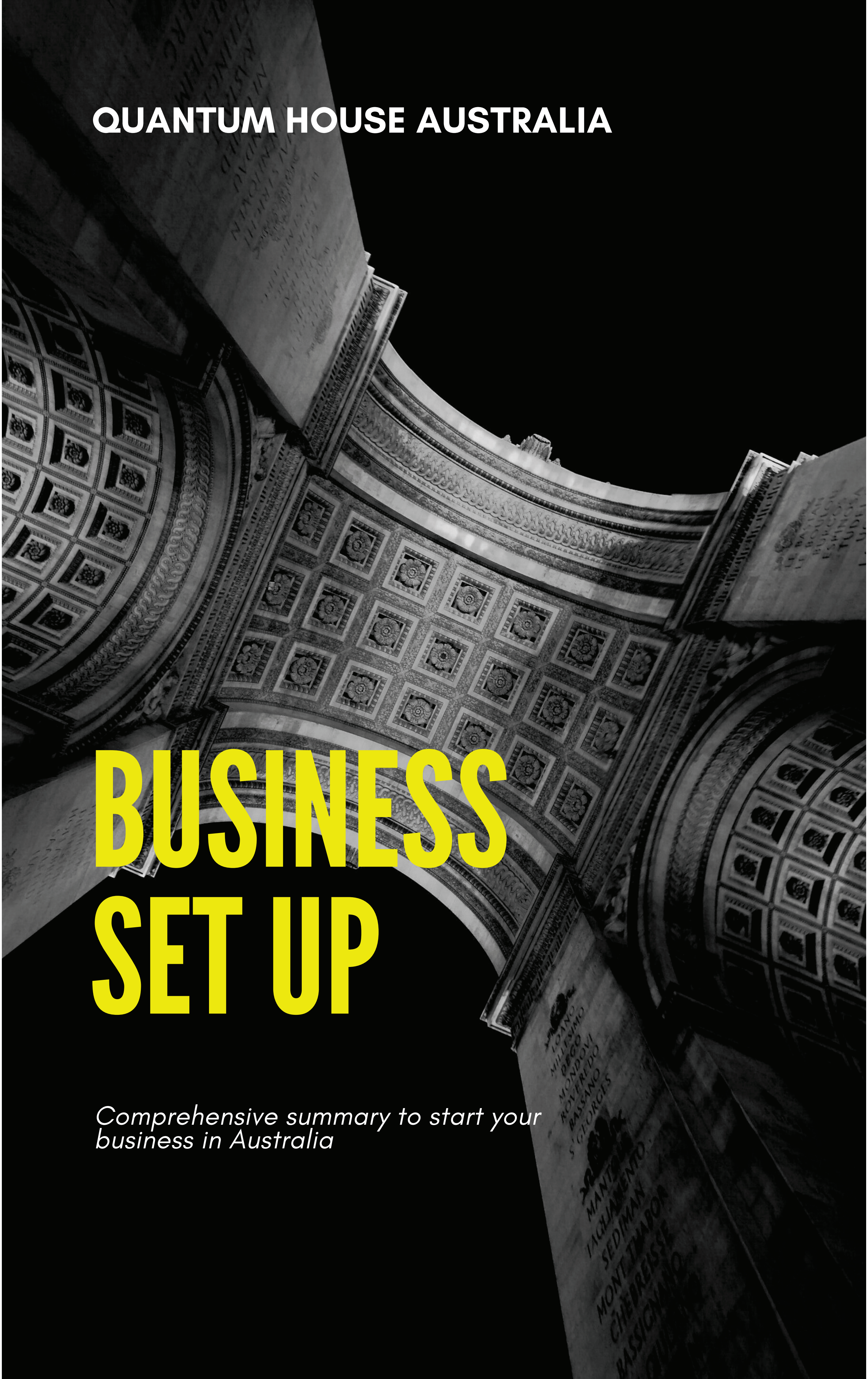

QUANTUM HOUSE AUSTRALIA

BUSINESS SET UP

Comprehensive summary to start your business in Australia

Chapter 1. A New Business Setup

If you have a business concept and are willing to make a profit from the business, you now need to have an Australian Business Number (ABN) for your business along with other registrations, depending on the type of business structure and business itself. There are many different options for business structure, and you need careful consideration to select the correct type of business structure as they have different perspectives on legal and taxation consequences. Also, it is sometimes difficult and costly to change the business structure while running the business.

