



START UP GUIDE:
**TOP 10 LEGAL CONSIDERATIONS
FOR START UPS**



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So you have decided to start a new business? You have a novel idea or a better way of doing things? What's next?

Starting a new business can be daunting, but with good planning and the help of experienced advisors, success is just around the corner. In this guide, our business advisory director, Nadia Sabaini, gives her top 10 tips for Start Ups embarking on a new business journey to maximise their chances of success and avoid legal hardships.

This guide is provided by way of general assistance only and for marketing purposes. Please contact us to discuss your personal situation and further information you may need.

Nadia Sabaini is a director in our business law team. Nadia routinely acts for clients in start-ups, mergers and acquisitions. Nadia also advises in the areas of finance and general contract law.

1. MAKE A BUSINESS PLAN

It goes without saying that failure to research and plan is one of the leading causes of business failure, yet making a business plan remains a step often overlooked by inexperienced entrepreneurs.

As lawyers advising start ups we always stress the importance of research and planning before incurring legal costs in establishing business structures and drafting agreements.

Writing a business plan will help you consider all critical and peripheral operational and financial considerations that need to be made and give your emerging business the best chance of success. Having a detailed business plan is also a must for pitching to investors and applying for finance.

Your business plan should not only cover your overall proposal and objectives but also specific matters such as:



Initial capital contribution



Initial equipment and set up procedures



A marketing plan

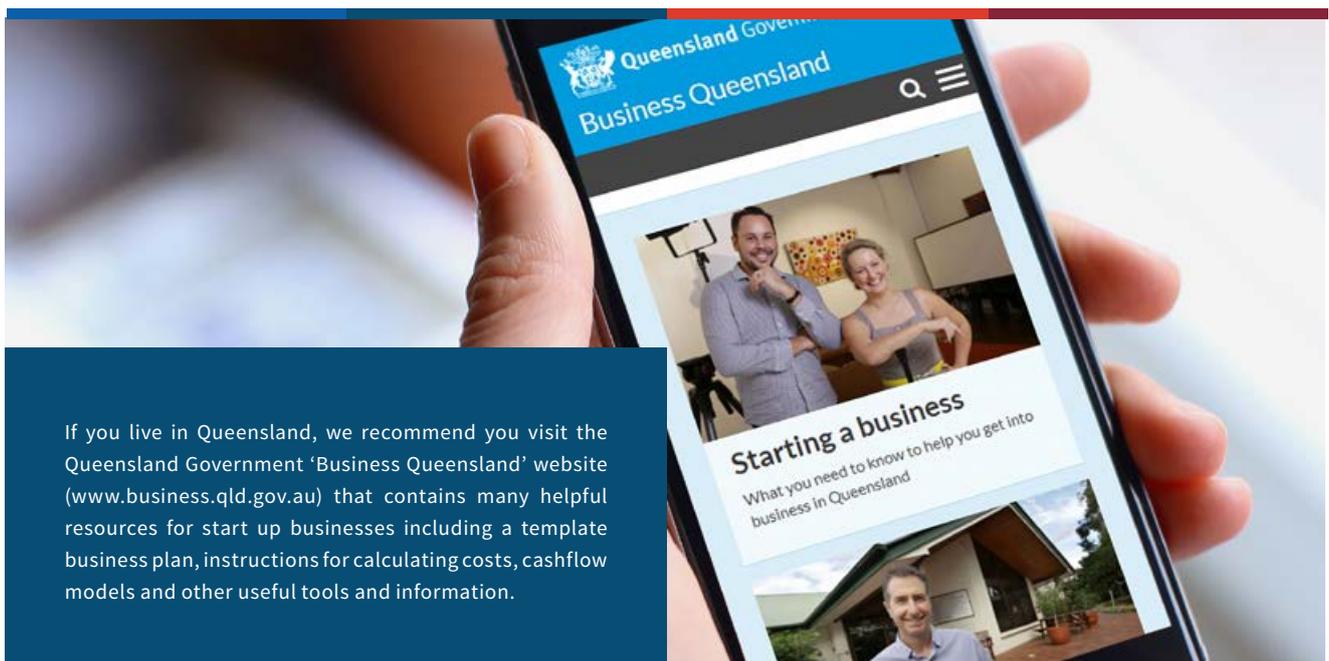


A profit and loss forecast



An expected cashflow analysis

Your business plan won't be static, you will need to review it regularly, but it is still recommended to be as detailed as possible and address not only your start up but at least the first 2-3 years of operations.



