Structuring your business -
Decisions made now affect you later

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As Shakespeare said hundreds of years ago nothing is as certain as death and taxes. Even the immortal bard could not have foreseen the amount of change that occurs in the tax system each financial year. On top of that every business owner has to be concerned with asset protection. One mistake from a careless employee can mean your business blows away like a pack of cards.

You have to be careful in which "vehicle" a business or asset is purchased. A person may buy, say, a real estate agency in his or her own name. As things go well the owner may want to share the profits with the spouse in order to reduce tax. Later the owner may want to take on partners or gain the benefit of a family, unit and service trust.

Every time you change the business structure you change ownership, the tax man will want to take his cut. If you started your business from scratch then your "cost base" may well be nil. If you later sell or transfer the business, to say, a Family Trust then you pay Capital Gains Tax on 100% of the value of the business - often as calculated by the Tax Office. This can have devastating results.

Therefore, decisions made now may well affect the future value and flexibility of the business. Let us look at some of the options before you.

1. Tax Planning for the small or family business

Every Taxpayer is different. For one person a Family Trust is best. For another a partnership may reduce more tax. The business vehicle best for you requires the skills of your Advisor, Accountant and Tax Lawyer.

2. Starting Checklist

1. comparative costs of maintaining
2. the possibility of legislative changes
3. Estate Planning & Succession Planning
4. Asset Protection
5. income tax issues and flexibility in streaming income
6. Capital Gains tax issues
7. the degree of sophistication of the Taxpayer (appreciation of legal niceties and understanding of the nature of the vehicle).

3. Possible Business Vehicles

1. Partnership
2. Family Company; (Pty Ltd)
3. Family Trust;
4. "Loss" Company
5. Unit Trust;
6. "Loss" Trust;
7. Tax Haven vehicle.
8. Cocktail of above

4. Family Trusts

The name of the game is to:

1. Keep control
2. Reduce Tax (choice on who suffers the tax and deferring the paying of tax)
3. Reduce the chance of losing the assets if you or the Family Trust goes broke

After sole proprietorships and partnerships, Family Trusts are the most popular business structure. Your Tax Lawyer sets up a deed. They are very flexible. They provide your Adviser and Accountant with great scope in sharing the tax burden around your family.

Here is a story about Charles and Gianna …

Charles and Gianna control (through a Family Trust) a corner deli. They give themselves annual wages of $60,000 each. At the end of the year their Accountant tells them the good news that (after their "wages") they have made $40,000. What would happen if Charles and Gianna took this additional income? They would pay almost half of it in tax - not much fun for all that hard work.

Because they are in a Family Trust they distribute $18,000 to their 18 year old son. The son gets all the tax benefits of an adult and pays tax at the lower tax rates. The remaining $20,000 Charles and Gianna keep in their Family Trust at 30%. The Family Trust pays a lesser tax rate than Charles and Gianna.
A Family Trust can exist for up to 80 years. You have up to 80 years to try and get back some or all of the 30% that you paid that year in tax. In theory, given time, you may be able to get all the income out of a Family Trust without paying any tax. You do this by distributing to family members who pay tax at less than 30%. The ATO gives you back all or part of the 30%!

**Who are the players in the Family Trust?**

a. **Trustee** - all trust assets are in the trustee's name. But the trustee is only the legal owner: an owner in name only. The trustee is not the "beneficial" owner. In the good old days the Trustee of the Family Trust is Dad or his company. These days the Trustees are generally Mum and Dad. Where there are two or more trustees their decision has to be unanimous (otherwise the Trust Deed needs amending).

b. **Appointor (Guardian)** - hires and fires the Trustee. Therefore, people often call the Appointor 'God'. The Trustee is often called a 'puppet'. The power to appoint and dismiss the trustee is given to the Appointor. Usually, the trust deed confers this power on one or two people. If it was my trust then I would want to be Appointor. If the Appointor hires and fires the Trustee at whim, then the Guardian tells the Trustee who gets what capital and income each year. However, it is virtually always the case that the Appointor and Guardian are the same people.

