



3 LEGAL ISSUES THAT NO STARTUP SHOULD DISMISS

 startupsmart

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Introduction

Ignorance of the law is no excuse.

If a startup owner has gaps in their legal knowledge or doesn't have the time to brush up in order to achieve a basic understanding, what will this mean for the survival of their business?

Managing a startup means you need to be across all departments and develop skills outside of your comfort zone, from marketing and sales, to IT and accounting. Although you will usually have a lawyer on hand to help you with legal matters, it's essential you have a basic understanding of some of the more common documents and issues you are likely to come across to avoid costly mistakes and potential lawsuits.

This eBook will demystify key legal concepts for your startup, with advice from McCullough Robertson's legal experts, who will provide strategies for the most common issues you're likely to come across on your startup journey.

Written by: Thea Christie



Chapter 1

Get it right from the start: Choose the right business structure

The early stages of a new business can be a whirlwind. You're buzzing with creativity, constructing your dream team, attracting investment and developing the product or service that you will offer.

But when starting out it's also crucial that you **decide on your business structure**. Your decision will depend on the size and type of business, your personal circumstances and how much you plan to grow, advises McCullough Robertson senior associate Ben Wood.



A sole trader runs a business in their individual capacity, usually under a trading name. This is simple and cheap, but does not provide any protection for the sole trader.

A partnership involves two or more people working together in a business - it is relatively easy to establish, but a partnership agreement is recommended. Partners are usually personally responsible for the liabilities of the partnership.

A company is a separate legal entity. It offers the benefit of limited liability for its shareholders and, generally, those who operate the business. A company is often the most appropriate structure.

Trusts can be used for various reasons, including personal asset structuring, but are often not the most appropriate structure for operating a business.

You need to be aware of the different duties and obligations that fall under each structure, says Wood: “These include a duty of care by the director (or even higher duties for trusts and partnerships), duties to stakeholders (shareholders or beneficiaries) and duties to creditors (solvency).

“There are a number of compliance and regulatory obligations such as tax returns, employee and superannuation payments, and workplace health and safety you also need to be aware of.

“Some risks are higher under some structures - you should choose your commercial objectives and then assess the best structure with professional tax, accounting and legal advice to find the best fit.”



Case Study

How *AdviceMarket* selected its structure

Spiros Christoforatos, founder of Australia's first interactive adviser search platform *AdviceMarket*, says he took a big picture view and considered the implications of each possible business structure for the future.

"It's important to think about the possible exit strategies and the consequences of each under the various structures. We sought advice from an experienced legal practitioner in the field to guide us through the selection process."

The final decision was made with the below principles top of mind:

- Minimise liability in the event of failure;
- Protect the strategic intent of the idea but take advantage of momentum;
- Raise capital if and when required;
- Protect the business from divorcing or 'rogue' shareholders;
- Tax efficiency.

Ultimately, a Pty Ltd company structure was implemented. In addition to the company's constitution, a shareholder agreement was drawn up that included clauses to protect the integrity of the concept/business and enabled the business to be agile and react to opportunities as they arose.

In addition, the agreement included the creation of a board that could make decisions on behalf of shareholders.

"Many SMBs have a huge amount of energy and are keen to dive in. But first talk to other founders and learn from their experiences, seek a qualified professional and don't take shortcuts and balk at the costs associated in laying a solid legal foundation. It could cost you a whole lot more in the long run if you don't get it right!"

Chapter 2

Checklist: Licences, permits and regulatory requirements

When starting a new business, it's vital to identify what registrations, permits and licences you need to apply for, according to Alex Hutchens, a partner at McCullough Robertson.

The requirements depend on your chosen business structure, and as each startup and industry is different there is no universal set of registrations, however the key ones include:

- Register your business name and **apply online for an Australian Business Number (ABN)**
- Register your corporate entity and Australian Company Number (ACN), if you choose to operate through a company
- GST registration
- Domain names and any trademarks or other registrable intellectual property (IP). Keep in mind that registering your business name does not grant legal protection of your trademark.

- Industry-specific licensing regimes apply to food service/ alcohol licensing, construction and financial services, to name a few. Contact the industry association for information.

The biggest mistake you can make is assuming that your business name and domain name are the same as registered trademark rights, warns Hutchens.

“They are not – and so if you only register a business name or a domain name, you might find that another person grabs the rights to use your trademark, which means you either lose the goodwill you have built up, or have to pay them for the right to use that name. Consider registering all three together, and register them early.”

Chapter 3

Protecting your intellectual property

You've applied for the relevant registrations, permits and licences, but don't forget to **protect your intellectual property (IP)**.

If you've developed an original product, technology or service, you need to learn how to safeguard it against exploitation.

Each type of IP protection is designed to cover a different kind of work and can be incredibly valuable, especially in the knowledge-intensive industries that startups often work in, says Hutchens.

"Just look at the ongoing **battle between Apple and Samsung for ownership** of, and rights to use, the patents in the smartphones. It's worth hundreds of millions of dollars, and shows the value of properly protecting your IP rights."

The most common types of IP protection include:

Copyright

Protects the 'expression of an idea', the particular form of words you use. It arises automatically without registration. It can protect standard written text like books, brochures, manuals and website copy, as well as more unexpected things like computer code. It also extends to artistic works, musical works, photos, movies and videos.

Trademark

Protects logos and trade names. This needs to be registered in order to be protected.



Patent

Protects inventions that make an 'inventive step' and usually applies to physical devices, but can cover software and process improvements as well. This needs to be registered in order to be protected.

Design

Protects industrial designs like furniture. Designs need to be registered, and can overlap with copyright protection.

Confidential information

An important general concept considered a form of pseudo-IP because it protects intellectual endeavour. This is the right to have information kept secret in circumstances where the receiver knew, or ought to have known, that the information was confidential.

There are two key benefits to gaining proper protection for your IP, says Hutchens:

On the defensive side

If you register the rights that need to be registered, and protect the non-registrable rights appropriately, no one else can use them to get a competitive advantage over you, and no one can charge you for the right to use them.

On the offensive side

IP rights secure your own competitive advantage in the marketplace because they give you the exclusive right to use them, and can turn into a revenue stream if you decide to let others use them (or you find others illegally using them and decide to negotiate a deal to allow them to keep using them).



3 steps to guard your assets

Step 1

Talk to a lawyer about your business and your ideas to determine what types of IP you are dealing with. Different rights protect different types of IP, and some need to be registered and some don't.

Step 2

Get a strategy for registering, protecting and maximising value from someone who understands the law and the market.

Step 3

Once you've identified the applicable rights you can make sensible decisions about what needs to be registered, and the possible risks associated with not registering, and decide whether you want to register your rights.

