

# Choosing a Business Structure Checklist

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## Purpose of this checklist

To help you assess the best business structure for your business.

### 1. Consider the type of income earning activity.

- 1.1 Personal Services Income (consider Alienation of Personal Services Income rules); \_\_\_\_\_
- 1.2 Business income or passive income (income splitting opportunities); \_\_\_\_\_
- 1.3 What type of income will be earned?  
*eg ordinary income, foreign income, capital gains;* \_\_\_\_\_
- 1.4 Will income streaming opportunities be available? \_\_\_\_\_
- 1.5 Do professional associations limit the range of entities that may be used? \_\_\_\_\_
- 1.6 Does the supplier of work to the business dictate the type of structure to be used? \_\_\_\_\_
- 1.7 How profitable will the business be? \_\_\_\_\_
- 1.8 Is it worth spending a lot of money on establishing a complex structure? \_\_\_\_\_
- 1.9 Are you in a professional practice? \_\_\_\_\_
- 1.10 Is a service trust appropriate? \_\_\_\_\_

### 2. Will you have significant assets? Consider asset protection/capital gains tax issues.

- 2.1 Will the assets be overcapitalised?  
*CGT concessions may not be important.* \_\_\_\_\_
- 2.2 Is the business expected to grow to over \$5 million value when assets are to be sold? If not, the controlling individual test for company or trust is irrelevant. \_\_\_\_\_
- 2.3 Consider Active Asset concession for business premises (if not held by the business, must be held by a connected entity). \_\_\_\_\_
- 2.4 Does the business intend to donate to charity as a trust distribution? \_\_\_\_\_

### 3. Who will be the business owners?

- 3.1 For arms length parties, a fixed interest/share would be appropriate. \_\_\_\_\_
- 3.2 Can the controlling individual test be met for the CGT concessions? \_\_\_\_\_
- 3.3 Are new partners/equity holders to be admitted in the future? \_\_\_\_\_
- 3.4 Does the structure provide ease of entry for new partners/owners? \_\_\_\_\_

3.5 Will the structure offer independence to each of the equity holders, such that one can sell their interest without adversely affecting the other/s? \_\_\_\_\_

**4. Consider the owner's family**

4.1 Consider ages for income distribution opportunities. \_\_\_\_\_

4.1.1 Will the family work in the business? \_\_\_\_\_

4.2 Can family members receive a commercial salary? \_\_\_\_\_

4.3 Can assets be transferred to a family member for income protection purposes if they are not business owners? \_\_\_\_\_

**5. Consider the owner's (and family's) current amount of debt and assets.**

5.1 If this is significant, consider impact on asset protection. \_\_\_\_\_

**6. Consider the age of the owner/s with respect to:**

6.1 Maximising superannuation contributions \_\_\_\_\_

6.1.1 CGT retirement exemption \_\_\_\_\_

6.1.2 Continuity of the business \_\_\_\_\_

**7. Consider your prior experience:**

7.1 Will you understand the structure and be able to manage it effectively? \_\_\_\_\_



- *eg not using the company bank account for private purposes without a loan agreement in place?*

**8. Does the structure accommodate your expectations, for example:**

8.1 Regular income distributions \_\_\_\_\_

8.2 Retention of profits \_\_\_\_\_

8.3 Ability to borrow money from the entity \_\_\_\_\_

8.4 Long term investment versus quick sale \_\_\_\_\_

**9. What are you most concerned about?**

9.1 Asset protection \_\_\_\_\_

9.2 Tax minimisation \_\_\_\_\_

9.3 Continuity of the business \_\_\_\_\_

**10. How will the business be funded?**

- 10.1 If injections of capital from owners, consider the company debt/equity rules. \_\_\_\_\_
- 10.2 If there will be significant negative gearing, consider that losses could be trapped if using trust or company. Also franking credits may be lost if net income is not derived by a trust. \_\_\_\_\_

