



BUSINESS STRUCTURING ANALYSIS REPORT

Takeaway Shop Acquisition - Entity Structure Comparison

Discretionary Family Trust vs Pty Ltd Company

Prepared for:	Instructing Accountant / Client (James)
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Client Brief / Query

Facts

James is buying an existing takeaway shop in Sydney. The seller is a Discretionary Family Trust. Current gross turnover of the business is \$850,000. Purchase price: \$1,900,000. The business is promising to grow further. James is married and his wife is unemployed. They have 2 children (aged 9 and 18 years old).

Questions

Structural Options

1. If James sets up a Discretionary Family Trust to buy the business - what are the implications?
2. If James sets up a Pty Ltd company to buy the business - what are the implications?

Discussion Topics

Topics for Discussion

1. GST implications (e.g. going concern application) for each option;
2. Discretionary Trust option for asset protection and income tax benefits;
3. Pty Ltd as an option for asset protection and income tax benefits.

1. Summary

Discretionary Family Trust with Corporate Trustee

This structure provides: (a) maximum income tax flexibility through discretionary distributions to James's wife (\$18,200 tax-free) and 18-year-old child (\$18,200 tax-free); (b) asset protection through the corporate trustee limiting personal liability; and (c) the 50% CGT discount on any future disposal of the business.

A Pty Ltd company offers stronger creditor protection (limited liability) and a flat 25% tax rate on retained earnings, but sacrifices income splitting flexibility and the 50% CGT discount - which is a significant disadvantage for a business with \$1.9M in goodwill that will likely appreciate further.

Both structures qualify for the GST going concern exemption under s 38-325 GST Act, provided the buyer entity is GST-registered, both parties agree in writing, and the seller supplies all things necessary for the continued operation. The buyer should register for GST before settlement regardless of structure (turnover \$850,000 exceeds the \$75,000 threshold).

The 9-year-old child CANNOT receive trust distributions at adult rates (Division 6AA penalty rates apply). Only James, his wife, and the 18-year-old are effective income-splitting targets. A bucket company can receive excess trust income at 25%.

2. Facts & Assumptions

Facts Provided

James is purchasing an existing takeaway shop in Sydney.

The seller is a Discretionary Family Trust.

Current gross turnover: \$850,000.

Purchase price: \$1,900,000.

Business is promising to grow further.

James is married; his wife is unemployed.

They have two children: aged 9 and aged 18.

Assumptions Made

Assumption [ASSUMED]	Affects
The \$1.9M purchase price comprises goodwill, equipment/fittings, stock, and possibly a lease assignment. The exact split is not provided. [ASSUMED]	Determines the depreciation base (equipment/fittings), GST treatment of individual components, and stamp duty calculation.
The business operates from leased premises (not freehold owned by the seller). [ASSUMED]	If the seller owns the freehold, real property transfer adds stamp duty and potentially GST complications. A lease assignment is simpler.
The business generates net profit (after all expenses including a reasonable salary to James) of approximately \$150,000-\$250,000 p.a. [ASSUMED]	Determines the tax saving from income splitting and the comparative tax position under trust vs company.
James will finance the purchase partly through borrowings and partly from savings. [ASSUMED]	Interest on borrowings to acquire the business is deductible under s 8-1 ITAA 1997. The financing structure does not change the trust vs company analysis.
James will work full-time in the business. [ASSUMED]	Affects whether Personal Services Income (Div 85-87) rules apply - unlikely for a takeaway shop with stock sales, but must be considered.
The 18-year-old child has no other significant income. [ASSUMED]	Determines the tax benefit of distributing trust income to the adult child.
James's wife has no other income apart from any future trust distributions. [ASSUMED]	Full \$18,200 tax-free threshold available for trust distributions.
The seller's trust is GST-registered and currently operating the business. [ASSUMED]	Required for the going concern exemption to apply on the seller's side.
NSW is the relevant state for stamp duty purposes (Sydney business). [ASSUMED]	NSW Duties Act 1997 applies. NSW has abolished duty on goodwill for business transfers (effective from certain date - must verify current status).

Information Needed

Missing Information [NEEDED]	Impact if Different
Detailed breakdown of the \$1.9M purchase price: goodwill, equipment, stock, lease premium (if any). [NEEDED]	Required for: depreciation deductions (equipment only), GST treatment of individual components, and stamp duty calculation.
Terms of the premises lease (remaining term, rent, conditions for assignment). [NEEDED]	The lease is critical for the going concern exemption - must be assignable and supplied to the buyer. Also determines ongoing fixed costs.
James's total income from other sources (if any). [NEEDED]	Affects his marginal tax rate and the comparative benefit of trust distributions vs company salary.

