

THE LAW
FIRM FOR
STARTUPS



STRUCTURING & TAX: TIPS FOR NEW BUSINESS

PRESENTED BY
BEN GOULDSON, HEAD OF BOLTER



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AGENDA

1. Key structuring issues affecting startups
2. Key tax issues affecting startups
3. Incentives available for corporations

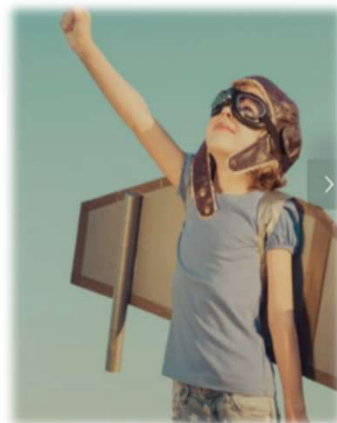
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1. KEY STRUCTURING ISSUES

- A) Typical position
 - Sole Trader
 - Partnership of Individuals
 - Side Hustle
 - Conflicts of Interest
- B) Preferred position
 - Separate legal entity
 - Arms length dealings
 - Timing issues
 - Managed conflicts
- C) Why



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1. KEY STRUCTURING ISSUES

Examples

- Engineer working for Mill Relining Company in the mining industry invents a new method for mill maintenance
- University Professor working for University of Queensland in Life Sciences invents a new trait technology for wheat which is resistant to a fungi which typically destroys crops
- Gym instructor working for Jets Fitness Australia invents a new all in one gym
- Baker at Tip Top Bakery develops a new way to bake bread which lengthens its shelf life without preservatives
- Sales Representative for Black & Decker invents a new system for drill head guidance and depth measurement

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1. KEY STRUCTURING ISSUES

C) Why -Employment contract – 'Intellectual Property'

- 1.1. You agree to immediately disclose to CG Law Services all Intellectual Property, valuable inventions, discoveries, improvements, designs, trade marks, work or other subject-matter created by or on behalf of you during the course of or in connection with performing work or fulfilling obligations under your employment with CG Law Services, whether capable of attracting Intellectual Property Rights or not.
- 1.2. By the Agreement, you assign to CG Law Services:
 - (a) any Intellectual Property Rights that may arise or be capable of being claimed as a result of anything done by or on behalf of you as a result of, during the course of or in connection with performing work or fulfilling obligations under your employment with CG Law Services; and
 - (b) your right, title and interest in any Intellectual Property.
- 1.3. You agree that the assignment pursuant to cl 18.3 takes effect as each part of the Intellectual Property Rights and/or Intellectual Property referred to in cl 18.3 comes into existence.
- 1.4. You consent to the infringement of any of your moral rights in the Intellectual Property by CG Law Services and CG Law Trading, CG Law Services's and CG Law Trading's successors in title, assigns, licensees and any person authorised by CG Law Services and CG Law Trading.
- 1.5. During and after your employment with CG Law Services, CG Law Services and CG Law Trading may alter any Intellectual Property.
- 1.6. On demand by CG Law Services, and in any event on the expiry or termination of your employment with CG Law Services for any reason, you agree that you will:
 - (a) deliver to CG Law Services all Intellectual Property, any part and all books, notes, notebooks, diaries, papers and all other materials containing, revealing, summarising, commenting on or referring to any part of the Intellectual Property in your possession or control; and then
 - (b) delete all Intellectual Property held electronically in any medium in your possession or control.

