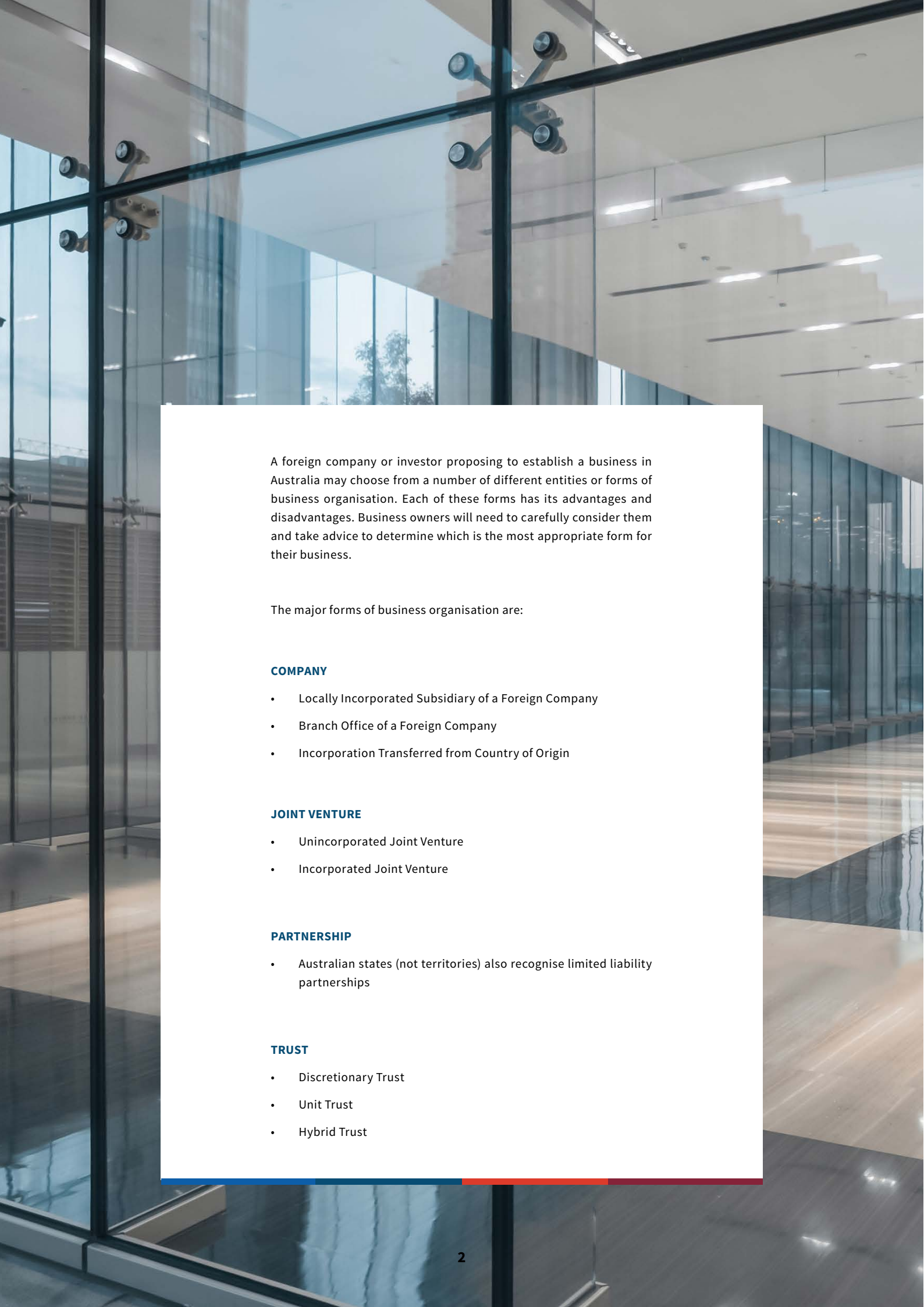




**DOING BUSINESS IN AUSTRALIA:**

# **MAJOR FORMS OF BUSINESS ORGANISATION**



A foreign company or investor proposing to establish a business in Australia may choose from a number of different entities or forms of business organisation. Each of these forms has its advantages and disadvantages. Business owners will need to carefully consider them and take advice to determine which is the most appropriate form for their business.