If you live in Queensland, we recommend you visit the Queensland Government 'Business Queensland' website (www.business.qld.gov.au) that contains many helpful resources for start up businesses including a template business plan, instructions for calculating costs, cashflow models and other useful tools and information.

2. ENGAGE THE ADVISORS YOU NEED

We don't mean to brag, but every start up needs a lawyer.

It is important to consult with at least your lawyer and accountant as soon as possible in the start-up journey. For example, there are often tax consequences to changing a business structure once a business has commenced trading.

Your lawyer will assist you with matters such as:



Establishing your business structure



Ensuring you have the appropriate licenses and policies in place



Drafting your terms and conditions



Other matters addressed in the next sections of this guide

Your accountant will advise you on matters of tax and ensure you comply your PAYG and BAS obligations.

There may be other advisors that you should also consult with such as licensing consultants and marketing consultants. Engaging professional advisors may appear costly but will give you peace of mind and ensure your business has the best chances of success.



When choosing advisors, it's useful to ask for recommendations by family or friends, but this should not be your only consideration. We recommend entrepreneurs conduct some due diligence and choose advisors, including lawyers and accountants, that fit their requirements and have the requisite experience in their industry or the field of expertise that is required.

3. SELECT THE RIGHT BUSINESS STRUCTURE

One of the very first considerations to be made and discussed with your lawyer or accountant is the type of business structure the new business will have.

The common business structures include:

SOLE TRADER

This arises where a person obtains an ABN in their own name. It is the simplest structure. The money earned will directly add to your taxable income and you will be personally liable for any debts you incur. Although simple to manage, it doesn't afford much asset protection or flexibility of income and capital distribution.

PARTNERSHIP

This is where two or more persons elect to conduct a business in partnership. All partners have an equal share in the profits of the partnership and all are equally responsible for its liabilities. Be careful when working with a business partner without an agreement in place, as a partnership can arise in certain cases by operation of law, with unintended consequences.

COMPANY

In a company, one or more persons hold shares in the company which carries on the business as an independent legal entity. The shareholdings can differ in percentage. The shareholders are not ordinarily liable for the debts of the company which means that, if the business fails, investors usually can't lose more than their initial capital unless they are also a director and breached their directors duties or have provided a personal guarantee. Companies are taxed at a fixed rate of 30% irrespective of how much the company earns.

TRUST

In this structure a trustee, usually a company, operates the business for the benefit of the beneficiaries of the trust, which may be family (in the case of a discretionary trust) or investors with fixed percentages (in the case of a unit trust). Trusts provide a good degree of asset protection and flexibility of income classification and distribution for tax purposes.

It is important that the decision of which business structure to use is made after proper consideration of the current and future requirements of the business and that it is made as soon as possible, as there can be transfer duty and other adverse consequences to changing a business structure once a business has commenced trading.

A lawyer or accountant trained in corporate structuring can help you make the right decision and correctly establish the right business structure for you.



4. SIGN A SHAREHOLDERS AGREEMENT

Disputes between business partners can arise at any time for any reason and can be crippling to a business.

Once a business structure is established, and particularly if it involves more than one business partner, it is imperative that a comprehensive governing document is put in place.

Most business structures will have a base governing document such as a partnership agreement, company constitution or trust deed. However, in some cases this document may be a standard issue document not intended to cover all that is necessary and may contain terms that are actually contrary to what you require. There is therefore a second step necessary, which is to obtain legal advice on the terms of the governing document and have an additional governing agreement or a variation prepared if necessary.

Companies, for example, should have a shareholders agreement in addition to their constitution. The shareholders agreement supplements the constitution by addressing matters not commonly addressed in a constitution such as:

- types of decisions requiring special majority resolution or unanimous resolution; and
- good leaver and bad leaver provisions including buyout rights.

The shareholders agreement may also vary certain parts of the constitution such as how directors may be appointed or removed, which is usually of key importance to emerging businesses.