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1. KEY STRUCTURING ISSUES

C) Why -Employment contract – 'Confidential Information'

- 1.1. You acknowledge that the Confidential Information has commercial value and CG Law Services and CG Law Trading owns all the Confidential Information.
- 1.2. You agree that you will not, both during the course of and after your employment with CG Law Services, for whatever reason:
 - (a) discuss the existence of, or the contents or details of, the profit share agreement;
 - (b) the percentage of profit prescribed to you under profit share agreement;
 - (c) the amount of payment received pursuant to the profit share agreement.
- 1.3. You agree that you will not, both during the course of and after your employment with CG Law Services, for whatever reason:
 - (a) use the Confidential Information for any purpose other than for the benefit of CG Law Services and CG Law Trading;
 - (b) either for yourself or any third party, use, disclose, appropriate, copy, memorise or in any manner reproduce (excluding any copying or reproduction necessary to perform work or fulfil obligations under your employment with CG Law Services) any of the Confidential Information without obtaining the prior written consent of CG Law Services and CG Law Trading; and
 - (c) make improper use of the Confidential Information acquired:
 - i. by virtue of the Agreement; or
 - ii. during the course of, or acquired as a result of, your employment with CG Law Services;

to gain directly or indirectly, an advantage for yourself or for any other person or to cause detriment to CG Law Services and CG Law Trading.

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1. KEY STRUCTURING ISSUES

C) Why -Employment contract – 'Conflict of Interest'

Conflict of Interest during Employment

1. During your employment with CG Law Services you must not:
 - (a) (either on your own behalf or through any other person) engage in any activity that:
 - i. conflicts with your role at CG Law Services; or
 - ii. conflicts with CG Law Services and CG Law Trading business and the services it provides;
 - (a) hold any shares or directorships or other senior positions in any entity (howsoever defined) that directly competes with CG Law Services and CG Law Trading or provides services that are similar or the same as CG Law Services and CG Law Trading without written consent from the Managing Director or his delegate.

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1. KEY STRUCTURING ISSUES

C) Why

-Section 182 *Corporations Act 2001 (Cth)*

CORPORATIONS ACT 2001 - SECT 182

Use of position--civil obligations

Use of position--directors, other [officers](#) and employees

(1) A [director](#), secretary, other [officer](#) or employee of a [corporation](#) must not improperly use their position to:

- (a) gain an advantage for themselves or someone else; or
- (b) [cause](#) detriment to the [corporation](#).

Note: This [subsection](#) is a [civil penalty provision](#) (see [section 1317E](#)).

(2) A [person](#) who is [involved in](#) a contravention of [subsection \(1\)](#) [contravenes](#) this [subsection](#).

Note 1: [Section 79](#) defines [involved](#).

Note 2: This [subsection](#) is a [civil penalty provision](#) (see [section 1317E](#)).

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1. KEY STRUCTURING ISSUES

C) Why

-Section 183 *Corporations Act 2001 (Cth)*

CORPORATIONS ACT 2001 - SECT 183

Use of information--civil obligations

Use of [information](#)--directors, other [officers](#) and employees

(1) A [person](#) who obtains [information](#) because they are, or [have](#) been, a [director](#) or other [officer](#) or employee of a [corporation](#) must not improperly use the [information](#) to:

- (a) gain an advantage for themselves or someone else; or
- (b) [cause](#) detriment to the [corporation](#).

Note 1: This duty continues after the [person](#) stops being an [officer](#) or employee of the [corporation](#).

Note 2: This [subsection](#) is a [civil penalty provision](#) (see [section 1317E](#)).

(2) A [person](#) who is [involved in](#) a contravention of [subsection \(1\)](#) [contravenes](#) this [subsection](#).

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1. KEY STRUCTURING ISSUES

C) Why

- Common Law Implied Duties
 - Exhibiting fidelity and good faith to your employer
 - Trust and confidence to each other
- Future Proofing
 - Sole Trader, Trusts, Joint Ventures, Company, Subsidiaries
 - Company – shares held personally v family discretionary trust
 - Employee Share Option Plan (ESOP)
 - Capital Raising (Venture, Private, Angel, Seed, Crowdfunding)
 - Sale / IPO
 - Safe Harbour Laws (Insolvency and Valuations)
 - Live forever – no rule against perpetuities
- CONSIDER THE BIG PICTURE