The major forms of business organisation are:

#### **COMPANY**

- Locally Incorporated Subsidiary of a Foreign Company
- Branch Office of a Foreign Company
- Incorporation Transferred from Country of Origin

#### **JOINT VENTURE**

- Unincorporated Joint Venture
- Incorporated Joint Venture

#### **PARTNERSHIP**

- Australian states (not territories) also recognise limited liability partnerships

#### **TRUST**

- Discretionary Trust
- Unit Trust
- Hybrid Trust

# MAJOR FORMS OF BUSINESS ORGANISATION

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## COMPANY

A foreign company seeking to establish a business in Australia may choose among three main forms of corporate organisation.

### LOCALLY INCORPORATED SUBSIDIARY OF A FOREIGN COMPANY

The most common type of company is a proprietary company limited by shares. Australia has a uniform national corporations law; as such there is no geographical restriction upon the territorial operation of an Australian company, nor a requirement to register in each Australian state and territory in which it seeks to operate.

A local subsidiary (usually a proprietary company) is a separate legal entity from its foreign parent or holding company. It must be incorporated in Australia and is required to comply with all relevant Australian laws. A proprietary company must also have at least one shareholder, and not more than 50 non-employee shareholders. It must also have at least one director and at least one director must ordinarily reside in Australia.

An Australian company will usually be fully taxed in Australia on all its income and profits, whether that income arises from its business activities conducted in Australia or elsewhere in the world. However, income of an Australian company that is from a non-Australian source that flows through to an Australian non-resident shareholder will, in certain circumstances be outside the Australian tax net. An Australian company must file an annual statement with ASIC and, depending on the size of the proprietary company, accounts. Usually a “small proprietary company” is exempt from lodging accounts with ASIC. However, if the company is controlled by a foreign company and its financial results are not consolidated into financial statements that another company or a registered foreign company has lodged with ASIC, it will be required to lodge accounts with ASIC.

As a local subsidiary is a separate legal entity, the liability of the foreign company parent for its subsidiary’s indebtedness is, in the absence of guarantees given by the parent or other contractual arrangements, limited to any unpaid amounts on share capital subscribed for by the parent. However, the parent may also be liable for insolvent trading by its subsidiary in circumstances where the parent ought to have known that the subsidiary was insolvent.

There is no minimum capitalisation requirement imposed by Australian company laws on an Australian company, although, in certain circumstances, various taxation acts may impose capitalisation requirements. Nonetheless, in Australia, a company with paid-up capital of \$1 is not uncommon.

**The cost of incorporating an Australian company is modest. The incorporation process is quick and easy, with same day incorporations possible provided all relevant information regarding directors, shareholders and share capital is known.**



# MAJOR FORMS OF BUSINESS ORGANISATION

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## BRANCH OFFICE OF A FOREIGN COMPANY

A branch office is simply a local Australian office of the foreign company and does not have a separate legal identity from its parent. If the foreign company “carries on business in Australia”, it is required to be registered with ASIC and must comply with all relevant Australian laws. Failure to register a foreign company carrying on business in Australia is a strict liability offence and could result in fines.



**The branch office will be taxed in Australia on all its income and profits that arise from its business activities conducted in Australia, although the provisions of applicable Double Taxation Agreements between Australia and the foreign parent’s country of incorporation may reduce the tax otherwise payable in Australia.**

The branch office must file an annual report and accounts. If the accounts are not in English then a translation must be filed.

As a branch office is not a legal entity separate from the foreign company, the foreign company will be liable for the debts and other obligations of the branch office. This is because all transactions will be entered into by the foreign company.

Some advantages of having a local subsidiary or branch office compared with appointing an agent include:

- Direct control over the business in Australia
- Potential cost reductions achieved by operating locally
- Identification with local business partners and customers
- Opportunities to establish or build a local corporate identity
- Access to other markets from a base in Australia

# MAJOR FORMS OF BUSINESS ORGANISATION

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## JOINT VENTURE

Forming a joint venture with an Australian organisation is a popular form of business organisation for foreign companies and investors. A joint venture is a business organisation where two or more people or entities become involved in a specific project or jointly participate in the conduct of a business operation.

There are two main forms of joint venture.

### UNINCORPORATED JOINT VENTURE

An unincorporated joint venture is not a separate legal entity. Rather, it is a contractual arrangement between two or more people who agree to conduct business for a particular purpose.

Where the participants share profits of the joint venture, the joint venture may, in certain circumstances, be classified as a “partnership”. If it is possible to structure the arrangements so that the participants share output rather than profit, then the joint venture may not be a partnership.