All companies including those with only two shareholders should still have a shareholders agreement in place. It forces the shareholders to discuss and agree on how they will run their business and plan for all likely and unlikely events, such as illness or an unexpected desire to retire, providing for transition arrangements and an agreed process for dealing with disputes, which may include forced buy-out provisions. In the absence of buy-out provisions, buy-outs may not be enforceable and the only remedy may be liquidation of the company.



Many of the disputes we routinely see in corporate businesses, including family companies, could have been avoided, or at least better resolved, if a shareholders agreement was in place.

5. REGISTER YOUR INTELLECTUAL PROPERTY

Before commencing business, it is important to have taken the necessary steps to protect the intellectual property that the business will be using.

Common forms of IP protection include:



Registered business name



Registered trademark



Registered patent

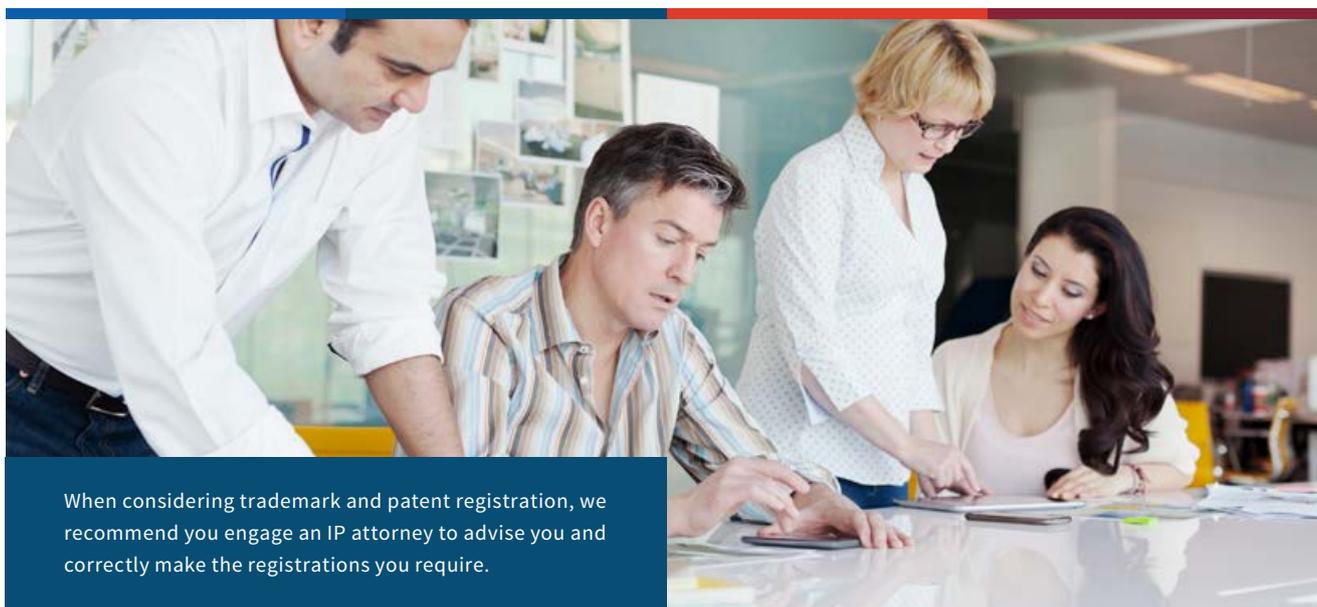


Registered design

Applying for a patent can be expensive but it may be critical if your business is relying on a new invention or idea. Once an invention becomes public, it is no longer possible to patent it.

If registering a patent is outside your budget or you think it's too early to do so, you may be able to protect your interests when sharing your idea with others by using a confidentiality agreement. Although there are confidentiality agreement templates available online, it is recommended that you have a confidentiality agreement drawn up that is suited to what you intend to disclose and the purpose of the disclosure. This is particularly important if your business is wholly dependant on the idea you are disclosing. Most lawyers can prepare a simple but tailored confidentiality agreement at little cost.

It goes without saying that you should also check if anyone already owns or is operating under your proposed business name or logo, and you should never attempt to operate under a business name, logo or idea that's deceptively similar to or a spin-off on someone else's. Although it might sound smart or quirky, you are putting yourself squarely in the line of fire and IP litigation can be extremely costly.



When considering trademark and patent registration, we recommend you engage an IP attorney to advise you and correctly make the registrations you require.