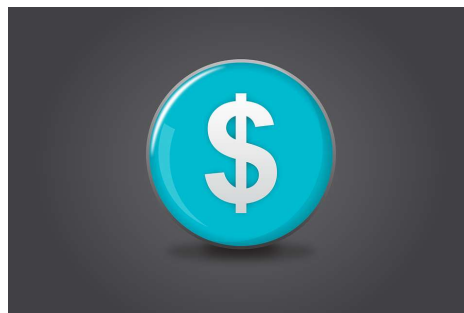
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2. KEY TAX ISSUES

- A) Income Tax
- B) Capital Gains Tax
- C) R&D Tax Incentives



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2. KEY TAX ISSUES

A) Income Tax - Individual

Tax Scale For Year Ended 30 June 2022

Tax scale 2021-22	
Taxable Income	Tax On This Income
\$0 to \$18,200	Nil
\$18,201 to \$45,000	19c for each \$1 over \$18,200
\$45,001 to \$120,000	\$5,092 plus 32.5c for each \$1 over \$45,000
\$120,001 to \$180,000	\$29,467 plus 37c for each \$1 over \$120,000
\$180,001 and over	\$51,667 plus 45c for each \$1 over \$180,000

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2. KEY TAX ISSUES

A) Income Tax - Company

Progressive changes to the company tax rate

Income year	Aggregated turnover threshold	Tax rate for base rate entities under the threshold	Tax rate for all other companies
2017-18	\$25m	27.5%	30.0%
2018-19 to 2019-20	\$50m	27.5%	30.0%
2020-21	\$50m	26.0%	30.0%
2021-22 and future years	\$50m	25.0%	30.0%

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2. KEY TAX ISSUES

B) Capital Gains Tax

- From 1 July 2016 investing in a qualifying early stage innovation company (ESIC) may provide eligibility for modified CGT treatment
- Investors may be able to disregard capital gains on qualifying shares continuously held for at least 12 months and less than ten years.
- Employee Share Schemes – tax concessions or special tax treatments may be available, particularly for startup companies

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2. KEY TAX ISSUES

B) Capital Gains Tax

- ESIC Tests:
 - early stage test
 - +
 - either:
 - the 100 point innovation test (self assessed); or
 - the principles based innovation test (ATO ruling).
- Got to: [Questions | Early stage innovation company \(ESIC\) decision tool \(ato.gov.au\)](#)
- Early Stage Test - 4 requirements to be met:
 - Australian company
 - total expenses of \$1 m or less in previous year
 - assessable income of \$200,000 or less in previous year
 - equity interests must not be listed on the ASX or other exchanges

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2. KEY TAX ISSUES

B) Capital Gains Tax

Table: 100-point innovation test

Points	Criteria
75 points	At least 50% of the company's total expenses for the previous income year are eligible notional deductions for the research and development tax incentive.
75 points	The company has received an Accelerating Commercialisation Grant ² at any time. The amount of this grant is also excluded from the company's assessable income for the purposes of the early stage test.
50 points	At least 15% but less than 50% of the company's total expenses for the previous income year are eligible notional deductions for the research and development tax incentive.
	The company has completed or is undertaking an eligible accelerator

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2. KEY TAX ISSUES

B) Capital Gains Tax – Employee Share Schemes

-Eligibility:

- Startup company
 - not listed on stock exchange
 - less than 10 years old
 - less than \$50 m aggregated turnover
- Employer must be an Australian resident company
- Employees must hold ESS interests for at least 3 years
- ESS interests
 - shares must be provided at a discount no greater than 15% of market value
 - rights must have an exercise price (or strike price) greater than or equal to the market value of an ordinary share in the issuing company

-See: ATO free documents: [ESS – Standard documents for the start-up concession | Australian Taxation Office \(ato.gov.au\)](#)

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2. KEY TAX ISSUES

C) R&D Tax Incentives

-The research and development (R&D) tax incentive provides a tax offset for eligible R&D activities.

