



CORAGGIO
FEARLESS OBJECTIVE ADVICE

CORAGGIO MEMBERS AND BUSINESS OWNERS BENEFIT FROM INDEPENDENT LEGAL ADVICE

Thought Leadership Article



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Being part of the Coraggion community enables Members to access the expertise of a lawyer to navigate best legal practices, business due processes and contractual structures. As a business owner it is critical to know and understand best company structure moving forward, as well as joint ventures, raising capital, IP protection, liability, debt recovery, insolvency and now more than ever your obligations as an employer.

Common reasons businesses fold is due to a lack of planning and consider how to mitigate potential risk for the business. To that end, every Coraggio Advisory Board has an appointed lawyer to support Member's across a diverse array of legal challenges and ensuring their risk is minimal as their businesses scale. They are qualified industry specialists who provide considered nonbinding strategic advice, recommendations, "wise counsel" and guidance to meet the future needs in relation to your business.

CEO, Richard Skarzynski cites,

*"We encourage our valued Coraggio Members to **start with the end in mind**. Establishing a business is no difference in terms of the best company structure. Other considerations our Member lawyers assist fellow Members with include commercial growth, joint partnerships, risk mitigation, raising capital, business liability, debt recovery, employee obligations, insolvency and protecting their intellectual property. As the old adage cites – he or she who fails to plan, plans to fail and we guarantee our Members succeed!"*

