LAWYERS

PRE-BUDGET

STRUCTURING
FOR THE FUTURE

2026 AND BEYOND

Commercial Law | Taxation Law | Corporate | Litigation | Property | Intellectual Property
Energy & Resources | Information Technology | Employment Law

The purpose of this paper is to set out some of our ideas for SME business structuring which we hope you will find useful. The ability to change structure, as a business grows, has vastly improved in recent years. The preference for companies over unit trusts for trading is also interesting.

We note that structuring usually involves more than one entity, so as to separate business assets from personal assets, and to separate the business risk from the assets which are used in the business but do not need to be owned by the trading entity i.e. an asset holding entity leasing assets to the trading entity.

As a business grows, it often needs to change its structure to accommodate the business and its stakeholders.

> **Following the 2026 Budget, and subject to any subsequent amendments, companies will be preferred over trusts in structuring. However, the preferred structure cannot yet be determined because of uncertainty about how the changes will be legislated and implemented.**

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PRE-BUDGET STRUCTURING FOR THE FUTURE – 2026 AND BEYOND

STRATEGY FOR STRUCTURE – BASIC FACTUAL ISSUES

It is important to realise that there is no right answer across the board for structuring. Importantly, as a business grows and changes, restructuring should be considered on a regular basis.

There is a number of key "factual" issues that need to be identified in respect of a client's requirements for their structures. Their relevance must be determined for the particular client prior to looking at taxation influences. They are as follows:

1. Asset protection, including separating business risk from other assets.
2. Access to cash.
3. 25% or 30% corporate tax rate, depending upon the nature of the company's business.
4. Flexibility of distributions; income splitting.
5. Ability for "partners" to come and go.
6. Are there plans to be a gain made on the sale of the business or other assets, or is it just an income producing business?
7. Privacy of financial information and the need for disclosure.
8. Consideration of employee incentives (see final page for employee incentive alternatives).

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TAXATION INFLUENCES

The preference for property has been to have real property assets in trusts so as to pass out annually tax depreciation benefits to beneficiaries and attract the general CGT 50% discount. The trend has been for businesses to be conducted in companies.

Although this is the general preference, as is indicated in the table of issues set out below, the basic factual issues for the client as set out at the start of this paper should be determined and shall determine the best solution on the facts:

	Primary Individual	Spouse	Disc Trust (DT)	Unit Trust w/Ind Unitholders	Unit Trust w/DT Unitholders	Company with Ind S/holders	Company with DT S/holders	Part'ship Of DTs
Asset Protection	✗	✓	✓	✗	✓	✗	✓	✗
Flexibility of Distribution	✗	✗	✓	✗	✓	✗	✓	✓
Access to Cash	✓	✓	✓	✓	✓	✗	✗	✓
Access to 25% or 30% tax rate	✗	✗	✓	✗	✓	✓	✓	✓
CGT 50% Discount	✓	✓	✓	✓	✓	✗	✗	✓
SB CGT 50% Discount	✓	✓	✓	✓	✓	✓	✓	✓
SB CGT Retirement (15 years)	✓	✓	✓	✓	✓	✓	✓	✓
Privacy of accounts	✓	✓	✓	✓	✓	✗	✗	✓

✓ = Yes / available ✗ = No / not available

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Recommended Business Structures – General

Business structures should always attempt to separate business assets of worth, such as property or even a trademark intellectual property, from the conduct of the business. Issues such as actions from unsecured creditors or from litigation (product liability, negligence, employee action) can and do occur regularly. Personal assets should generally be held and protected in another structure altogether.