Missing Information [NEEDED]	Impact if Different
Whether the business holds any liquor licence, food licence, or other regulatory approvals. [NEEDED]	Licences may not be transferable between entities. Some may require fresh applications. This affects the going concern analysis.
Whether James's wife and 18-year-old are Australian residents for tax purposes. [NEEDED]	Non-residents do not receive the tax-free threshold.
The 18-year-old's employment/study status. [NEEDED]	May affect Centrelink, HECS, or Youth Allowance interactions if receiving trust distributions.

3. Related Areas & Cross-Over Analysis

Area	Relevance	Key Provision	Impact
GST - Going Concern	Sale of business may be GST-free if conditions met.	s 38-325 GST Act; GSTR 2002/5	Both trust and company can qualify. Buyer must be GST-registered. Saves \$172,727 in GST (1/11 of \$1.9M).
GST - Registration	Turnover \$850K exceeds \$75K threshold.	s 23-5 GST Act	Mandatory registration for the buying entity. Must register BEFORE settlement for going concern to apply.
Income Tax - Trust Distributions	Discretionary trust enables income splitting.	Div 6 ITAA 1936, s 97	Distribute to wife (0% on \$18,200) and 18yo child (0% on \$18,200). Annual saving of ~\$15,000+.
Income Tax - Company Rate	Company taxed at 25% (base rate entity).	s 23AB ITRA 1986	Flat 25% rate on profits. No income splitting. Div 7A applies to extractions.
Division 6AA - Minors	9-year-old cannot receive trust distributions at adult rates.	Div 6AA ITAA 1936	Unearned income above \$416 taxed at 66%. Not an effective distribution target.
Section 100A	Reimbursement agreement risk on trust distributions.	s 100A ITAA 1936; TR 2022/4	Distributions to wife and 18yo must be genuine.
CGT - Future Sale	50% CGT discount available for trusts/individuals, NOT companies.	Div 115 ITAA 1997	Trust preserves the 50% CGT discount if the business is sold in the future. Company does NOT get this discount.
Division 7A	Company to shareholder/associate payments.	Div 7A ITAA 1936	If company structure chosen: all loans/payments to James must comply with Div 7A or be treated as deemed dividends.
Stamp Duty (NSW)	Transfer of business assets.	Duties Act 1997 (NSW)	NSW does not charge duty on business asset transfers (goodwill, chattels) - only on real property, motor vehicles, and certain rights.
Asset Protection	Separating business risk from personal assets.	Bankruptcy Act 1966 ss 120, 121; Corporations Act 2001 s 197	Company: clear limited liability. Trust with corporate trustee: strong protection (trustee liability limited to trust assets).
SB CGT Concessions	Future sale of business - Div 152 concessions.	Div 152 ITAA 1997	Both structures can access Div 152 if conditions met. Trust structure allows 50% CGT discount to stack with the 50% active asset reduction = 75% total reduction for individual beneficiaries.

4. Analysis

4.1 GST Implications - Going Concern

Going Concern Requirements (s 38-325 GST Act)

The sale of a business can be GST-free if it qualifies as a supply of a going concern. Section 38-325(1) GST Act requires ALL of the following:

Requirement	Provision	Application to This Sale
The supply is for consideration	s 38-325(1)	Satisfied - \$1.9M purchase price.
The recipient is registered, or required to be registered, for GST	s 38-325(1)(a)	The buyer entity (trust or company) MUST be registered for GST before settlement. Turnover is \$850K, well above the \$75K threshold - registration is mandatory.
The parties have agreed in writing that the supply is of a going concern	s 38-325(1)(b)	Must be included as an express term in the sale contract. Both parties must agree in writing that the supply is a going concern for GST purposes.
The supplier supplies all things necessary for the continued operation of the enterprise	s 38-325(2)(a)	The seller must transfer: equipment/fittings, stock, goodwill, customer lists, supplier contracts, lease (by assignment or new lease), licences, recipes/IP, and ongoing advertising/branding.
The supplier carries on the enterprise until the day of supply	s 38-325(2)(b)	The seller must continue operating the takeaway shop up to settlement day. Any closure before settlement risks invalidating the going concern exemption.