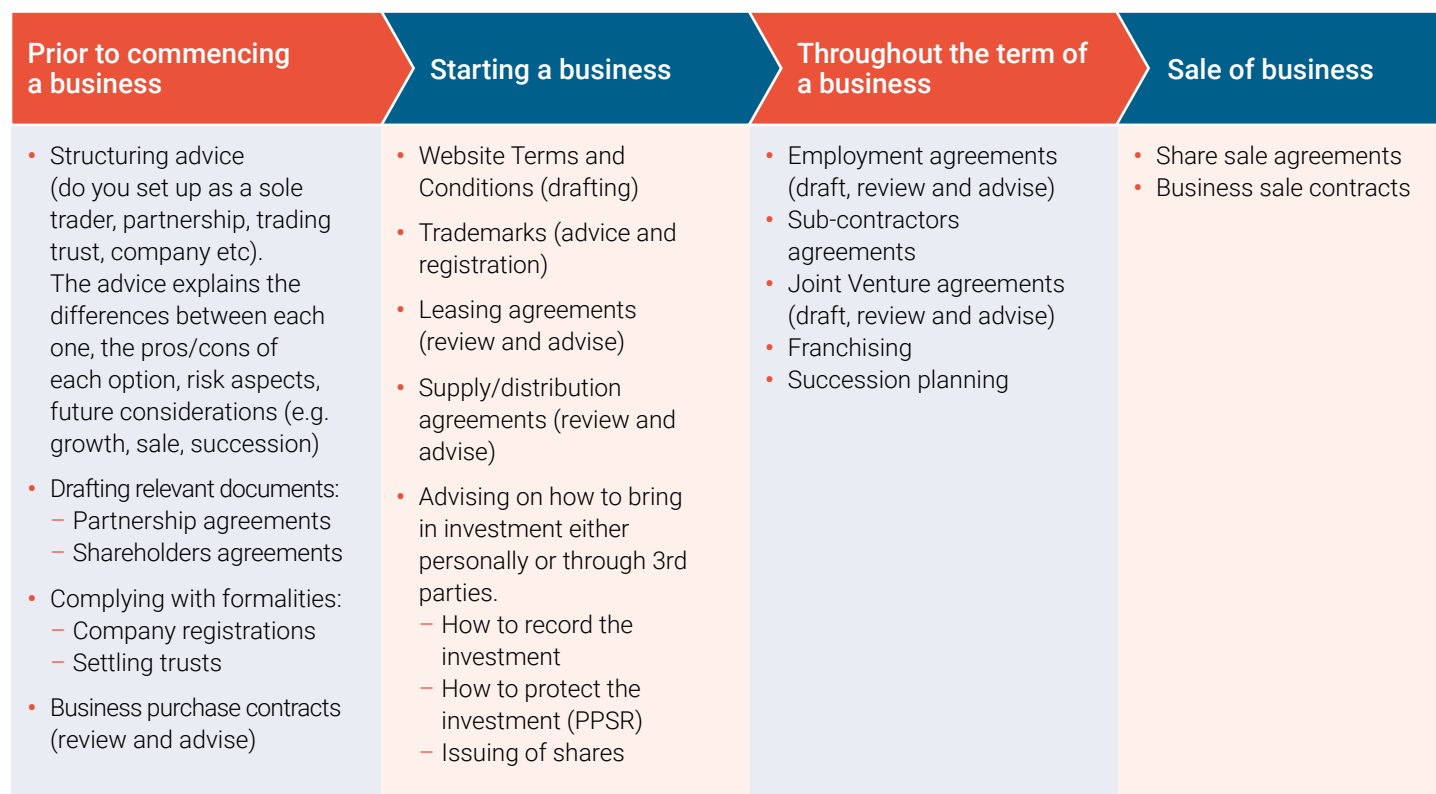


What every business owner needs to know to navigate their business legal structure

You work tirelessly negotiating deals and investing time fostering client relations, however many businesses neglect to invest the time ensuring their corporate legal structure is in check correctly to improve your confidence and quality of your decision making and provide a solution-focused approach which is critical in a complex, ever changing business environment.

*As a business owner you should **Start** with the **End** in mind. Set your business up for success from the beginning to mitigate costly risk and unnecessary expenses down the track. The right lawyer will give you more than just advice.*

Business Life-Cycle



Coraggio Member lawyers share a health check

Coraggio's peer to peer mentoring provides access to great business minds culminating their combined industry experience, filling skill gaps in Member's knowledge and facilitating impartial advice.

Coraggio's Member lawyers share their knowledge to generate proactive outcomes for their fellow Members towards company structure, JVs, commercial business growth, risk mitigation, defamation, raising capital, business liability, debt recovery, employee obligations, insolvency and protecting your IP.

This independent unbiased legal advice is presented in the best interest of all Members and the following questions presented to four Coraggio Member lawyers and their responses were informative, insightful and timely highlighting legislation updates, ASIC trends and industry sector changes.

Coraggio Member Joel Cranshaw, Director of [Clearpoint Legal](#) from Melbourne, responds to questions as follows,



What are the deciding factors to determine the best business structure?

- To determine the best business structure for your business – call your accountant or your lawyer because there's almost no business structure that doesn't carry some risk and it's important to get the structure right from the outset, because changing later may be difficult and expensive!
- The main things to be considered are the type of business, services provided, risks associated which may impact on your personal liability and future plans for the business.
- People sometimes commence as a sole trader and change the business structure later when they become clearer on the future of the business and the associated risks.

What happens if a business is too successful or not successful enough?

- The right corporate structure can protect you as a business owner whether your business is too successful or not successful enough. Businesses that are too successful are often moving too fast to consider the legal risks and the value of documenting their commercial agreements, agreements between owners and employment terms.

However, businesses that are not successful enough, fail to document the same agreements due to a lack of available cash.

- Incorporating a company e.g. a pty ltd limits personal liability that can arise if a business is too successful or not successful enough.

What are the rules regarding novation of contract?

- There are no specific rules. It is important to note that novating an agreement is different to assigning one. You can only assign rights, not obligations. So if you assign an agreement you may still be liable if the assignee fails to fulfil its obligations. A novation contract is tripartite (between three parties) with the exiting party, the continuing party and a new party to the agreement.

The new party steps into the agreement taking over rights and obligations from the start of the agreement. Although they don't need to be in writing they most commonly are and often take the form of a deed to avoid the need for consideration (an agreement that is not a deed, must have some form of consideration e.g payment).

- Before agreeing to have an agreement novated you should do your due diligence to ensure you are not inheriting any past liability. You can also avoid this by specifying that the agreement will only be novated going forward, rather than from the commencement of the agreement.

What should I think about if I want to 'partner' or JV with another business?

- You can structure a JV by incorporating a company special purpose company in which each party shares ownership or contractually using a partnership, co-operation or collaboration agreement.
- If a partnership is formed, then each entity shares liability therefore clarity regarding terms and conditions are imperative. For a JV company, a detailed shareholders agreement should govern the relationship including terms regarding contributions, decision making and how the JV will be unwound and who is entitled to which assets.

Coraggio Member Walter MacCallum, Principal of Russell Kennedy Lawyers from Sydney shares his insights regarding, the following questions,

How can I enforce payments from overdue debtors / customers?

- I advise clients that *prevention is better than a cure*. Maintain open lines of communication with customers to potentially mitigate any unforeseen risk in terms of their cash flow.
- However, if you have to go to Court, you can do so by filing a statement of claim. Then once you have a judgment, you have options to enforce such as:
 - Garnishing wages or cash in a bank account.
 - Issue a Writ of execution through the court to get access to their possessions which can be sold to pay the debt or a Writ on Property which enables the Sheriff to sell the debtor's property.
 - Or, an examination summons – which is an order that the judgment debtor must come to Court to answer questions and disclose documents pertaining to their financial position.
- There are also the options of bankruptcy notices and Statutory Demands.