Diagrams of Structuring Choices

A Standard Structure Where Business and Business Property

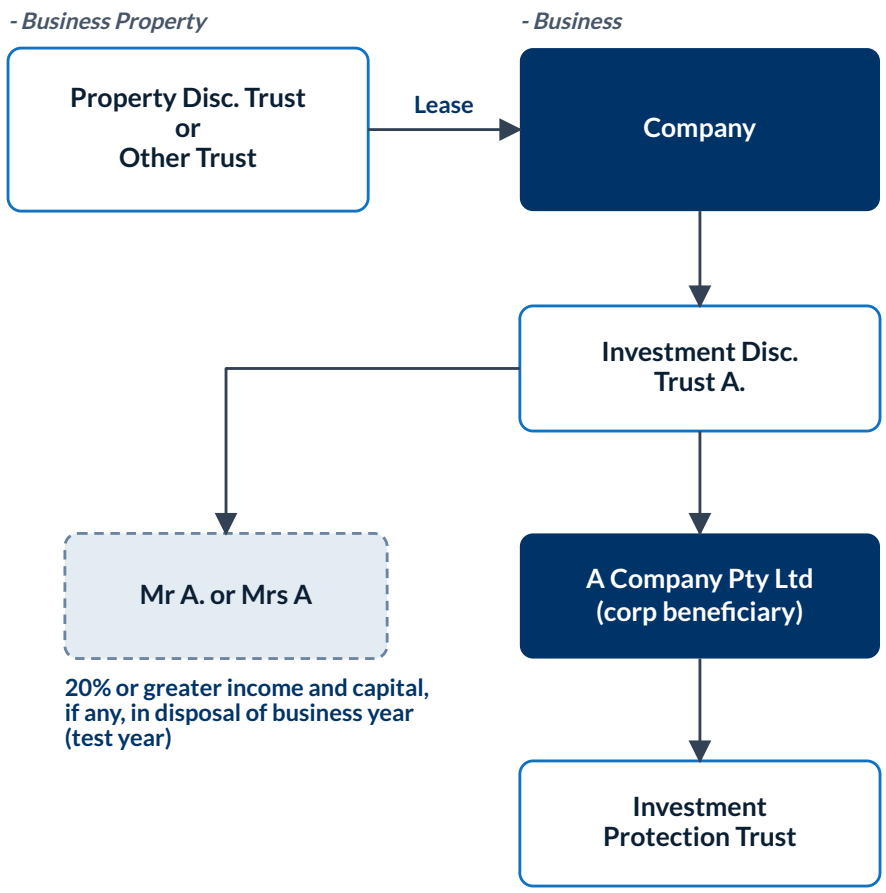


Diagram A — Standard Structure Where Business and Business Property

Company · Trust · Individual · Other party

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Notes to Diagram A

1. Business property trust has business assets separated from business risks of business.
2. Company for business is 2026 preference.
3. Investment Protection Trust owns A Company P/L so that income channelled to the corporate beneficiary doesn't increase wealth of Mr A & Mrs A i.e. provides asset protection.
4. Can distribute any Div. 40 depreciating assets deductions each year.
5. Not subject to large ASIC corporate regulations.
6. Potential of investors dealing with their own tax.
7. CGT discount for capital owned over 12 months.
8. Foreign companies acting as trustees for Australian trust are subject to Div. 7A. Foreigners lending money to Australian trusts should therefore set up as a company rather than a trust to avoid being captured by Div. 7A.

