

Business structures

If the shoe fits

The structure you choose for your business should fit comfortably, like a good pair of shoes. A poor choice of business structure can prove painful. The most common business structures are sole trader, partnership, proprietary limited company, association and co-operative. Each has advantages, and disadvantages.

In deciding what structure to choose, you should consider such factors as taxation, type and size of business, finance requirements and establishment costs. Your final decision should only be made after talking to your accountant or solicitor.

Sole trader

This is the simplest and most inexpensive form of business structure to set up. As a sole trader you can trade under your own name.

However, when a business operates under a name other than that of the proprietor that name must be registered under the *Business Names Registration Act 2011 (Cth)*. Business names are administered by the Australian Securities and Investments Commission (ASIC). For more information about business names or to register, cancel, renew or search for a business name, visit ASIC's website at www.asic.gov.au

Partnerships

A partnership is defined by the *Partnership Act 1892 (NSW)* as the relationship which exists between persons carrying on a business in common with a view to profit. It involves an agreement between two or more parties to enter into a legally binding relationship and is essentially contractual in nature.

It's wise to have a **formal written partnership agreement** because it sets out each partner's responsibilities and reduces the likelihood of disputes. For example, one partner may be contributing more money or time to the business and therefore be entitled to a greater share in the business. An agreement can also cover what happens if the structure is dissolved or

changed, for example, through the retirement or death of one of the partners.

The Partnership Act (PA) enables three types of partnership to be formed:

- a partnership ('normal partnership'),
- a limited partnership, and
- an incorporated limited partnership.

There are differences between these types of partnership in terms of their requirements and features, for example registration, complexity, source of funds, liability of the partners for the debts of the partnership and taxation treatment.

In the case of registration requirements, the Partnership Act only requires 'limited partnerships' and 'incorporated limited partnerships' to be registered.

Normal Partnerships

A 'normal partnership' or just simply a 'partnership' does not need to be registered under the Partnership Act.

Normal partnerships may be a suitable structure where more than one person wants to carry on a business together and use a structure which is usually simpler than a company structure. For example, sometimes a husband and a wife may form a partnership, where one of them does the 'front end' work (for example carpenter, electrician, caterer, motor vehicle repairer, real estate agent or other small business) and the other looks after the 'paperwork' for the business.

If you are thinking about whether a normal partnership may be a suitable structure for your business, you may wish to:

- read the parts of the NSW Partnership Act dealing with normal partnerships – on the website www.legislation.nsw.gov.au, or
- discuss your circumstances with your accountant or solicitor.

If you are a 'normal partnership' but are using a name to conduct business under other than your own name that name must be registered under the *Business Names Registration Act 2011 (Cth)*. Business

names are administered by the Australian Securities and Investments Commission (ASIC). For more information about business names, visit ASIC's website at www.asic.gov.au

Limited Partnerships

A limited partnership is more flexible than a normal partnership, in that it has two types of partners – 'general partners' and 'limited partners' whose duties and liabilities vary.

General partners are responsible for the day to day management of the limited partnership and their liability for its debt is unlimited. There must be at least one and up to 20 general partners in a limited partnership.

Limited partners play no role in managing the limited partnership and their liability for its debts is limited to the amount of money contributed to that partnership, as recorded in the Register maintained by NSW Fair Trading. The upper number of limited partners for a limited partnership is not restricted, but there must be at least one such partner per partnership.

A person may be admitted as a partner of the limited partnership without the need to obtain consent of any other limited partner (s.69 of PA).

Raising funds with a limited partnership is more flexible.

The limited partners can contribute funds for the operation of the partnership in return for a share of its profits, without having to be involved with the running of this partnership. In effect, they are 'passive' investors in the limited partnership.

Limited partnerships can be used in most businesses needing to raise capital and where the additional formalities and complexities of a company registered under the *Corporations Act 2001 (Cth)* are not required. Examples where a limited partnership might be a suitable business structure could include:

- industrial or real estate developments,
- agricultural schemes,
- mining projects,
- arts, theatrical and film ventures or
- other small to medium businesses needing to raise funds in a relatively straight forward way.