6. HAVE YOUR LICENSES AND POLICIES IN PLACE

It is imperative for start ups to have their necessary licenses and policies in place before they commence trading.

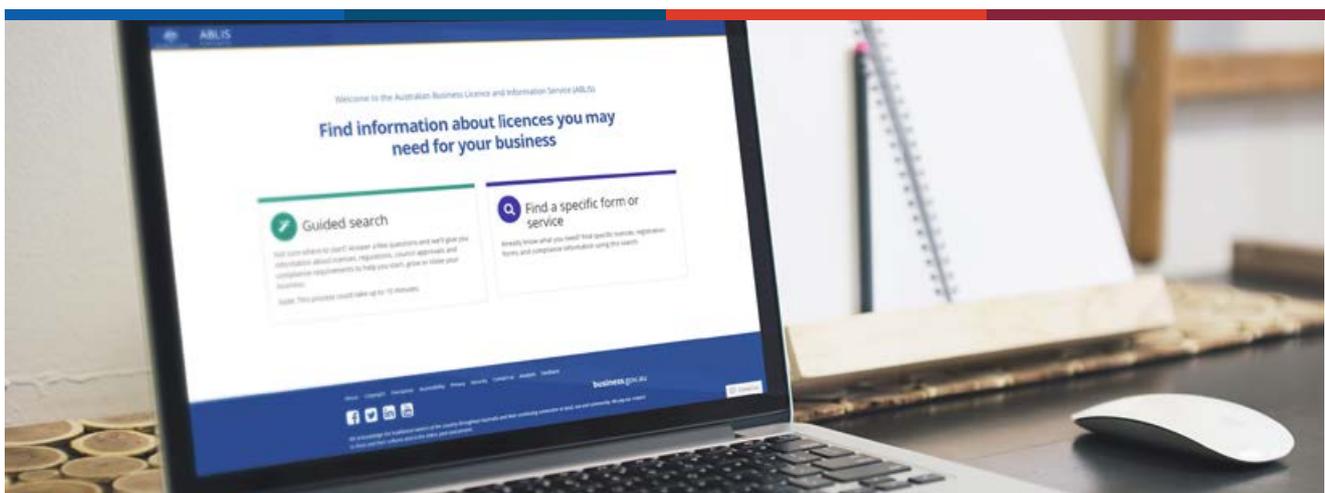
During your business research and planning you will have hopefully discovered any licenses, permits and other requirements that you will need. If you live in Queensland, a good starting point is to use the Queensland Government's Australian Business Licence and Information Service (www.ablis.business.gov.au) which contains a guided questionnaire on your proposed business, designed to identify any possible licenses, permits and other requirements you may require. You should also enquire with any industry association in your industry, membership may provide you with access to industry services and compliance advice.

Most Government departments offer hotlines designed to assist customers with general information. However, you should consider engaging a qualified industry consultant to give yourself the best chances of success in applying for Government licenses and permits, particularly if you are applying for licenses in specialist areas, such as environment, liquor and gaming.

Most businesses are legally required to have a number of standard policies in place, such as a privacy policy and workplace health and safety policies. If your business turnover is likely to exceed \$3m per annum, if you will be obtaining credit information or reporting to a credit reporting body, or if you are providing goods or services on credit exceeding 7 days, a basic privacy policy is not sufficient. There are more complex privacy requirements and disclosure material that you will need.

If you will be collecting personal information, credit information or tax file numbers, you may be the subject of data breach reporting obligations and you will need a data breach response plan.

Your lawyer can assist you with the formulation of policies and practices for your business. If you are engaging a business consultant, they may also advise you on these matters and provide you with pro-forma policies, but make sure that you review them and that they are satisfactory for your business. Policies should be reviewed regularly with your business plan and actively implemented with your staff.



If you live in Queensland, visit the Queensland Government 'Business Queensland' website (www.business.qld.gov.au) for useful information on licenses, permits and policies required start up businesses.

7. TAKE CARE WHEN CHOOSING HOW TO FINANCE YOUR BUSINESS

There are numerous ways of financing a new business venture and careful consideration should be given to the options most suitable for your business at start up and in the future, as well as the legal steps involved.

Capital raising options include:

BANK FINANCE

A bank loan is a good option when you don't need or want investors and are satisfied with the interest and repayment obligations.

