassionate leave
6. Community service leave
7. Long service leave
8. Public holidays
9. Notice of termination and redundancy pay
10. Fair Work Information Statement, a copy of which must be provided to an employee.





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CAN SOMEBODY DO BUSINESS FOR ME AND NOT BE AN EMPLOYEE?

We limit our response to contractors and sub-contractors.

If an entity is doing business with another entity that regularly trades with a number of other entities simultaneously, then there is no implied employee relationship.

Sub-contractors may be deemed to be an employee where they act in the same manner as an employee, for example, working standard hours within a reporting structure.

For a sub-contractor to be bona fide, a specific assignment must be undertaken and under their own supervision.

The sub-contractor must be registered with an Australian Business Register (ABN) number, must invoice the entity and in most cases, will be required to collect GST. Extreme care needs to be taken to ensure that your sub-contractors are not deemed to be employees under other legislation. If so, Superannuation, Payroll Tax and WorkCover responsibilities will apply.





HOW TO READ FINANCIAL STATEMENTS IN AUSTRALIA

PINNACLE LARGE PROPRIETARY COMPANY SPECIAL PURPOSE PTY LIMITED

ABN 00 666 111 222

STATEMENT OF CASH FLOW FOR THE YEAR ENDED 30 JUNE 2016

	Note	2016 \$'000	2015 \$'000
		\$	\$
Cash flows from operating activities			
Receipts from customers (inclusive of GST)		516,249	484,305
Payments to suppliers and employees (inclusive of GST)		<u>(446,416)</u>	<u>(432,555)</u>
		69,833	51,750
Interest received		1,084	540
Other revenue		391	48
Income taxes paid		<u>(9,216)</u>	<u>(8,461)</u>
Net cash from operating activities		<u>62,092</u>	<u>43,877</u>
Cash flows from investing activities			
Payments for property, plant and equipment		(12,275)	(3,048)
Proceeds from disposal of property, plant and equipment		1,511	250
Proceeds from release of security deposits		<u>155</u>	<u>-</u>
Net cash used in investing activities		<u>(10,609)</u>	<u>(2,798)</u>
Cash flows from financing activities			
Dividends Paid		(4,000)	(3,200)
Repayment of borrowings		<u>(26,871)</u>	<u>(37,089)</u>
Net cash used in financing activities		<u>(30,871)</u>	<u>(40,289)</u>
Net increase in cash and cash equivalents		20,612	790
Cash and cash equivalents at the beginning of the financial year		<u>5,524</u>	<u>4,734</u>
Cash and cash equivalents at the end of the financial year		<u>26,136</u>	<u>5,524</u>



BASIS OF PREPARATION

In the directors' opinion, the company is not a reporting entity because there are no users dependent on general purpose financial statements.

These are special purpose financial statements that have been prepared for the purposes of complying with the Corporations Act 2001 requirements to prepare and distribute financial statements to the owners of Pinnacle Large Proprietary Company Special Purpose Pty Limited. The directors have determined that the accounting policies adopted are appropriate to meet the needs of the owners of Pinnacle Large Proprietary Company Special Purpose Pty Limited.

These financial statements have been prepared in accordance with the recognition and measurement requirements specified by the Australian Accounting Standards and Interpretations issued by the Australian Accounting Standards Board ('AASB') and the disclosure requirements of AASB 101 'Presentation of Financial Statements', AASB 107 'Statement of Cash Flows', AASB 108 'Accounting policies, Changes in Accounting Estimates and Errors', AASB 1048 'Interpretation of Standards' and AASB 1054 'Australian Additional Disclosures', as appropriate for for-profit oriented entities.

SPECIAL PURPOSE FINANCIAL REPORTS VS GENERAL PURPOSE FINANCIAL REPORTS

While most SME's (Small to Medium Enterprises) will produce a simple profit and loss and balance sheet, there are specific guidelines to follow in preparing financial reports, whether they are needed for banks, tax or other purposes.

Businesses/Companies have various reporting requirements to meet subject to a range of regulations and necessities. How a set of financial accounts/reports are presented and prepared is usually determined by applying the Australian Accounting Standards, as produced by the Australian Accounting Standards Board ("AASB"). These standards are now amended to accommodate the necessity to be able to produce accounts by applying common standards from around the world and the current AASB's have an equivalent International Financial Reporting Standard ("IFRS"). Generally there are two types of financial reports that can be produced by a business. These being:

1. Special Purpose Financial Reports: These reports can be prepared in virtually any format that the business requires or desires them to be in. Generally as a minimum they will be made up of a Profit and Loss Account and a Balance Sheet, however they may contain varying degrees of other reporting requirements as established by the directors/owners/members. These are the type of reports that are prepared by most SME's.
2. General Purpose Financial Reports: These reports are prepared by applying the AASB's and will generally follow a specified format although there still remains some ability to vary this. These reports are prepared by entities as determined under the Corporations Act and the application of the Statement of Accounting Concepts (SAC) 1 and 2. As a general guide any company that has a large number of employees, foreign ownership or a perceived high number of end users that are reliant on the financial accounts to make decisions regarding the application of their resources, then general purpose accounts may need to be prepared – however application and interpretation of these rules can vary.