c. **Trust Fund** - The assets of the trust. These can be business or other assets such as a home or shares.

d. **General Beneficiary** - The group of people who can benefit from the trust's income and capital. Often 100s of people that you have never met or who haven't been born yet.

e. **Specific Beneficiary** - Sometimes called "Takers in Default", "Primary Beneficiary" and "Specified Beneficiary". They are a special class of beneficiaries. If you forget to make a distribution one financial year, then instead of the income getting taxed 48.5% in the trust the Specific Beneficiaries are deemed to receive the income. If you then forget to distribute the capital of the trust after 80 years (the usual life of the trust) then the Specific Beneficiaries get the capital. This is just a complete legal fiction. Tax lawyers have been threatening to just remove Specific Beneficiaries out of new trust deeds for years because they are rarely if ever used.
f. **Settlor.** This is the Tax Lawyer who settles $10 on the trust. This just "starts" the trust. Because of old English law you need to prime the trust with some wealth. The Settlor is about the only person that can never be a beneficiary under the trust. Therefore, don't pick your friends or family for this job. The "head of the family" is never the person to set up the trust. The Settlor should be your Lawyer who prepares the trust by putting an asset into it (usually $10). The head of the family, (after the Family Trust is set up), puts assets into the trust. If the Settlor is a family member then there are adverse tax consequences.

**Who gets what in a Family Trust?**

This is up to the Trustee (acting under the advice of the Appointor). Therefore, the class of beneficiaries is as wide as possible - including the dreaded mother in law and the divorced spouse! Why have your mother-in-law as a beneficiary? Beneficiaries have no rights to demand any asset under a Family Trust. By being a beneficiary they really have no rights and no property in the Family Trust. They only have a "mere hope" that they may get some income or capital from the Family Trust.

**Does the Family Court respect and admire the beauty of a Family Trust?**

You must be kidding. Twenty years ago the Family Law Court snubbed its nose at Family Trusts and said it would treat the assets as belonging to the spouse.

**Does Centrelink pay tribute to the Family Trust?**

Similarly, Centrelink changed the laws. Effective 1 April 2002, like the Family Court, Centrelink "looks through" to the real controllers of the Family Trusts. There is a sad paper prepared by Brett Davies Lawyers on this dark side of Centrelink's attack on the pensioner.

**What happens if the Family Trust goes broke?**

The Trustee of the trust is indemnified out of the assets of the trust. The beneficiaries of the trust are generally not liable or exposed to the losses in the Family Trust. They may lose their "loan accounts" but no more. This means that should the family business find itself in difficulty with creditors, *provided you have followed the advice from your Accountant, advisor and Tax Lawyer*, then it is likely that the only assets that can be called upon to pay these debts are those owned by the Family Trust.

Personal assets owned by the Trustee outside the trust may be available for discharging any trust liabilities. Of course, if any person is forced to give a guarantee of any of the obligations
of the Family Trust then that person can lose everything. If you are upset by that then don't sign guarantees.

The trust also limits the personal liabilities of individual members of the trust business. A director generally goes down with the company. However, the Appointor and Beneficiary generally don't go down with a Family Trust. The Trustee is generally the only one with exposure.

**What happens if you go broke? - Asset protection**

If you are the Trustee of the Family Trust and you end up in personal financial trouble or bankrupt then you can't remain as Trustee and anyway, the Appointor will sack you. If you are the Appointor (God) then to date the Trustee in Bankruptcy has been unsuccessful in "standing in your shoes" and directing the trustee to distribute all the wealth of the Family Trust to the bankrupt Appointor. The argument is that the Appointor's job of bossing the Trustee around is a "duty". This is not property. Nevertheless, you should put in that if you are insolvent or bankrupt then you give up your job to another person - this should be in the deed.