Recovering small debts from debtors is often difficult because the legal fees can often outweigh the amount of the debt. What approaches can you share with Members that work best when trying to recover small debts?

- There are several options to recovering debts, however prevention is even more important with small debts. Recovering small debts (less than 20,000) through Court is often not worth it as there are limitations on the amount of legal fees you can recover.

Therefore strengthen your terms and conditions and try to incorporate personal guarantees and charging clause which enables you to place a caveat on the debtor's property, which will stop them selling or mortgaging the property unless the debt is paid.

- But good communication with your debtors is key so you can recognise when things start to go wrong and you can hopefully take steps to prevent it – move to COD or limit credit etc.

What are my responsibilities when it comes to my employees?

- The obligations of employers towards employees has grown over the last 20 years.
- The main sources of these duties come from the common law, the Fair Work Act (including the National Employment Standards (or NES)) and Awards, and other legislation.
- There are common law duties such as the duty of good faith – or honesty – which is a mutual duty.
- The NES sets out 11 minimum requirements for things like to maximum working hours, parental leave, annual leave and personal leave, notice of termination and redundancy.
- Another major area of responsibility which has been vastly affected by COVID of the duty to maintain a safe workplace – this is both common law and in the various pieces of legislation relating to work health and safety – and this is relevant to things such as managing employees performance, bullying, workplace harassment.

If a Coraggio Member's business is struggling and is (or is likely) to become insolvent, what should I do?

- Immediately contact your accountant, insolvency practitioner or an insolvency lawyer (or both) to mitigate any risk and identify the options available – such as things like “safe harbour” – to assess ways to potentially save your company.
- Often when business owners are facing cash flow challenges they wait too long before acting, often hoping that supply issues or payments will improve. You also need to assess your own personal position and if you have given personal guarantees for your business, your own assets may be at risk and you need to address this sooner rather than later.

Coraggio Member Ben Warren, Director of Ellem Warren Lawyers from Brisbane injects with his responses to the following questions,



How can I protect my ideas / intellectual property / business name? (Employee v Contract, Sham Contracting) What are risks relating to regularly engaging individuals as contractors in my business?

- Intellectual Property (I.P.) - Firstly, it is important to understand that the law does recognise some (not all) forms of intellectual property. Many are best protected by registration and in Australia, which happens at IP Australia (<https://www.ipaustralia.gov.au/>), which has an excellent, free, plain English explanation of the different intellectual property types and how to register and protect them, where applicable.

Secondly, if you're investing a lot of time and/or money into something creative and new that you want to protect, talk to a lawyer about it as early as possible. Thirdly, you have to understand that although legal protection is recommended and well worth having, it is not always very effective on its own because enforcing intellectual property rights can be very complex and expensive.

Think about all the people who used to download mp3 file music and/or use peer to peer services to download movies and *Game of Thrones* – so think also about practical protections, for example: secrecy and technological protections; not just legal.

- A 'sham' transaction is one that disguises or misleads as to its true nature, for example: a transaction having no economic effect that is made to create tax benefits, and a 'sham' contracting arrangement with someone who the law considers to be an employee can be very, very costly; existential (millions of dollars) of risk, especially in connection with workplace safety, large numbers of 'contract' tradies or cleaners or salespeople, or if Unions become involved.
- There is no single test to mitigate this risk when it comes to hiring people to do work. There are at least a dozen different relevant factors or indicia. Seek legal advice if you have a business that regularly hires ABN sole traders and/or a lot of subcontractors performing low skill work and/or your business controls many aspects of the work and to others, the subcontractor could appear as if he/she were your employee (uniform, email, business card, etc.). Note: a person with an ABN (Australian Business Number) who invoices you could still be your employee in a 'sham' arrangement.

Therefore a good contract is essential: be clear up-front, and document contractually, the mutual intention around superannuation and tax, insurance, delegation and subcontracting etc.

How do I protect my confidential information and business IP (intellectual property) in the process eg due diligence?

- Start with the **end in mind** – establish the correct legal documents including NDA (non disclosure agreements) and contracts outlining legal protection, and don't forget practical protection: secrecy, encryption, use secure 'data rooms', etc. Once someone has your code, invention, database or other valuable digital or other

intellectual property, it can be very expensive and difficult to prove illegal conduct (e.g. breach of contract or copyright infringement) as opposed to lawful reverse engineering or similar-but-different technology.