VENTURE CAPITAL

Venture capital funds look for newly established or emerging businesses to invest capital in exchange for equity. There is usually a pre-agreed exit strategy such as an intent to later list on the stock exchange. A term of the funding is usually the acceptance of strategic advice by the VC fund, which typically wants to be fairly heavily involved in the decision making.

ANGELS

Angels are experienced investors, usually affluent individuals with expertise in specific fields or industries, who are willing to invest in new businesses in exchange for equity or a debt convertible to equity. Angels typically provide mentoring advice and offer their contacts, but rarely engage in day to day decision making. The amount invested is typically far less than venture capital funds.

GOVERNMENT GRANTS

Your business may be entitled to apply for start up grants or industry grants by local, State or Federal authorities. It is something every business should research as part of its planning.

CROWDFUNDING

If you are considering crowdfunding, take note that crowdfunding equity (shares) is the subject of new regulations by ASIC. You must use a licensed Australian crowdfunding platform and you will need to prepare a disclosure statement and other information to be made available to potential investors. Crowdfunding in exchange for a future product or service may be the subject of other regulations. Running a successful crowdfunding campaign is not simple and it requires careful preparation and marketing. You should consider engaging a consultant to assist you if you decide to crowdfund.

Keep in mind that the sale of shares in companies requires certain procedures to be followed, so seek legal advice before making offers of shares including to family and friends.

8. DON'T FORGET TO SIGN EMPLOYEE AGREEMENTS

All businesses should have employee agreements in place with all employees, from executives to casuals, this includes employees covered by a Modern Award.

Modern Awards only provide for the primary terms of employment and there are other matters that you may want addressed. These may include:

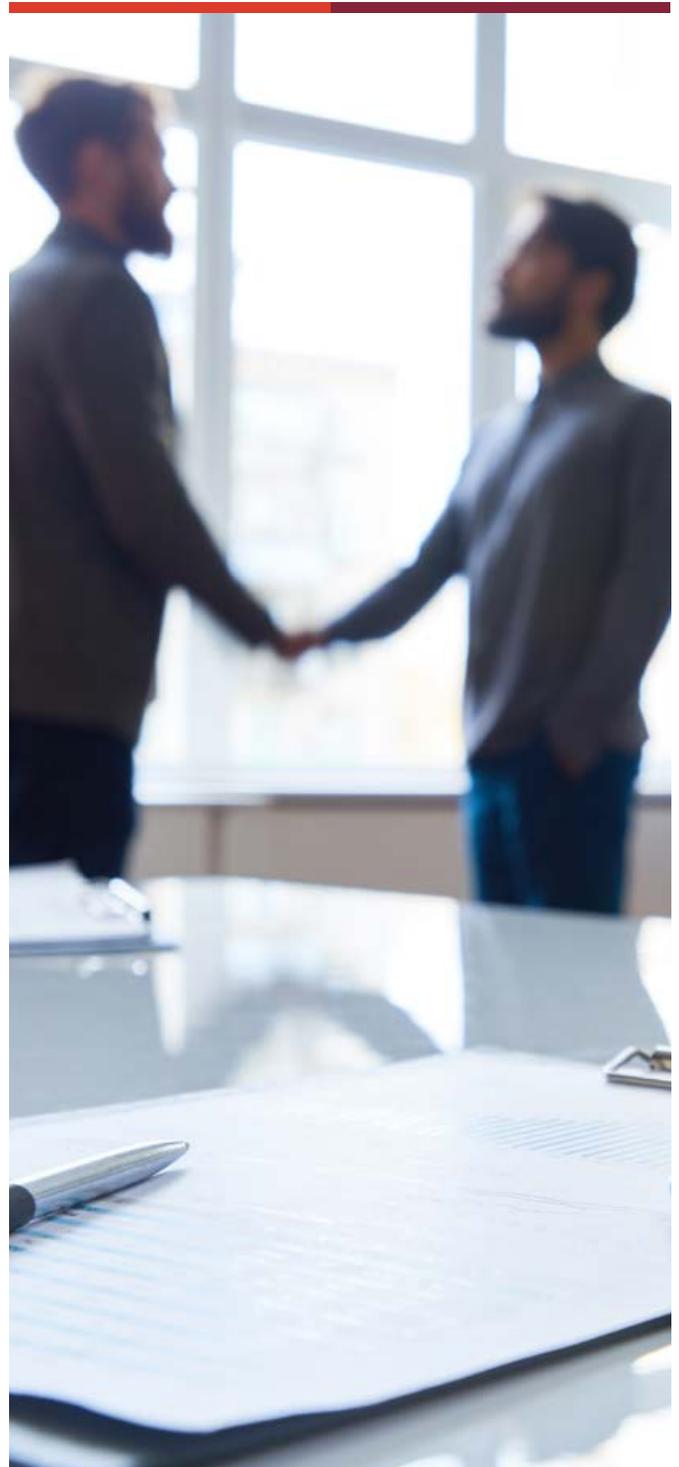
- an acknowledgement of key company policies;
- agreed procedure for complaints, warning and dismissal;
- confidentiality obligations;
- restraint of trade obligations;
- use and return of company property;