**How long can a Family Trust exist?**

Like a company a trust offers a greater degree of stability than a partnership because it is not dissolved on the death of a beneficiary or trustee. A trust can operate up to 80 years in Australia (even longer in some states). All trusts can only go for 80 years. Self Managed Super Funds are strangely not caught by the 80 year rule. A SMSF can go on forever while you have members. Companies can go forever provided you comply with the legislation (i.e. pay money and lodge forms).

**Can Family Trusts avoid the death taxes such as Capital Gains Tax and Stamp Duty?**

Family Trusts allow legal avoidance of de facto death taxes because case law has held that the rights of beneficiaries in Family Trusts don't constitute an "interest" in your Will. Interestingly, the assets of a Family Trust do not form part of a deceased estate. A person could have millions in their Family Trust and yet die a pauper. The only exception to this is "Loan Accounts". These are moneys that someone has "loaned" to the Family Trust. These belong to the person making the loan.

**Are Family Trusts still a useful vehicle if trusts were ever to be taxed like companies?**

In the past there were unsuccessful moves to have Family Trusts taxed at the same rate as companies - 30%. This applies to income whether "distributed" or "accumulated". You
"distribute" if you pay out income to the beneficiary. You "accumulate" if the Family Trust just keeps the money and pays the taxman 30%. Beneficiaries are entitled to the 30% "franking credit" for tax paid by the Family Trust.

What is "franking credit"?
If the trust "accumulates" the income then it pays tax on that income at 30%. For example, $1,000 income means $300 in tax in that year. You don't "lose" that $300 that you paid in tax. Next year you distribute "last year's $1,000" to John Jr your son. If John Jr earns only a small income then he gets back all of the $300 that the Family Trust paid in tax.

Income, Capital and Loans blur if trusts are taxed as companies
Distributions and loans to beneficiaries are considered to come firstly from profits, then from contributed capital. Capital gains by trusts are not eligible for the 50% exemption to which individuals are entitled.

What are the Advantages of Family Trusts?
Family Trusts provide great flexibility and less governmental interference than companies. You also get asset protection, income streaming, a fixed tax rate and are not subject to Will challenges. Wealth in your Family Trust doesn't "belong" to you (you just "control" it.) Therefore, your Will can't touch or effect those assets. The Family Court often sees fit to ignore a Family Trust. However, a spouse can have a Prenuptial Agreement (legally called a "Binding Financial Agreement"). The Family Court has to follow a legal Binding Financial Agreement. A Binding Financial Agreement only became operational in December 2000.

How often should my Family Trust Deed be reviewed?
Most pre-1992 Family Trusts need to be amended to include "streaming provisions". This allows you to distribute one type of income to one person and another sort of income to another. The income can then be distributed with reference to its source. For example, you may want to distribute dividends with franked credits to a high income earning beneficiary. You may also want to distribute income subject to capital gains tax to a lower income earner.

Similarly, you need to update pre 2001 if the Ralph Tax reform ever goes ahead. Like all legal documents they should be reviewed from time to time to make sure they are still up to date. Since August 2002 all Family Trusts need to be amended for the "39%" rules relating to charities. Otherwise, it will be virtually impossible to get the small business 50% CGT reduction. See Brett Davies Lawyers for the latest information on Family Trusts.
5. Partnerships

Splitting Income
The use of a partnership, as a device for splitting income between the various members of a family, has declined because of the greatly increased use of (discretionary) Family Trusts. Family Trusts have 100s of beneficiaries who can absorb tax. Partnerships can only use the partners to absorb tax. However, a partner in a partnership can be a Family Trust.

Unlimited Liability
Another disadvantage is that partners have unlimited liability. Shareholders in a company aren't responsible if the company can't pay its debts. (I note however that this "limited liability" does little to protect the Directors or de facto Director's of the insolvent company.) For a partnership, if your business partner borrows money for a Rolls Royce and disappears you are left having to pay the whole debt.