1.1 Registration of a Business

If you plan to start a business now, you need to have an Australian Business Number (ABN) to start a business in Australia. The ABN is a single identifier for all business dealings with the Australian Taxation Office (ATO) and other government agencies. Registering for ABN is easy to register for Goods and Services Tax (GST) if the annual turnover is expected to be over $75,000. All not-for-profit organisations with a yearly turnover of $150,000 must register for GST. If a company is running your business, the Australian Company Number (ACN) is required to get the ABN. Also, a business is required to get a tax file number (TFN) and a business name registered. A business name is the name under which a person or other entity trades. If your trading name is different from your entity name (your personal name or company name), you are required to register your business name in each state in which you are trading. The main objective of requiring registration of a business name is to enable the public to find out who is operating the business. However, registering a business name does not mean your business name is legally protected. The best way to protect a trade name is to register a trademark.

However, from 28 May 2012, ASIC will be taking over the registration of business names from the states and territories. To register a business name, you must complete an online application and lodge it with ASIC.

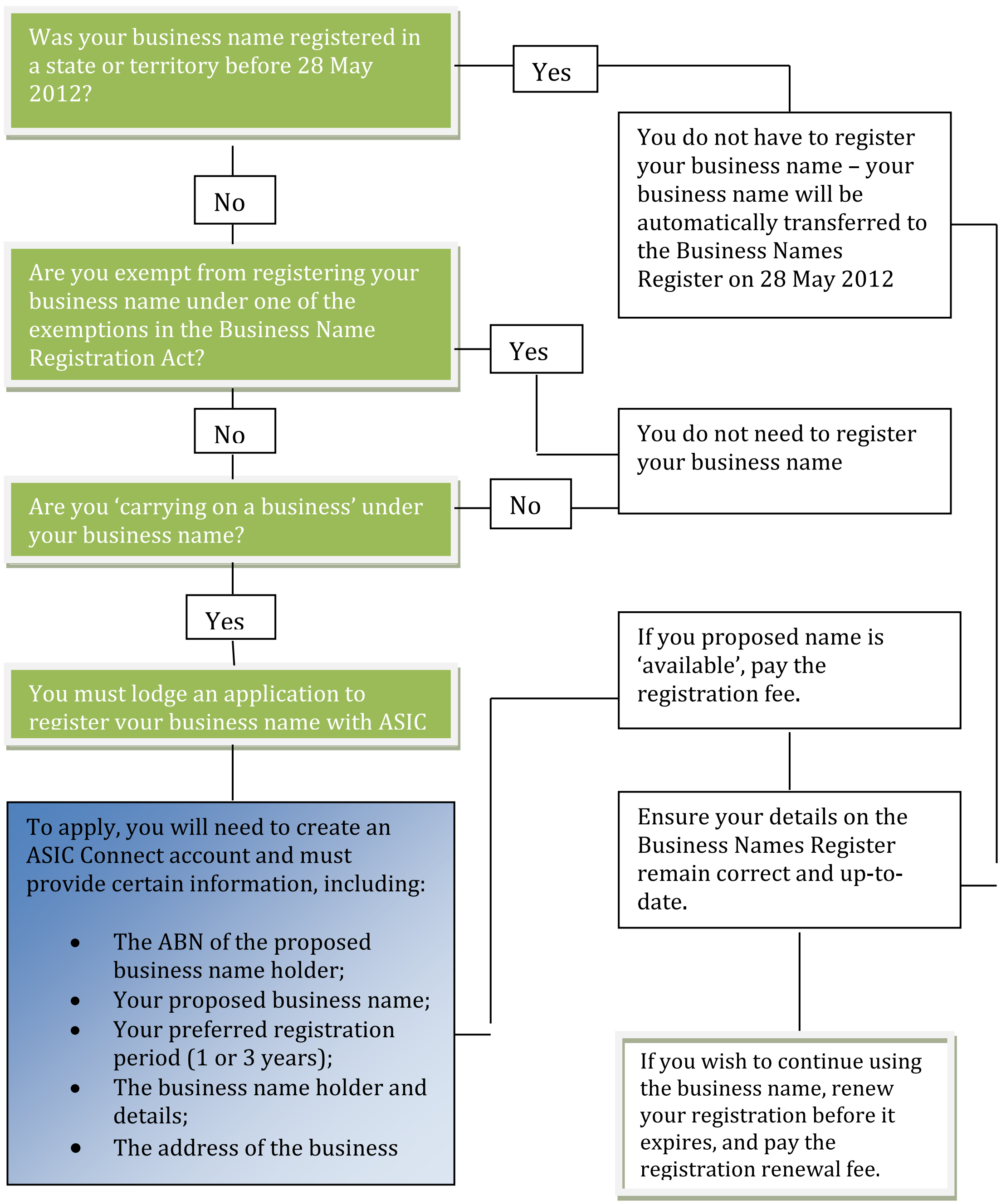

Figure 1. Summary of the new business name registration process with ASIC

If your business name is currently registered in a state or territory, it will be automatically transferred to ASIC's Business Names Register and you do not need to register with ASIC.