If you are working with a business consultant, they may provide you with a pro-forma employment agreement to use, but consider if you should engage a lawyer to prepare one tailored to your business.

Be careful of the trap of engaging an employee as an independent contractor to avoid employee type obligations. The law will class an independent contractor as an employee in certain circumstances, including where they are not permitted to or generally do not work for others, or have little discretion in the hours they work or how they perform their tasks.

Keep in mind that the fact that you are paying a worker more than the base rate does not imply that they will not be entitled to penalties and other entitlements. When additional pay is in lieu of entitlements, this must be explained in the employment agreement and is subject always to the requirements of any applicable Modern Award and the Fair Work Act 2009 (Cth), so check before putting any such terms in place.

If you are employing a foreign person, you must verify that they hold the appropriate VISA to work in Australia. If you are providing a sponsorship arrangement, ensure that you have taken independent legal advice on your obligations.



Visit the Fair Work Ombudsman website (www.fairwork.gov.au) for useful information such as minimum terms of employment, calculating wages and leave entitlements.

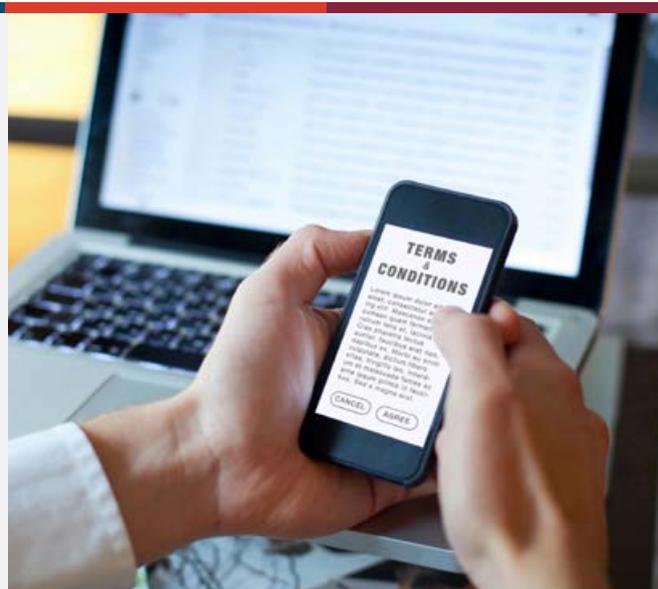
9. HAVE YOUR LAWYER PREPARE YOUR TERMS AND CONDITIONS

The temptation to buy a set of terms and conditions online is strong, as legal drafting can be expensive. However, many T&Cs available online are simply not worth the paper they are written on.

Many online T&Cs come from foreign sites and are not made for Australian law. Additionally, these documents almost never marry up with the way the subject business operates, which means that they won't be any help when you need them most. Here are 4 simple ways to tell if your T&Cs need review:

- **There is no definition section** – This is an indication that your T&Cs are poorly drafted. Generally, comprehensive T&Cs will have a definition section, either at the start or the end. We recommend you have your terms reviewed by a lawyer.
- **The word 'Article' is used in reference to legislation or foreign legislation is cited.** If you 'google' legislation cited in your T&Cs and find that it is foreign legislation (usually USA), this means the T&Cs were taken from a foreign site and are not suitable for Australia. This is a serious issue plaguing Australian businesses who buy low cost documents online. You need new terms immediately because they could be unenforceable.
- **You can see references to the 'Trade Practices Act'** – This is the old version of the Australian consumer law which was replaced by the Consumer and Competition Act 2010 (Cth). It means your T&Cs are outdated and need an urgent update as a lot has changed since 2010.
- **You cannot find any reference to the 'Personal Property Securities Act' or 'PPSA' or 'PPSR'** – This is recent legislation that revolutionised the way we deal with retention of title in unpaid goods and taking security over personal property including against debtors. If your T&Cs do not address this legislation, chances are that they are outdated. You need to update them in order to take advantage of this new law and implement any other updates required.