How do I establish a Partnership?
A verbal or written partnership (very common) has become a delight to the ATO. It is easy to have a lawyer prepare a written Partnership Deed. However, written partnerships between the members of a family may not be effective to create a partnership for income tax purposes. At the very least, you need an intention to conduct the business as a partnership. The intention must be borne out in the way in which your business is in practice conducted.

Partnerships don't have to be equal. Otherwise Dad may lose control of the business. Dad can have 51%. The children can have the rest. Another method for control is providing in the partnership agreement for the appointment of a managing partner with full power of management and control. You can prepare your own Partnership Deed with LawCentral over the web in minutes.

Does a Partnership need its own tax accounts and tax return?
Yes, but it is the partners who end up paying the tax. When the partnership accounts are prepared, due care should be given to the terms of the partnership deed (the failure to do so had unfortunate consequences in Schultz’s case (1964) 111 CLR 482).

A partnership doesn't have to distribute income based on your interest in the partnership. For example, you may have only a 50% interest in the partnership but get 80% of the income because your "silent partner" wants to reward the extra time you spent working. If mum and dad are the sole partners in a Partnership seek written advice if you distribute income other than 50/50. Don't even think about doing this unless you have a written trust deed.
Division 6AA - Does the Tax Commissioner hate children?
Division 6AA imposes penal tax rates on "unearned income" derived by minors (Income Act 1936). If your 17 year old son works at McDonalds then the tax rate is just what you and I suffer. That is "earned" money. But if the child gets "unearned" money from, say a trust, then the tax rate is often 66%! Diverting income to children may be ineffective in reducing tax. You can lock income away from wayward adult children in the partnership. However, this "uncontrolled partnership income" often suffers penalty tax. Accordingly, income producing partnerships are often only of benefit in tax planning for partners over 18 years and people you trust with money.

Can a partnership contribute to Super?
A company or trust can claim deductions for all superannuation contributions made on behalf of employees. This is a specified limit each year. This depends on the employee's age. However, the maximum deductions of Superannuation available to a partner (self employed) is less than an employee. This seems unfair.

CGT roll-over relief If you are an individual then you reduce your Capital Gains Tax bill by 50% - if you comply with all the conditions. Family Trust companies lose this advantage. However, the Partnerships do get this reduced 50% CGT rate. If the asset is also the business asset ("active asset") then you may get another 50% CGT relief. (Only if you are under $5 million in business assets.) You may also roll over up to half a million dollars into Super and defer the CGT bill.

Can you share the profit equally?
Most partners allow for unequal distribution of profit provided all partners agree. A partnership may also be so constituted that one of the partners has the power to direct the net partnership profit among the partners. Partnerships so formed are uncommon. This is because the joint and several unlimited liability leads partners to require certainty as to their respective rights.

Income derived by a partner as a result of such a distribution is not subject to additional tax under section 94. This is because that provision applies only to an uncontrolled share in partnership income; i.e. the question is not whether the determination of the amount of the share is controlled, but whether the share of partnership income, once ascertained, is effectively controlled by the partner. A net partnership loss may be subject to allocation in a similar fashion.
Care must be exercised in drafting the partnership agreement to ensure that the income is not derived by the partner having the power of direction but is merely dealt with as he or she directs (*Jones* (1963) 109 CLR 342; 13 ATD 6).

**Can one partner get income and the other get losses?**

Profits cannot, for tax purposes, be allocated to one partner and another incurs a share of partnership loss. There is only one net amount. Either net income of the partnership or a partnership loss is available under section 92. The practice of the Tax Commissioner in assessing partners who receive distributions in the form of salaries, as well as in the form of shares of net profit or loss after payment of salaries, where there is a net loss, is concessionary only and not one which the partners could oblige the Commissioner to adopt.