A **form** for an Application for registration of a Limited Partnership may be viewed or downloaded by visiting the Australian Business Licence and Information Service (ABLIS) website at ablis.business.gov.au

Incorporated Limited Partnerships

The NSW Partnership Legislation also provides for a special type of partnership, the Incorporated Limited Partnership (ILP), to be registered for four types of limited partnerships which can be established under Commonwealth legislation for venture capital investment purposes:

- Venture Capital Limited Partnerships (VCLP)
- Early Stage Venture Capital Limited Partnerships (ESVCLP)
- Australian Venture Capital Fund of Funds (AVCFOF)
- Venture Capital Management Partnerships (VCMP).

Visit the Incorporated limited partnerships page on the NSW Fair Trading website for further information on registering as a partnership or incorporated limited partnership (ILP).

Public Register

NSW Fair Trading is responsible for administering the **Register of Limited Partnerships and Incorporated Limited Partnerships** under the Act. Information about registration arrangements is provided below.

Information on the Register is available for public inspection upon the payment of the fee prescribed in the Partnership Regulation. Requests for inspection and information from the Register may be made contacting Registry Services on (02) 6333 1400 or freecall 1800 502 042.

Other Obligations

Fair Trading can also provide information on the obligations that certain partners have to advise about changes in the circumstances of a limited partnership or an incorporated limited partnership, so that the Register can be updated by Fair Trading. Changes include:

- name of the partnership
- address of the registered office of the partnership in NSW

- name or address of the partners
- status of a partner, from general to limited partner or vice versa, or
- limitation of the liability for a limited partner (in a limited partnership).

Limited and Incorporated Limited Partnerships must maintain a registered office in NSW which also displays the certificate of registration of the partnership.

For further information on registering a Limited or Incorporated Limited Partnership contact Registry Services on (02) 6333 1400 or freecall 1800 502 042.

Proprietary Limited Company

A private company is a more complex business structure formed by one or more people who wish to have a business that is a separate legal entity to themselves. When you form a company, you could become an employee, director and/or shareholder of the company.

Private companies are regulated under the Corporations Law which sets out substantial obligations for company directors. Establishment and ongoing administrative costs associated with Corporations Law compliance can be high. This is why the structure is generally considered to be better suited to medium to large businesses.

The Australian Securities and Investments Commission (ASIC) offer a number of resources to help you form a company. The Commission has a service centre at:

Level 5
100 Market Street
Sydney NSW 2000
Tel. 1300 300 630

Website: www.asic.gov.au

Associations

An incorporated association is an alternative to forming a company or a co-operative for small non-profit groups. As is the case with companies and co-operatives,

an incorporated association has its own legal identity separate from its members. An association can trade but this cannot be its main objective. Any profit from the trading should be put back into the association and not given to its members.

Associations tend to be small community groups but can include specialist interest groups such as sports associations, industry associations, animal breeder associations and hobby associations.

For more information visit the About associations section on the NSW Fair Trading website.

Cooperatives

A co-operative is a form of business organisation which is member-owned. A co-operative must have five or more members. The fact that they are member-owned means that co-operatives allow for a more democratic style of work, pooling of resources to be more competitive, and sharing of skills. Co-operatives supply goods and services to their members or to the general public in areas such as retailing, manufacturing, labour hire, printing and agriculture.

NSW is one of the largest and most significant co-operative sector in Australia with approximately 640 registered co-operatives generating millions of dollars in revenue.

For further information on co-operatives and how to set one up, contact Registry Services, NSW Fair Trading on (02) 6333 1400 or 1800 502 042.

For more information visit the About cooperatives section on the NSW Fair Trading website.

www.fairtrading.nsw.gov.au
Fair Trading enquiries 13 32 20
TTY 1300 723 404
Language assistance 13 14 50

This fact sheet must not be relied on as legal advice. For more information about this topic, refer to the appropriate legislation.

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