Application to Both Options

Factor	Option 1: Discretionary Trust Buyer	Option 2: Pty Ltd Company Buyer
GST registration	Trust must register for GST before settlement. Apply for ABN and GST registration as soon as the trust deed is executed.	Company must register for GST before settlement. Apply at ASIC registration or immediately after.
Going concern eligibility	Trust can be the recipient. Written agreement required in the sale contract.	Company can be the recipient. Written agreement required in the sale contract.
GST outcome if going concern applies	GST-FREE. No GST on \$1.9M. Saves \$172,727.	GST-FREE. No GST on \$1.9M. Saves \$172,727.
GST outcome if going concern FAILS	Taxable supply. Seller charges GST (\$172,727). Buyer claims ITC - but cash flow timing issue.	Taxable supply. Seller charges GST (\$172,727). Buyer claims ITC - but cash flow timing issue.
Risk mitigation	Include a GST indemnity clause in the contract. If going concern fails, seller is liable to remit GST.	Same - include GST indemnity clause.

GST Conclusion: Identical for Both Options

Both structures are equally eligible for the going concern exemption. The GST outcome is identical for both options. The critical actions are: (1) register the buying entity for GST BEFORE settlement; (2) include a written going concern agreement in the sale contract; (3) ensure the seller transfers ALL things necessary for continued operation (GSTR 2002/5); and (4) ensure the seller trades up to settlement day.

Stamp duty note (NSW): If the going concern exemption applies, no GST is included in the dutiable value. If GST is payable (going concern fails), NSW stamp duty is calculated on the GST-inclusive price, adding approximately \$17,000+ in additional duty. This reinforces the importance of structuring the going concern correctly.

4.2 Option 1 - Discretionary Family Trust

Structure

JAMES FAMILY TRUST (Discretionary Trust)

- Trustee: James Trustee Pty Ltd (\$2 dormant company)
- Director: James (sole director initially; consider adding wife)
- Shareholder: James (sole shareholder of the trustee company)
- Appointor: James (controls who is trustee - the most powerful role)
- Guardian: Trusted family member (veto power over appointor changes)
- Beneficiaries: James, wife, children, and related entities (wide class)
- Purpose: Acquires and operates the takeaway business
- Distributes: Net profit to beneficiaries before 30 June each year

Income Tax Benefits

Under Division 6 ITAA 1936 (s 97), the trustee has discretion to distribute income to any beneficiary in any proportion. This enables income splitting across the family:

Beneficiary	Tax Position	Distribution Capacity	Effective Tax Rate	Recommendation
James's wife	Unemployed - no other income	Up to \$18,200 tax-free; then \$18,201-\$45,000 at 16%; \$45,001-\$135,000 at 30%	0% on first \$18,200	PRIMARY TARGET. Utilise full tax-free threshold. Consider distributing up to \$45,000 (effective rate ~7%).
18-year-old child	Adult rates apply (over 18)	Up to \$18,200 tax-free; then marginal rates	0% on first \$18,200	EFFECTIVE TARGET. Full adult threshold available. Check HECS/Centrelink interactions.
9-year-old child	Minor - Div 6AA penalty rates	\$416 unearned income; then 66% to \$1,307; 45%+ above	66% above \$416	NOT EFFECTIVE. Do not distribute to this child.
Bucket company (optional)	Flat 25% (BRE)	Unlimited - receives excess	25% flat	Useful for income above family members' optimal brackets. Div 7A applies on extraction.

Asset Protection

The trust provides medium-to-high asset protection:

- Trust assets are legally held by the trustee (James Trustee Pty Ltd), not by James personally.
- Creditors of the business cannot access James's personal assets (home, savings).
- The corporate trustee (Pty Ltd) limits the personal liability of the directors to the trust's assets, subject to s 197 Corporations Act 2001 (directors liable if trust assets insufficient).
- The appointor role (James) controls who is trustee. This is the most critical succession role - must be documented in the deed and James's will.

Asset Protection Note

Food business risks: product liability (contamination, allergens), workers compensation, slip-and-fall claims, lease disputes, food safety regulatory action. These risks attach to the operating entity (the trust) but the corporate trustee shields James personally.

Important: James should NOT provide personal guarantees for business debts where possible. A personal guarantee defeats the asset protection benefit. However, banks and landlords commonly require personal guarantees for new businesses.

CGT on Future Sale

Trust: CGT Discount Preserved

A key advantage of the trust: the 50% CGT discount (Div 115 ITAA 1997) is available when the trust sells the business in the future. This discount is applied at the trust level, and the net capital gain is then distributed to beneficiaries.