-refundable tax offset for certain eligible entities whose aggregated turnover is less than \$20 m

-non-refundable tax offset for all other eligible entities

-Eligibility:

-MUST be a corporation with connections to Australia

-incorporated under Australian law

-otherwise

-Australian resident for income tax;

OR

-Foreign resident where double tax agreement exists with 'permanent establishment'; and

-carrying on business in Australia through 'permanent establishment'

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3. INCENTIVES FOR CORPORATIONS

A) Taxation

B) Transfer Duty & Control

C) Insolvency Reforms

D) Risk

E) Grants

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3. INCENTIVES FOR CORPORATIONS

A) Taxation

- carried forward tax losses with additional flexibility over when to apply the losses
- loss carry back tax offset – apply loss to prior profit year/s
- preferred income tax environment if revenues over \$45,000
-(32.5% versus 25%)
- preferred CGT environment, particularly if shares in company held by a trust
- R&D availability

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3. INCENTIVES FOR CORPORATIONS

B) Transfer Duty & Control

- transfer duty on share transfers unless land rich corporation
- entry and exit of shareholders relatively easy
- removal of directors relatively easy
- decision making beyond death or incapacity manageable

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3. INCENTIVES FOR CORPORATIONS

C) Insolvency Reforms

-Small Business Reforms

-From 1 January 2021 two new processes are available:

- simplified liquidation framework
- Small business (SB) restructuring plan

-Eligibility

- incorporated businesses
- liabilities of less than \$1m

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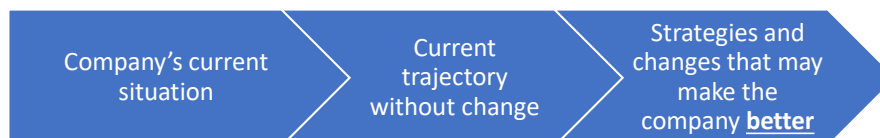
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3. INCENTIVES FOR CORPORATIONS

C) Insolvency Reforms

-Safe Harbour



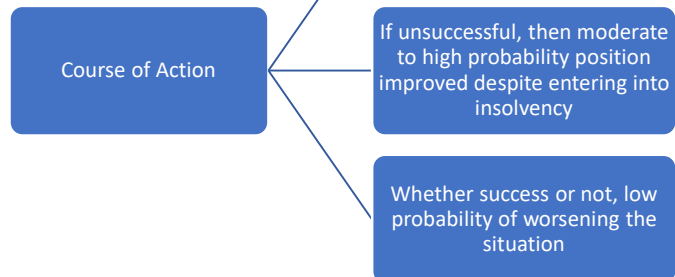
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3. INCENTIVES FOR CORPORATIONS

- C) Insolvency Reforms
 -reasonably Likely
 -to Produce
 -A Better Outcome



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3. INCENTIVES FOR CORPORATIONS

- D) Risk
- separate legal entity
 - corporate veil
 - conflicts

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3. INCENTIVES FOR CORPORATIONS

E) Grants




- some grants require the applicant to be an incorporated legal entity
- acquittal requirements
- conflicts
- reporting

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WHAT HAVE WE COVERED?

-  1. Key structuring issues affecting startups
-  2. Key tax issues affecting startups
-  3. Incentives available for corporations

QUESTIONS?

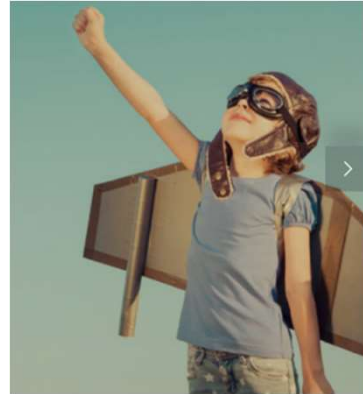
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