So the general process of registration of a business in Australia is,

1.2 Business Structures

There are several ways to run a small business in Australia. You can set up your business with your own name as the sole trader, or you can set up a company that is separate from you. Partnership and trust structure are other options to consider. It is very important to choose the right business structure before you commence business activities with regard to legal obligations, taxation, and other matters such as asset protection purposes. Changing the business structure while you are running can be costly and sometimes cause inevitable negative consequences (HumphreyNicholas, 2004).

Company

A company is a separate legal entity from its owners (shareholders). It can incur debts, sign contracts, and sue or be sued. A company can own its own property and must lodge its own tax return. In a company, ownership and control are separate. The shareholders own the company, but the directors exercise most of the control over the business.

Companies are registered with the Australian Securities and Investments Commission (ASIC). Once registered, you will have an Australian Company Number (ACN) mentioned above. You also need to file your company every year with ASIC with costs of $290 at the time of this writing (June 2023).

Under the Corporations Act, a shareholder's liability is limited to the amount of capital they contributed, plus any unpaid capital. Directors of a company, however, can be personally liable to the company's creditors if the directors knew that the company was trading while it was insolvent. Having an insurance policy over a director's liability is common to protect the director against his or her personal liabilities.

Private companies (Pty Ltd) are divided into two groups, 'large proprietary companies' and 'smaller proprietary companies'. If a company satisfies any of two of the below categories, then the company is a large proprietary company.

- Gross operating revenue of more than $50 million
- Gross assets of more than $25 million
- Having more than 100 employees

A large proprietary is required to lodge an audited financial report with ASIC. Smaller companies are not required to prepare a financial report unless 5 per cent of shareholders require it.

Private companies are only required to have one director who is resident in Australia. Directors are bound to the various duties under the Corporations Act, and breach of these duties may result in large fines or imprisonment.

Sole Trader

A sole trader is someone who owns and runs the business by themselves. All of the property of the business, such as leases, stock and office equipment, is owned by the owner.

The results in the following legal consequences, among others:

- The income of the business is the owner's personal income;
- The owner is responsible for any liability of the business, and business creditors can satisfy liabilities out of the owner's assets;
- When someone deals with a sole trader business, it is the owner who is legally obliged to carry out the deal;
- The owner is personally responsible for any business wrongdoing, even if an employee commits it.

There are several advantages to being a sole trader.

- As all of the business's rights, obligations and property are in the owner's name, there is no need for any additional legal arrangement. As a result, setting up a business as a sole trader is simpler and easier than any other form of business;
- Maintenance of a sole trader business is more straightforward. As a sole trader, there are no requirements for some of the administrative tasks required for other business structures, such as annual meetings, lodgement of returns or the passing of resolutions for certain actions;
- The minimal legal disclosure regulations attached to a sole trader mean you have the greatest privacy;
- Just as the owner owns the assets of the business, so all of the profits of the business are owned by the owner. There is no need to share profits, nor is there any obligation to use the profits for the good of the business.

However, there are several disadvantages to the sole trader structure, including the following.

- The sole trader is liable for all the obligations of the business. In the event of insolvency, the sole trader must cover the shortfall from personal funding;
- A sole trader may not offer shareholdings to other people as such the only way to raise capital is by borrowing debt or using personal assets;
- As the owner is the business, both legally and commercially, it can be difficult to sell the business if the owner dies or simply wishes to get out;
- Sole traders are taxed at individual marginal tax rate, but companies are presently taxed at a lower rate than individuals unless the taxable income is in low level.

Partnership

Partnership is defined as 'an association of two or more people formed for the purpose of carrying on a business with a view to profit'. A partnership has no separate legal existence. Instead, the partnership agreement sets up the rights and obligations of the partners.

With a partnership, the business is made up of all of the partners acting together. Under this arrangement, every one of the rights, obligations, assets and liabilities of the business is owned and owed by each of the partners, both separately and as a group. As a result, each of the partners has an interest in all of the property and the profits of the business. (HumphreyNicholas, 2004)

One should note that each partner is liable for debts incurred by the other partners regardless of knowledge of the other partner and the liability of partners is not limited to the assets of the business, i.e. if a debt is greater than the available funds of the business, a creditor can recover from the personal funds of the partners. Partners will have a 'joint and several liability'. A creditor can recover the entire amount of any debt from any partner, even if another partner was responsible for creating the liability. This is an important fact that you should consider before engaging in partnership-based business.