If the business grows to \$3M+ in value (as indicated by the growth trajectory), the CGT discount could save several hundred thousand dollars on a future sale compared to the company structure.

Additionally, the trust can access the Small Business CGT Concessions (Div 152) including the 50% active asset reduction (Subdiv 152-C). For individual beneficiaries, this stacks: 50% CGT discount + 50% active asset reduction = 75% total reduction of the capital gain.

Disadvantages of Trust

- Trust losses CANNOT be distributed to beneficiaries. If the business makes a loss (e.g., in early years during transition), the loss is trapped in the trust (can only be carried forward against future trust income if a Family Trust Election is in place).
- Trustee must resolve distributions before 30 June each year. Failure = trustee assessed at 47% (s 99A ITAA 1936).
- Higher setup and compliance costs than a simple company.
- Banks may be less willing to lend to trusts (may require personal guarantees).
- NSW land tax: if the trust holds NSW land, a trust surcharge may apply unless specific beneficiaries are nominated.

4.3 Option 2 - Pty Ltd Company

Structure

JAMES OPERATIONS PTY LTD (Company)

Director: James

Shareholder: James (100%)

Purpose: Acquires and operates the takeaway business

Tax rate: 25% (base rate entity - turnover < \$50M)

Profit extraction: Salary (deductible) and/or franked dividends

Income Tax

The company is taxed at a flat 25% rate on all profits (base rate entity under s 23AA ITAA 1997 - aggregated turnover < \$50M and no more than 80% base rate entity passive income). Profits are extracted via:

(a) Salary to James: deductible to the company, assessable to James at his marginal rate.

(b) Franked dividends: company tax creates franking credits. When distributed as franked dividends, James receives a franking credit tax offset. Effective top-up tax = marginal rate minus company rate.

(c) Retain in company: profits left in the company are taxed at 25% (not James's 47% marginal rate). However, eventually the money must come out (via dividends or on winding up), at which point James pays the top-up tax.

Company: No Income Splitting

No income splitting: All company income is the company's. James cannot distribute company profits to his wife or adult child. The wife and child's tax-free thresholds (\$18,200 each) are WASTED. This is the primary tax disadvantage of the company structure.

The company rate advantage (25% vs James's marginal rate of up to 47%) is a timing advantage only - it defers tax, it does not eliminate it. When James eventually takes the money out, the top-up tax is payable.

Asset Protection

The company provides the strongest asset protection of any standard structure:

- The company is a separate legal entity (Corporations Act 2001). Creditors of the company cannot access James's personal assets.
- James's liability is limited to his shareholding (the share capital - typically nominal).
- Directors' duties (ss 180-184 Corporations Act) and insolvent trading (s 588G) create personal exposure for James as director, but only in limited circumstances.
- Banks and other financiers generally prefer lending to companies - clearer credit profile, separate entity borrowing capacity.

CGT on Future Sale

Company: No CGT Discount

A key disadvantage of the company: NO 50% CGT discount. Companies are not entitled to the CGT discount under Div 115 ITAA 1997.

If James later sells the business for \$3M (cost base \$1.9M), the \$1.1M capital gain is taxed at the full company rate (25% = \$275,000). In a trust, the same gain would be reduced by 50% CGT discount (\$550,000) and then potentially further reduced by the 50% active asset reduction (\$275,000) = only \$275,000 taxable, distributed to individual beneficiaries at their marginal rates.

For a business with \$1.9M in value that is 'promising to grow further', the loss of the CGT discount is a significant long-term cost.

Division 7A Risk

Division 7A ITAA 1936 is a constant compliance burden for private companies. Any payment, loan, or debt forgiveness by the company to James (or his associates, including his wife and children) is treated as a deemed unfranked dividend UNLESS it falls within an exception (e.g., complying loan under s 109N, or payment of reasonable salary).

Common traps: James uses company funds for personal expenses; James borrows from the company without a complying loan agreement; the company pays for James's personal assets. Each triggers a Div 7A deemed dividend at James's top marginal rate.