Special purpose vehicle trust – as a building block

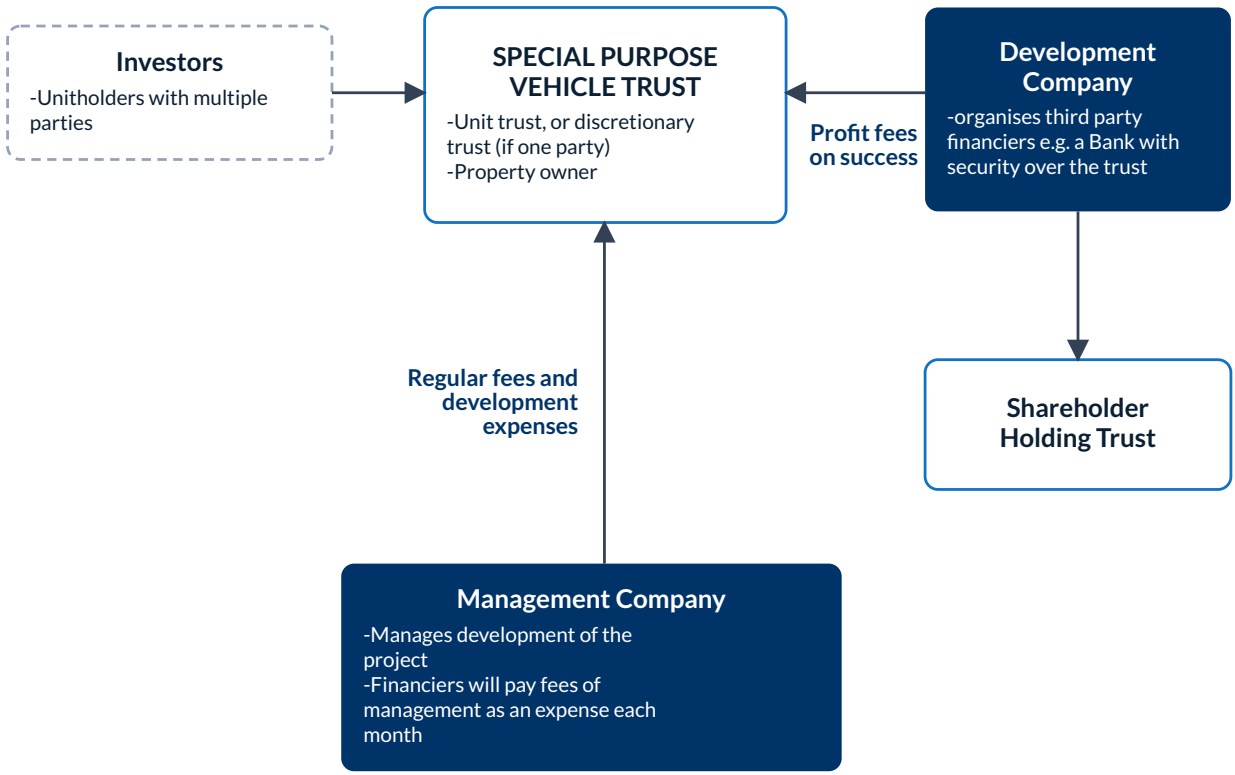


Diagram B — Special purpose vehicle trust – as a building block

Company · Trust · Individual · Other party

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Notes to Diagram B

1. Not subject to large company ASIC corporate regulations.
2. Potential of investors dealing with their own tax.
3. CGT discount for capital owned over 12 months
4. Foreign companies ATF are subject to Div. 7A on foreign profit. Foreigners lending money to Australian trusts should therefore use a company rather than trust to avoid being captured by Div. 7A.

Company – as a building block

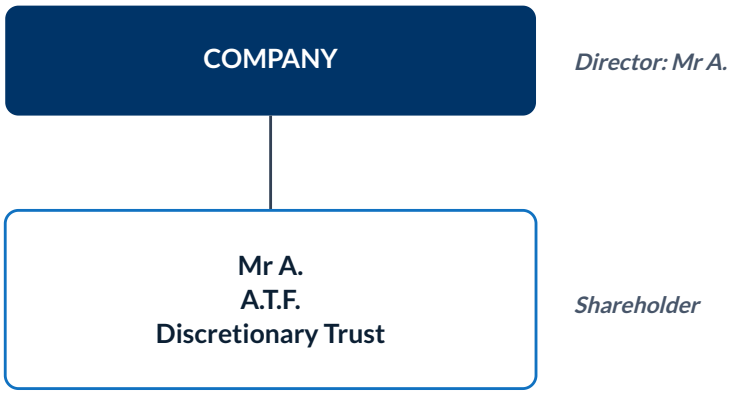


Diagram C — Company – as a building block

Company Trust Individual Other party

Notes to Diagram C

1. Company has only 1 director who could be liable for actions e.g. PAYG, SGC, GST, insolvent trading.
2. Company owned by discretionary trust. All assets owned by company are therefore not assets of Mr A.
3. Has been a good set-up for a corporate beneficiary of a discretionary trust in the past. Will continue to be good if assets are to be held in a company.
4. Note: if business is conducted in the company and if the small business Div. 152 relief on the sale of the shares or superannuation payment on the sale of a small business is contemplated in the future, 20% or more of the gain (and all the income in that disposal year) would need to flow through the trust to Mr A.
5. General CGT 50% exemption not applicable to a sale of business by the company, but would apply to a sale of the shares held by the shareholding trust for over 12 months as long as an individual presently entitled to the gain.
6. Refund of imputation credits on gain provides a certain level of income splitting ability.

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Discretionary Trust – as a building block



Diagram C — Discretionary Trust – as a building block

Company Trust Individual Other party

1. Trustee should be a company if the trust conducts a business or is subject to any significant liability. Liability falls on the trustee first, then the trustee has the right to be indemnified from trust assets. Trustee can be an individual if the trust is only holding assets and the individual and the assets are without risk. Corporate trustee directors are important. If Mr A is "at risk", he should consider not being a director and/or restructuring his assets at risk.
2. Appointor position is important. Appointor has power to change the trustee. Assets in Discretionary Trust are not taken into account in succession law in Victoria and further, loan accounts can be called upon.