**11. Will assets from another entity be transferred into the new entity? Consider:**

- 11.1 Stamp Duty \_\_\_\_\_
- 11.2 Legal costs \_\_\_\_\_
- 11.3 CGT roll over provisions \_\_\_\_\_
- 11.4 GST \_\_\_\_\_

**12. Will the new entity be sufficiently connected with an existing entity in order to meet threshold tests relating to:**

- 12.1.1 Average annual turnover for eligibility to Simplified Tax System \_\_\_\_\_
- 12.1.2 GST grouping \_\_\_\_\_
- 12.1.3 CGT concessions for active assets \_\_\_\_\_

**13. Taking into account each of the considerations above,**



- *Look at the advantages and disadvantages of each structure and the comparison between entities in the following table.*

## Links

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1. [Alienation of personal services income: financial planners fact sheet](#)
2. [ATO - Guide to Capital Gains for Small Business](#)
3. [ATO - Advanced Guide to Capital Gains for Small Business](#)
4. [At call loans - questions and answers](#)

	Sole Trader	Partnership	Company	Unit Trust	Discretionary Trust
Established By	N/A	Partnership Agreement	Constitution	Trust Deed	Trust Deed
Establishment and Operating Costs	Low	Medium	High	High	High
Perpetual Existence	Terminates on death	Terminates on change of partners	Yes	Must vest within certain period	Must vest within certain period
Limited Liability	No	No	Yes	Yes, if corporate trustee	Yes, if corporate trustee
Controlled by	Individuals	Partners	Directors/Shareholders	Trustee/Unitholders	Trustee/Appointer
Flexibility for new equity holders	No	No	Yes, but consider value shifting rules	Yes, but consider value shifting rules	Yes
Does principal have fixed interest	Yes	Yes	Yes	Yes	No
Asset Protection Allowed	No	No	Yes	Yes	Yes
Method of distribution to equity holders	Wholly to sole trader	Distribution in proportion to partnership share (and partners salary if allowed in Partnership Agreement)	Dividends accordingly to shareholding	Trust distribution in accordance with unitholding	Trust distribution in accordance with trustee resolution
Streaming of Income	No	No	No	Yes	Yes
Distribution of losses	Individual can use	Partners can use	Remain in company, and must meet tests to recoup	Remain in trust, and must meet tests to recoup	Remain in trust, and must meet tests to recoup
Transfer of losses	No	No	Yes, if part of consolidated group	No	No
Non Commercial Losses rules	Apply	Apply	Not Applicable	Not Applicable	Not Applicable
Tax Rate applicable	Marginal Tax Rate	Partners marginal tax rate	Company tax rate (30%)	Beneficiaries marginal tax rate (or 48.5% if retained in trust)	Beneficiaries marginal tax rate (or 48.5% if retained in trust)

Basis of Accounting for Tax	Cash or accruals	Cash or accruals	Accruals Cash if in STS	Accruals Cash if in STS	Accruals Cash if in STS
PAYG Instalment Arrangements	Paid by individual	Paid by individuals	Paid by company	Only paid if income retained in trust	Only paid if income retained in trust
Employment of principal	No	No	Yes	Yes	Yes
FBT applicable to benefits provided to principal	No	No	Yes	Yes	Yes
Superannuation Contributions	Self Employed	Self Employed	Employer Sponsored	Employer Sponsored	Employer Sponsored
Remuneration for associates	Yes, but limited by s26-35 and PSI rules	Yes, but limited by s26.35 and PSI rules	Yes, but limited by s109 and PSI rules	Yes, although not limited by a specific provision, consider s8-1, Part IVA and PSI rules	Yes, although not limited by a specific provision, consider s8-1, Part IVA and PSI rules
Ability of principal (or associate) to withdraw money	As drawings	As partner drawings	Must have Div 7A loan agreement	Allowed, but consider s109UB	Allowed, but consider s109UB
50% CGT Discount	Yes	Yes	No	Yes	Yes
Controlling Individual Test for CGT Concessions	N/A	N/A	Applies	Applies	Applies
R&D Concessions	No	No	Yes	No	No