The basic principle of the partnership extends to control of the business as well. Each partner will have an equal say in controlling the business, unless the partnership agreement specifies otherwise.

As with companies and sole traders, partnerships have number of advantages and disadvantages built into the structure. The advantages include the followings:

- A partnership can split the income of the business between the partners. If the partners are members of the same family, the income can be evenly split so as to minimise the amount of a family's income which is in higher tax brackets;
- As the income of the business is really the income of the partners, losses of the business can be offset against other income of the partners. If the partnership agreement allows, it is possible to split income on a different basis to losses;
- If the partners desire, it can be possible to access assets of the business easily. This must be expressed in the partnership agreement.
- Joint and several liability means that creditors will have greater security for any loans advanced to the partnership, meaning that they will be more willing to take the risk. However, a partnership structure restricts equity finance to what is contributed by new and existing partners.

The disadvantages of the partnership structure can be summarised as follows:

- Each partner is personally responsible for each and every debt of the partnership. As every partner is bound by the actions of any one partner, partners can find themselves liable for a debt that was incurred without their knowledge or consent;
- As each partner has an interest in the partnership, making decisions for the business requires considering the interests of all of the partners. This may cause management difficulties;
- A partnership is a legal relationship between a set group of partners. If any one of the partners leaves that set group, the previous partnership no longer exists and a new partnership must be formed.

Trusts

Under a trust structure, a trustee owns the assets of the trust for the beneficiaries, which are often family. The general rule is that a trustee may not benefit from the property of the trust. The trustee is entitled to be reimbursed for expenses but is not entitled to be paid fees unless the trust deed provides for this or all the beneficiaries agree to the payment. Trustees cannot sell the property and keep the proceeds for their own use.

The specific rights, restrictions and powers of the trustee, manager and beneficiary are set out in a document called a trust deed. This sets out the objectives of the trust and describes the investment/business guidelines and how the income is distributed.

Types of trust

There are two basic types of trust – unit trusts and discretionary trusts. In a unit trust, the beneficiaries hold 'units' in a trust, similar to how shareholders hold shares in a company. However, the most commonly used in small business trading trusts is a discretionary trust. In a discretionary trust, the beneficiaries are specified as a class of persons. None of those people has a claim on a fixed proportion of the trust property, unlike a unit trust. The trustee has the discretion to distribute the income of the trust in any way among the beneficiaries. This means you can apportion income between members of your family to minimise tax. However, under the tax law, trusts cannot be established for the express purpose of avoiding tax.

The trust structure may also make it harder to access assets quickly. Unless the trust deed provides otherwise, assets cannot be taken out of a trust without the consent of all the beneficiaries. And in the case of some discretionary trusts, it may not be possible to determine who all the beneficiaries are.

There are many advantages and disadvantages to a trust structure.

- A discretionary trust allows the trustee to split income between the beneficiaries, allowing a family to put as much of a business's income as possible into low tax brackets;
- If the trustee is a company, the trust can take advantage of the corporate structure in terms of limited liability and ease of succession.

The drawbacks of trusts include the following:

- The assets of the business are tied up in a complex structure, which makes it difficult to access assets easily;
- In order to trade as a trust, a trustee company may need to be set up and a trust deed drafted. The setup costs for this can be significant;
- What the trustee can do may be limited by either the trust deed or the law of trusts (HumphreyNicholas, 2004).

1.3 Licences & Permits

The state and federal governments require certain types of businesses to obtain licences or permits to carry out business. As a pre-condition to obtaining a licence, you may need to satisfy certain criteria, such as educational requirements, fitness, character or experience, as well as paying a fee. The objective of this is to protect consumers from 'shonky' and untrained service providers.

The Business Licence Information Service (BLIS) provides a centralised information service in relation to the various licences and permits required to operate a business. If you are planning to run your business from home, you may also need to comply with local council regulations(HumphreyNicholas, 2004).

Industries subject to registration

Special licences, permits, approvals and registrations are required by a variety of different government authorities for a variety of different industries, including:

- Advertising agents
- Auctioneers
- Builders/plumbers/electricians
- Conveyancers
- Dealers/advisors in securities and other financial products
- Employment agencies
- Importers of medical goods/devices
- Real estate agents
- Restaurants
- Retail outlets
- Security guards
- Tax agents/advisers
- Travel agents
- Valuers

Retail outlets and factories are subject to a broad range of additional regulations, including:

- Health regulations
- Safety regulations
- Storage of chemicals
- Trading hours
- Waste disposal
- Water/gas/electricity connections

You will also need a permit to display signs or advertising materials outside your premises.

For further information please contact our team:

Website: www.quantumhouse.com.au
Email: inquiry@quantumhouse.com.au
Phone: 1300 809 697

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