   E.g. Appointor definition: Mr A and Mrs A, when they have legal capacity (mental and financial), and if not, the children jointly (consider trusted professional advisor, nominee company, as appointor, in limited circumstances).

   Where there is a second or third marriage, care must be taken in respect of the appointors positions and loan accounts payable.
3. Ability to hold superannuation funds separately for dependants under Superannuation Industry Supervision (SIS) Legislation should be considered.
4. Ability to issue units should be considered and included in trust deed.
5. General CGT 50% exemption applicable to a sale of business held for more than 12 months by the Discretionary Trust, if gain can be passed through to individual beneficiaries.

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Unit Trust

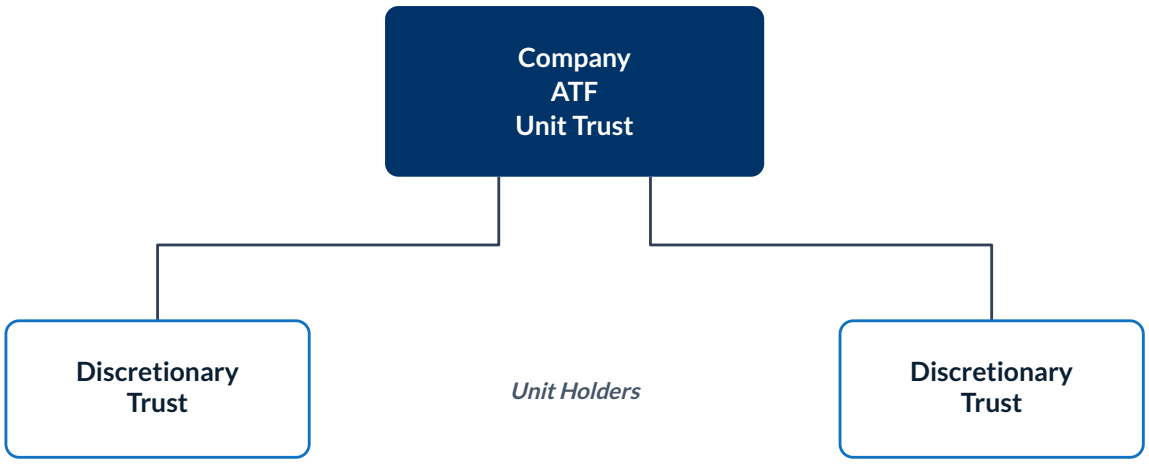


Diagram D — Unit Trust

Company Trust Individual Other party

1. The most common form of structure for property holdings between independent parties, and sometimes, businesses.
2. Still has the ability to be able to introduce new capital without there then being any disposal under the CGT provisions. This may be an advantage over other structures.