### INCORPORATED JOINT VENTURE

More commonly, a separate special purpose proprietary company is incorporated to operate the joint venture and each participant becomes a shareholder in the joint venture company. This confers on them the protection of the company’s limited liability status. Australian company law regulates this type of joint venture company.

There are many different ways to structure a joint venture, which may require specific treatment depending on the type of industry or project in which the joint venture will be involved. In addition, the participants must carefully consider foreign investment rules, taxation matters (which can differ depending on the structure), management and control of the joint venture, the respective rights and obligations of the participants, supply and purchase agreements, the division of profits, the sharing of costs and expenses and the termination or sale of the joint venture. These issues are typically addressed in a joint venture (shareholders) agreement that is entered into between the shareholders and the joint venture company.



# MAJOR FORMS OF BUSINESS ORGANISATION



## PARTNERSHIP

A partnership is an arrangement between two or more people or entities to carry on a business with a view to profit. It may be formed by an agreement between the partners. In the absence of an agreement, the Partnership Acts in the various states and territories set out many of the partnership rules that apply to the arrangement. The Partnership Acts follow the well-established common law model. If the partnership does not conduct business under the actual names of its partners, the partnership name in which the partnership operates must be registered with ASIC.

Ordinarily, partnerships are not separate legal entities and the partners have an unlimited personal liability, both jointly and severally, for the debts and obligations of the partnership. In addition, each partner is deemed to be an agent for the others and so may act on behalf of and bind the other partners.

The laws of Australian States permit limited liability partnerships, which limit the liability of some partners who do not manage the partnership business. They are generally used for specialist investment activities and are not commonly used.

**A non-limited liability partnership is not subject to taxation in its own right, but the partners are liable to pay tax on the amounts they receive from their partnership income and profits, which are assessed at the partners' marginal tax rates. A limited liability partnership is taxed as a company.**

# MAJOR FORMS OF BUSINESS ORGANISATION

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## TRUSTS

A trust is a legal relationship whereby a trustee, being the legal owner of trust property, deals with that property for the benefit of some other person or persons (the beneficiaries) or for some object or purpose permitted by law. A trust is not a separate legal entity and does not enjoy limited liability, although it is common to use a company as the trustee and thereby limit the potential liability of the trustee. A trustee owes a high standard of care to beneficiaries and is subject to several duties. These include the duty to act in good faith, to avoid conflicts of interest, to make full disclosure to beneficiaries and not to make a secret profit or gain. Trusts are widely used in Australia as a trading vehicle. The two main forms of trust are discretionary trust and unit trust.

### DISCRETIONARY TRUST

In a fully discretionary trust, the trustee has an absolute discretion in distributing both capital and income among the beneficiaries and it may choose to not allocate to some beneficiaries at all. Discretionary beneficiaries have no proprietary interest in the trust assets. The role and power of the trustee, the purposes of the trust fund and the rules regarding its use are generally contained in a trust deed. Discretionary trusts are typically used in family and family-owned business arrangements as they can confer tax benefits on the beneficiaries and they are relatively simple to create and operate.

### UNIT TRUST

A unit trust is a common investment vehicle that allows the pooling of investment funds and the investment of those funds through a trustee, whose powers are clearly defined in the trust deed. Trust beneficiaries, known as unit holders, have a fixed share of the profits of the trust. The unit holders can transfer their units in similar fashion to shares in a company. The trustee may be assisted by a separate entity known as a manager, whose job is to select and manage the investments while the trustee acts as a guardian of the interests of the unit holders. It is common for the unit holders to enter into a unit holders agreement, which covers issues similar to issues covered in a shareholders agreement.

### HYBRID TRUST

Less common is a hybrid trust, which is simply a trust that possesses the characteristics of more than one of the above trust categories. The trustee of a hybrid trust generally has the power to distribute income and capital among the beneficiaries as described in the trust deed, as in a standard discretionary trust. However, a hybrid trust generally also allows for units in the trust to be issued, entitling the unit holders to receive at least part of the income and/or capital of the trust in proportion to the number of units that they hold.

**In certain circumstances there may be advantages in selecting a trust as the form of business organisation, particularly from a taxation viewpoint. However, care must be taken to determine that it is appropriate for, among other things, the type of business, the taxation status desired, the required return, the degree of control required and the flexibility needed.**

# ABOUT BENNETT & PHILP

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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.

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We provide personalised service across six core areas of specialisation:



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Property



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Estate



Compensation  
Law



Wills & Estates

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We care about the growth of your business; and meeting your individual needs. As a law firm with the full range of business advisory and personal legal services, we can support you across every stage of life and business.

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