Mr & Mrs McDonald had a house …

Have a look at *McDonald’s* case 87 ATC 4541. Mr & Mrs McDonald acquired a rental property as "Joint Tenants". [1] They agreed that any net profit is apportioned 75% to the wife and 25% to the husband. On the other hand they agreed that the husband wholly absorbs any loss. (Mr McDonald, we assume, was making a bucket of money and paying a lot of it in tax. Mrs McDonald we assume was paying tax at a lower rate. Consequently, Mr McDonald wanted losses to reduce his tax. Mr McDonald wanted income because her tax rate was less than her husbands.)

The court held that there was no partnership at general law. Therefore, the husband was entitled to claim only half of the losses (not all of the loses). His wife could only have half the profits.

Importantly, the position may have been different had there been a written partnership deed. (see Case 12/95 95 ATC).

**Note:** [1] "Joint Tenants" have to have to have equal holdings in the asset. For example, if you have 2 people, then to remain as joint tenants they have to be 50/50. To keep 3 people as Joint Tenants they have to be 1/3, 1/3 and 1/3.

6. A Company (Pty Ltd, Limited and No Liability)

Quite often a person will rush off and buy a Proprietary Limited Company. All up the cost to buy a "$2 shelf company" is less than $1 000. (Partnership deeds and Family Trusts cost far less.) In the good old days if your company was broke your assets were protected. This is
called "limited liability". The tremendous benefits of limited liability are a thing of the past because:

1. The Corporations Law can hold executive, non-executive and de facto directors responsible for the companies' debts
2. Landlords and banks generally require you, as the director, to sign personal guarantees. These guarantee the companies' contractual obligations and debts.

All Australian companies and their shares are controlled by a great deal of legislation. Most of which is contained in the Corporations Law. This is the 2nd largest single piece of legislation in Australia (after the Tax Act). This increases the expense and time to manage and comply with all the government regulations.

Talk it over with your Adviser, Accountant and Tax Lawyer before you buy a company.

**Would a future Ralph render a company completely useless?**

The Ralph reforms aren't going ahead. But if something similar ever gets up, Family Trusts will have the same tax rate as companies - 30%. However, companies cost more to set up and maintain. A company can provide greater flexibility than a partnership in the manner of dealing with profits, e.g. by providing for shares with different classes of rights. However, Family Trusts have even greater flexibility than either a partnership or company.

**How many Directors do you need in a company?**

There is good news. Companies may now have only one shareholder and director (making it easier for sole traders to incorporate). In order to reduce the administrative burden on small business various accounting and other requirements have been removed. Further improvements increase the capacity of companies to distribute capital to shareholders. This allows companies to stream all capital contributed for shares to the shareholders who did not contribute it.

Another interesting point is the so-called "dividend access" shares. This may be issued to family members without giving them any control over, or substantial equity, in the company but enabling company profits to be distributed to those shareholders. This is contingent on minors being of sufficient maturity to understand the general nature of their contract with a company. This is also subject to certain other qualifications. For example, such shares may be issued to minors (although dividends derived by minors are subject to the higher Division 6AA penalty rate of tax).
Other advantages of a company are: unlike a natural person, it does not die thus avoiding any difficulties relating to devolution of property. A company provides shareholders with the benefits of limited liability and is a well recognised commercial vehicle with a reasonably solidly established body of law concerning its operations. On the other hand, a director has substantial and stringent legal duties and, in certain circumstances, is liable for the debts of the company.

Tax advisers should be aware that the Commissioner regards the use of a family company to split an individual's personal exertion income among family members, as a potential tax avoidance arrangement. The general anti-avoidance provisions of Pt IVA can strike down such arrangements unless the family company has either significant income-producing activities or assets, or engages a number of employees (Taxation Ruling IT 2121). Note that the simple disposition of an income-producing asset by an individual to a company wholly owned by that individual will not generally attract the operation of Pt IVA. An example being where an individual incorporates a company to which he or she transfers a rental property or share portfolio (Taxation Determination TD 95/4).