Be careful of adopting a competitors' T&Cs as they could be just as ineffective, and the last thing you want as a start up is to defend a law suit for intellectual property infringement. We strongly recommend that you invest the money required to have a good tailored set of T&Cs prepared for you by a business lawyer, it will be the best money you've ever spent.



10. TAKE OUT INSURANCE COVER

A key consideration when commencing business is the type of insurance you need before you commence trading.

There are some forms of insurance that are compulsory for many businesses such as:

- **Workers compensation insurance** – compulsory if you have employees;
- **Public liability insurance** – mandatory for certain companies and usually required under a premises lease; and
- **Plate glass insurance** – usually required under a premises lease.

Other types of insurance that you should consider depending on your circumstances include:

- **Contents insurance** – this is important if you are leasing premises as the landlord is usually not liable for and will not insure your contents.
- **Business interruption insurance** – if you are renting and the premises are damaged for any reason, there may be a period you cannot access the premises and won't be entitled to compensation from the landlord.
- **Management liability insurance** – which may cover directors liabilities, employment practices liability, government fines and tax audits.
- **Professional indemnity insurance** – important if you will be acting as a professional advisor.
- **Products liability insurance** – vital if you will be manufacturing products.
- **Transport insurance** – relevant if you are transporting goods, importing or exporting product.
- **Motor vehicle insurance** – compulsory third party insurance is included in the registration fee but this is injury cover only, it does not cover damage to the other party's vehicle or your own vehicle. You must insure for these separately.

In addition to the above, there are some other kinds of insurance that you may not have heard of and which could be of interest to you, such as:

- **Privacy and cyber insurance** – insurance against loss of data or liability due to a data breach.
- **Intellectual property insurance** – insurance to cover costs of intellectual property claims against you or by you.
- **Contract liability insurance** – insurance to cover liability or loss arising from third party contracts.

It is important to consider what your needs are and select the right policy and level of cover. You should definitely seek the advices of a broker when sourcing business insurance. A lawyer can also review a policy to confirm if it addresses any specific items of cover that are of concern to you.

TO DO LIST

1 Business Planning

- Research the market
- Prepare a Business Plan

2 Consultants

- Meet with a lawyer and accountant
- Consider and meet with any additional consultants

3 Business Structure

- Select business structure and establish

4 Governing Agreement

- Discuss and agree on terms of governing document (eg. shareholders agreement)

5 Intellectual Property

- Meet with IP attorney and commission IP registrations
- Procure draft confidentiality agreement (if required)

6 Licenses and Policies

- Investigate licenses and permits required and obtain
- Procure privacy policy
- Procure WHS policies
- Prepare data breach response plan

7 Finance

- Consider finance options
- Seek legal advice before offering shares
- Seek legal and financial advice on investor proposals

8 Employee Agreements

- Sign employee agreement with all employees

9 Terms and Conditions

- Commission lawyer to prepare trading T&Cs

10 Insurance

- Arrange compulsory policies
- Consider and arrange any additional insurance required

ABOUT BENNETT & PHILP

Established in 1984, Bennett & Philp is a mid-tier law firm based in the heart of Brisbane offering end-to-end legal solutions for both business and individual clients. Our team offers a broad range of services us to support both Australian and international clients across every stage of business and life.

AREAS OF PRACTICE

We provide personalised service across five core areas of specialisation:



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Services



Disputes & Litigation



Intellectual
Property



Property & Real
Estate



Compensation
Law



Wills & Estates

MEET OUR TEAM

With 15 Directors and over 70 team members across six different service areas, you can rest assured that our experienced team can give you the practical and solutions-oriented legal advice you need for any occasion.



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Contact us today and talk to us about how we can assist you in your situation.