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Class Trust/Hybrid Trust

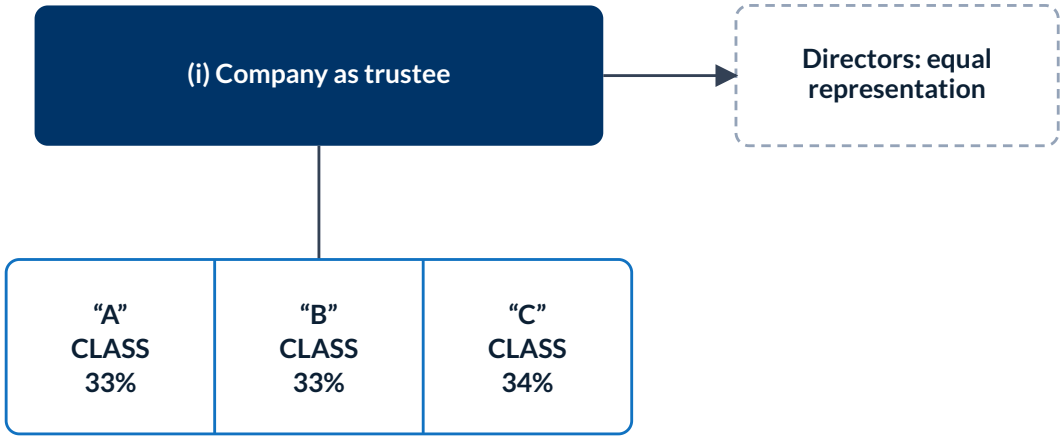


Diagram E — Class Trust/Hybrid Trust

Company · Trust · Individual · Other party

1. Effectively a collection of Discretionary Trusts with class interests held in set percentages. This allows the trust to be used, for example, for 3 families, rather than using a unit trust. Family one would have "A" class, family two would have "B" class, and so on. Each class would be entitled to a fixed % of the trust income and capital. Within each class, the trustee has a discretion as to how to distribute the income.
2. Such trusts avoid a problem with capital distributions gain with unit trusts (CGT event E4) as no person within a class has a fixed entitlement: TD 2009/17.
3. There is a risk of a disposal of interest for CGT if another party is admitted. Some trust deeds attempt to draft around this.
4. Have been cheaper to establish and administer than a partnership of trusts – **less common in 2026**.
5. General CGT 50% exemption applicable to a sale of the business by the discretionary trust, if gain passed through to individual beneficiaries.
6. Small business CGT can still be available as it is still possible to trace a "significant individual(s)".
7. Test for use of trust losses the same as for a discretionary trust. Income injection must be monitored as such a trust for more than one family can't make a family trust election. Not a preferred structure where shares are issuing, income are to be held due to this issue.
8. Check trust for beneficiary liability limitation from Trustees right to be indemnified, definition of income etc.

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Partnership of Trusts

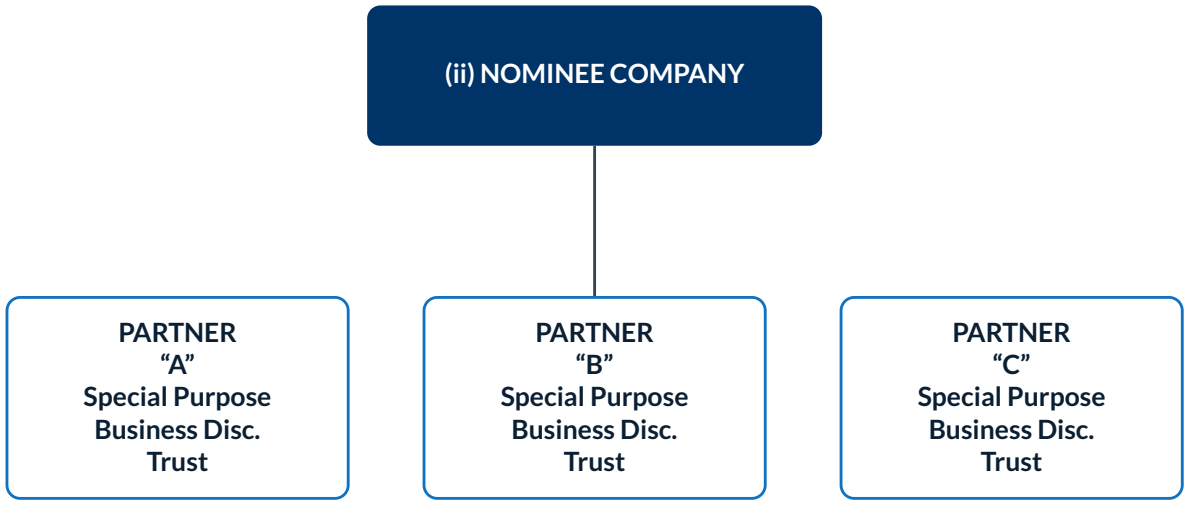


Diagram F — Partnership of Trusts

Company · Trust · Individual · Other party

1. No corporate protection from nominee for partnership of trusts. Liability of partners requires special purpose business discretionary trusts. Was in favour since did not have a problem with CGT event E4 where there was to be a sale of interests in the trust. **No longer in favour**.
2. There is a disposal of interest for CGT purposes if another party is admitted.
3. Each special purpose business discretionary trust can be part of the relevant partner's family group for the loss trust provisions. The appropriate Family Trust elections/ entity elections can be made.
4. CGT 50% exemption applicable to a sale of business by discretionary trusts if gain passed through to individual beneficiaries.
5. No Income Injection Test either if "family trust" election made. Note each partner can decide the fate of his trust separately!
6. The retirement concession under the small business concessions applies to each partner.

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Employee incentive alternatives

Our team has experience working with, and setting up a variety of employee incentive plan types, including:

- performance rights plans (zero exercise price)
- NED rights plans (salary sacrifice)
- employee share plans
- employee option plans
- $1,000 tax exempt share plans
- $5,000 salary sacrifice plans
- share appreciation rights plans
- premium priced option plans
- start-up share and option plans
- loan funded share plans
- phantom cash plans

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