**Hot CGT issues in a company**

Where the business of a company is structured to have a small amount of issued capital and a large amount of loan funds (provided by the proprietors of the issued capital) the cost of the shares would not substantially increase the cost base of such shares. (The $2 shelf company is a bad idea if you expect capital gains.) In some such cases it may be desirable to inject additional funds into the company as capital.

However, if the shares in the company were issued or allotted prior to the introduction of the GST (20 September 1985), great care must be taken to ensure that sections 149-55 and 149-35, which may deem a pre-CGT asset to have been acquired after 19 September 1985 where there is a substantial change in the underlying beneficial interests, or the share value shifting provisions of Division 19B are not triggered. Alternatively, it may be desirable that the assets of the business be sold rather than the shares in the company.

If the business of the company commenced before 20 September 1985 but substantial share capital was issued on or after that date, it may be advantageous to sell the assets rather than the shares, as a substantial amount of goodwill may be exempt from CGT. If the sale consideration includes a share of future profits, the implications of Taxation Ruling TR 93/15 will need to be considered. Broadly, that ruling requires the vendor to pay tax on the market value of the right to profits. The right itself is an asset. Therefore, you have CGT questions.
Note that when shares in a company are sold the proceeds of the proposed roll-over relief, applicable (from 1 July 1997) where active assets of a small business are sold and the proceeds reinvested in active assets of another business (where total assets do not exceed $5m), will not be available.

Companies should not be used to hold capital appreciating assets. To the extent that dividends distributed to shareholders represent the indexed component of a capital gain, which is tax-free, those dividends will not be franked (franking credits do not arise where no tax is paid). Accordingly, a resident individual shareholder may pay tax on what would otherwise be a tax-free amount. Alternatively, a lack of franking credits may erode the value of the company's shares.

7. What is a Unit Trust?

A Unit Trust is similar to a Family Trust but is used - you guessed it - for businesses rather than a single family. The Unit Trust is simply an extension of a Family Trust into the field of commerce. A Family Trust is controlled by one or two people (usually a husband and wife.) The husband and wife have complete discretion as to whom they distribute income to each financial year. Such "trust" is not usually shared out side a family! Hence the need for a Unit Trust. (For more information on Unit Trusts see Brett Davies Lawyers or get one at LawCentral.)

How does a Unit Trust work?
At the end of each year, income is distributed to the Unit Holders in proportion to the units that the beneficiary holds. The Trustee has no discretion. Units may be held by Family Trusts, companies or by individuals.

Can't I just use my Family Trust to do all this?
A Unit Trust serves a different purpose to a discretionary Family Trust. A Unit Trust has:

- negotiability (you can buy and sell units)
- fixed annual entitlements to income and capital (the trustee can not reduce your entitlements)

A Unit Trust can have discretionary units. However, the discretion is restricted to income (not capital). A Unit Trust should generally not be used as a substitute for a Family Trust. Rather it may be prudent to have your Family Trust owning the units in the Unit Trust.
What happens if the Unit Trust goes broke?
Unfortunately, unit holders can be liable to pay any shortfall of assets on the Unit Trust going broke, especially if the trust is not properly drafted and maintained by your professional advisers.

In *Broomhead Pty Ltd (in Liquidation) v Broomhead Pty Ltd* Justice McGarvie stated that the unit holders in a Unit Trust were liable to indemnify the trustee against liabilities incurred in carrying on a business. In this case the share of each beneficiaries' liability was limited to the proportion of his or her beneficial interest.

Cashing in and transferring of units
The ownership of the trust funds is divided into a number of equal units. The units are recorded on a register and are transferable like shares in a company. Well-constructed Unit Trusts include mechanisms for cashing in (redemption) and transferring the units. Of particular importance is the procedure for determining the price at which units are to be redeemed.

Units in the Unit Trust can be readily traded and people holding them can participate in the profits of the business on a set percentage.