When are the best steps towards raising capital?

- The opportune time to borrow money from family, colleagues, the bank, or equity investors – anyone - is before the funds are required. And, if you are borrowing to fund a growing start-up try to avoid borrowing in multiple installments or tranches prior to achieving a cash-flow positive position within the business.

Try to lock-in, in one transaction, a legally binding commitment for all the funding you'll need to reach a cash-flow positive position. Otherwise there is a grave risk that when your business is running out of cash and is desperate, the lenders (debt and/or equity) can squeeze from you a much better deal for themselves and/or let your business fail, and buy the assets from the liquidators.

- If, as a business owner, you are lending personal money to the business / company I strongly recommend you generate (talk to a lawyer) the same documentation that a bank would have required if it were lending the money. In other words, there should be good loan and security documentation and registration; i.e. mortgage, PPSR-registered general security agreement. As an owner that has lent money or time/value, be a secured creditor of your own business. Then, if your company runs into trouble you have some control, and hope of recovering the valuable assets from the business to start again.

Coraggio Member Michael Jeffery, Director of Sierra Legal cites,

“Legal and accounting advice is always in intricate part of any business owner’s growth or exit strategy. As a lawyer, it is incredibly rewarding to see your fellow Members achieving their goals and knowing that you have been a part of their success.”



“Belonging to the Coraggion community has enabled me to leverage industry knowledge, to receive supportive and innovative advice, and to network with industry leaders & entrepreneurs. The Members of my Advisory Board keep me accountable to my business goals and make sure I stay focused on scaling and productively growing my business.””

Ramy Arnaout is a Coraggio Chair and CEO of ARNAGROUP OF COMPANIES. The group concentrates on value add businesses and developments, restructuring and growing businesses for the purpose of sale. Specifically specialising in cost reduction with the integration of specialised industry based systems developed over many years to achieve the greatest outcome for profit and end sale.



Ramy encourages business owners, including his Sydney-based Members, to understand business basics including identifying the right team culture for your business.

“The biggest challenge in business is people. Surrounding yourself with good loyal people is key to any positive outcome. It’s very lonely at the top by yourself.”

In conclusion, being part of a highly effective business community guaranteeing leadership, facilitating legal and financial matters and sharing innovative ideas within a cohesive and confidential national network provides the safety net a Coraggio Advisory Board offers, mitigating risk for your business and providing peace of mind.



What is Coraggio?

Navigating the business world includes facing uncharted territory, including determining effective ways to manage company structure and legally futureproof a profitable and sustainable business. Making the right decisions deserves more than an occasional conversation with a mate. Aggregate the experience and shared knowledge of collective awareness from fellow executives to stay ahead of the curve. It doesn't have to be lonely at the top.

Operating a company typically presents complex issues, sometimes on a daily basis. Imagine if you could leverage the experience from an extensive group of industry peers to improve your decision making and social proof as well as future proof a sustainable business, whilst being held accountable?

Also imagine if you gained the peace of mind to seamlessly access these answers and navigate business challenges, simply by connecting with entrepreneurs and gaining knowledge from business leaders? This is the strength of peer to peer leadership mentoring and impactful, meaningful relations.

Coraggio offers a mutual exchange of expertise, ideas and a support system enabling you to capitalise on a give-and-take dynamic amongst advisors who have walked the path before, mitigating risk to your business.

Leading business owners and entrepreneurs join Coraggio to become part of a highly effective business community facilitating leadership, guaranteeing accountability and sharing innovative ideas within a cohesive and confidential national network.

This mutual exchange of Member's expertise tangibly results in sustainable revenue streams, increased cash reserves and productive outcomes to future proof your business.

Coraggio Chairs are industry leaders, Members are forward-thinking advisors and all Advisory Boards are dedicated to the ongoing success of their fellow Member's businesses, offering *Fearless Objective Advice* – that's the Coraggio Spirit!

Afterall, in the words of Henry Ford

“If everyone is moving forward together,
then success takes care of itself”.





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Being a business owner typically presents complex issues and may include facing uncharted territory. However, it doesn't have to be lonely at the top. Discover how Coraggio's proven methods can assist you build a better business and become a more effective leader.

JOIN BUSINESS LEADERS TO GAIN A COMPETITIVE EDGE

Contact info@coraggio.com.au or call **1300 899 006** to touch base with our Advisory Board Team.

Visit coraggio.com.au for an in-depth understanding of our Member's success stories applying the Coraggio competitive edge.

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