4.4 Head-to-Head Comparison

Factor	Discretionary Trust	Pty Ltd Company	Winner
Income splitting	YES - distribute to wife (\$18,200 at 0%), 18yo (\$18,200 at 0%), James (balance)	NO - all income taxed to company at 25%, then top-up on extraction	TRUST
Tax rate on retained earnings	Trustee at 47% if not distributed. Must distribute by 30 June.	25% (base rate entity). Can retain indefinitely.	COMPANY
50% CGT discount on future sale	YES - 50% discount at trust level, then distribute to individuals	NO - companies do not get the CGT discount	TRUST
SB CGT concessions (Div 152)	YES - 50% CGT discount + 50% active asset reduction = 75% total for individuals	YES - 50% active asset reduction only (no CGT discount stacking)	TRUST
Asset protection	MEDIUM-HIGH (corporate trustee). Trustee liability limited to trust assets. s 197 director exposure.	HIGH - strongest limited liability. Clear legal separation.	COMPANY (marginal)
Division 7A risk	LOW - trust distributes to beneficiaries. UPE risk only if distributing to a company beneficiary.	HIGH - all personal use of company funds risks Div 7A deemed dividend.	TRUST
Losses	TRAPPED in trust. Cannot distribute. Must make FTE to carry forward (Sch 2F).	Carried forward in company (subject to COT/SBT). Can offset against future company income.	COMPANY
Banking/lending	May require personal guarantees. Some lenders less familiar with trusts.	Banks prefer companies. Cleaner borrowing profile.	COMPANY
Compliance cost	Higher - trust return + corporate trustee ASIC fee + distribution minutes.	Lower - company return + ASIC annual review.	COMPANY (marginal)
Annual distribution obligation	YES - must resolve by 30 June or trustee taxed at 47%.	NO - can retain earnings at 25% indefinitely.	COMPANY
GST going concern	Equally eligible. Must register before settlement.	Equally eligible. Must register before settlement.	EQUAL
Stamp duty (NSW)	No duty on goodwill/chattels. Same for both.	No duty on goodwill/chattels. Same for both.	EQUAL

Discretionary Family Trust

Overall assessment: The trust wins on the factors that matter most for this client's circumstances: income splitting (wife unemployed, 18yo available) and CGT discount preservation (business valued at \$1.9M and growing). The company's advantages (banking, retained earnings, loss treatment) are real but secondary for a profitable, growing takeaway business with an available family income-splitting opportunity.

If the business were expected to make losses in the early years, the company would be the stronger option (losses usable against future company income). However, the business is already profitable (\$850K turnover, established) and 'promising to grow further' - losses are unlikely.

5. Worked Example Tables

5.1 Annual Income Tax Comparison

Assumes: Business net profit \$200,000 after all operating expenses. James takes \$100,000 salary equivalent for his work in the business.

Item	Trust Structure	Company Structure
Business net income (before James's salary equivalent)	\$200,000	\$200,000
James's salary/drawings	Trust: distribute \$100,000 to James	Company: pay \$100,000 salary (deductible)
Remaining profit	\$100,000 (available for distribution)	\$100,000 (taxable at company rate)
Trust distributions / Company tax:		
Wife - distribution/dividend	\$45,000 (tax: ~\$3,463 incl Medicare)	N/A (cannot distribute to wife)
18yo child - distribution	\$18,200 (tax: \$0)	N/A (cannot distribute to child)
James - remaining trust distribution	\$36,800 (tax: at marginal rates ~\$7,500)	N/A
Company tax on \$100K retained	N/A	\$25,000 (25% BRE rate)
James - tax on \$100K salary/distribution:		
James: tax on his total distributions	\$100,000 salary equivalent. Tax: ~\$22,967 (incl Medicare)	\$100,000 salary. Tax: ~\$22,967 (incl Medicare)
TOTAL FAMILY TAX:	~\$33,930	~\$47,967
Effective family tax rate on \$200K profit:	~17.0%	~24.0%
ANNUAL TAX SAVING (TRUST vs COMPANY):	~\$14,037 per year	

Tax Comparison Notes

Notes: The company tax of \$25,000 is not the final tax cost. When the \$75,000 retained earnings (\$100K - \$25K tax) are eventually distributed as franked dividends to James, he pays top-up tax (marginal rate minus 25%). The total tax across both years is higher than the trust.

The trust saves approximately \$14,000 per year by utilising the wife's and 18-year-old's tax-free thresholds and lower marginal brackets. Over 10 years, this represents approximately \$140,000 in cumulative tax savings.

5.2 Future Sale - CGT Comparison

Assumes: Business sold 8 years later for \$3,000,000. Cost base remains \$1,900,000. Individual beneficiary is in the 37% marginal bracket.