What do you consider when setting up a unit trust? Some of the issues to be considered when setting up a unit trust are:

1. the composition and control of the trustee company, the method of arriving at decisions (e.g. whether unanimity should be required in certain cases) and the method of removing the trustee and appointing a new trustee (the fact that two or more unrelated parties may be associated in the operation of a unit trust and the fact that the unit trust, unlike a discretionary trust, will normally be under the control of more than one person, increases the risk of disputes as to the management of the trust assets and the construction of the relevant documents);

2. the powers of the trustee to determine whether receipts, receivables, outgoings and other charges are on income or capital account with particular regard to the effect of special tax concessions;

3. the extent of control which should be exercised by unit holders over the activities of the trustee;
4. the means of transferring units or permitting unit holders to have their units transferred or redeemed;

5. whether units should, in any circumstances, be subject to compulsory redemption and how this should be achieved;

6. the means of introducing new unit holders;

7. the extent of the indemnity which should be provided to the trustee for breaches of trust and the effect of these provisions upon potential lenders to the trustee;

8. the means of excluding a unit holder (frequently the trustee of a discretionary trust for the family of a particular principal) from a continued interest in the unit trust following the death of the principal in a manner which is both fair to the family of the deceased principal, but not onerous for continuing unit holders; and

9. the protection of unit holders from personal liability to the extent that this is possible.

8. Unit Trust vs Company

On the face of it, owning units in a Unit Trust is similar to owning shares in a company. However, The High Court of Australia has stated that a unit in a Unit Trust is fundamentally different to a share in a company. A share holder has no interest in the assets of the company. A Unit Holder holds a proprietary interest in all the trust property: *Charles v Federal Commissioner of Taxation* (1954) 90 CLR 598.

Therefore, a unit holder can lodge a caveat over land held in the Unit Trust. A shareholder in a company has no such right. Other differences are:

- A trust comes into existence as the result of a private rather than a government act. There is less governmental regulation of trusts.

- A company is a legal entity in itself. A trust is not a separate legal person and offers more flexibility.

- In a Unit Trust the trustee holds property, such as shares in a company, on trust for the Unit Holders. The Unit Holders are regarded, like beneficiaries under a trust, as equitable owners of the investments held by the trustees.
• A company is linked together by a contract in the company's Memorandum and Articles or Constitution. On the other hand, investors in a Unit Trust are not necessarily in any contractual relationship with each other. There is more flexibility in a Unit Trust.

• Although a trust is not a corporation or company, a person connected with a trust may be a company.

• You can sell both shares in a company and units in a Unit Trust. You can draft your Unit Trust so that you have to offer your units to other unit holders before you sell them on the open market. Shareholders in a company can enter into similar restrictions through a shareholders’ deed. (However, there is often higher stamp duty on the sale of Units.)

• Employee Share Scheme concessions aren’t available for Unit Trusts.

9. Family Trust vs Company - is it a fair fight?

The factors relating to the question as to whether Family Company is to be preferred to a Family Trust have been altered considerably in recent years. The imputation system in relation to dividends and the abolition of undistributed profits tax (particularly where the family income consists wholly or mostly of dividends or other property) is beneficial to the family company.

Of course, as much flexibility as possible should be maintained in any set-up. In some cases, this may be obtained by having a discretionary Family Trust with both individual and company beneficiaries. The shareholders of the company being those persons whom it is desired should eventually benefit. Ultimately, however, whether a family company or a discretionary Family Trust is the appropriate vehicle will depend upon the circumstances of each case. Considerations other than tax (e.g. the costs of establishing and maintaining a particular structure) must also be taken into account.

Can you gear into a Family Trust and a Company?

Yes, you can. Negative gearing transactions may involve the use of Family Trusts or companies. For example, in Janmor Nominees 87 ATC 4813, a Family Trust was allowed a deduction for interest payable on loans used to purchase an investment property even though the interest ($14,251) considerably exceeded the rent earned in the year in question.
($6,915). This decision is significant in the context of highly geared residential properties, which generally produce significant revenue losses (ignoring capital appreciation).

It cannot be assumed, however, that interest on all negatively geared investments will be deductible.