Step	Trust Structure	Company Structure
Capital proceeds	\$3,000,000	\$3,000,000
Less: Cost base	(\$1,900,000)	(\$1,900,000)
Gross capital gain	\$1,100,000	\$1,100,000
50% CGT discount (Div 115)	(\$550,000)	\$0 (companies not eligible)
Gain after CGT discount	\$550,000	\$1,100,000
50% Active asset reduction (Subdiv 152-C)	(\$275,000)	(\$550,000)
Retirement exemption (Subdiv 152-D)	(\$275,000)	(\$500,000)
Taxable capital gain	\$0	\$50,000
Tax payable	\$0	\$12,500 (at 25% company rate)
		Plus: \$550K active asset reduction trapped in company

Trust CGT Advantage: ~\$12,500+ on Future Sale

In this scenario, the trust structure results in \$0 CGT on the future sale. The company pays \$12,500 company tax, but the real cost is higher: the \$550,000 active asset reduction remains trapped in the company and can only be released on winding up. The trust's 50% CGT discount + 50% active asset reduction + retirement exemption eliminates the gain entirely for the individual beneficiary.

6. Case Law Support

Primary Authority

Case	Court	Principle	Application
<i>FCT v Bamford (2010) 240 CLR 481</i>	HCA	Trust income determined by the trust deed and general law. Proportionate approach for Div 6 assessment.	Foundation for the income splitting mechanism through the discretionary trust.
<i>FCT v Guardian AIT Pty Ltd [2023] FCAFC 3</i>	FCAFC	Section 100A reimbursement agreements. Scope of the 'ordinary family or commercial dealings' exclusion.	Directly relevant to the s 100A risk on distributions to James's wife and 18-year-old child.
<i>FCT v Myer Emporium Ltd (1987) 163 CLR 199</i>	HCA	Profit-making purpose. Income characterisation for isolated transactions.	Relevant to whether the takeaway business income is ordinary income (s 6-5) and the future sale characterisation.

Supporting Authority

Reference	Source	Principle	Relevance
GSTR 2002/5	ATO (Binding)	When is a supply of a going concern GST-free? Comprehensive guidance on s 38-325 requirements.	Governs whether the \$1.9M purchase qualifies as a going concern. Critical for both options.
TR 2022/4	ATO (Binding)	Section 100A reimbursement agreements - comprehensive guidance.	Trust distributions to James's wife and 18-year-old must comply.

7. Conclusion

The Discretionary Family Trust with a corporate trustee provides:

(1) Income splitting: approximately \$14,000 per year in tax savings by distributing income to James's wife (\$18,200 tax-free plus lower brackets) and the 18-year-old child (\$18,200 tax-free). The 9-year-old is not an effective distribution target due to Division 6AA penalty rates.

(2) CGT discount preservation: the 50% CGT discount under Div 115 is available if the business is sold in the future. For a business currently valued at \$1.9M and growing, this could save several hundred thousand dollars compared to a company. Combined with SB CGT concessions (Div 152), individual beneficiaries can achieve up to 75% reduction of the capital gain.

(3) Asset protection: the corporate trustee (James Trustee Pty Ltd) holds the business assets. James's personal assets (home, savings) are separate from the business risk. The corporate trustee's liability is limited to the trust's assets (subject to s 197 Corporations Act).

(4) GST: the going concern exemption under s 38-325 GST Act applies equally to both the trust and company options. The trust must be registered for GST before settlement. No difference between the two options on GST.

The Pty Ltd company is the weaker option for these circumstances due to the loss of income splitting (wife's and child's tax-free thresholds wasted) and the loss of the 50% CGT discount on future sale. The company's advantages (banking, retained earnings, lower compliance) do not outweigh these costs for a profitable, growing business with available family distribution targets.

Next Steps

Key action items: (1) Engage a solicitor to prepare the trust deed with wide beneficiary class, streaming powers (CGT and franked distributions), and appropriate appointor succession provisions; (2) Register the corporate trustee with ASIC; (3) Apply for ABN and GST registration for the trust BEFORE settlement; (4) Include a written going concern clause in the sale contract (s 38-325(1)(b)); (5) Verify the seller will transfer ALL things necessary for continued operation (lease, equipment, stock, goodwill, supplier contracts, licences); (6) Consider a Family Trust Election if losses are anticipated in the transition period; (7) Set up annual distribution minutes process before 30 June each year.

8. Risks & Caveats

Section 100A - reimbursement agreements: [MEDIUM] Distributions to James's wife and 18-year-old must be genuine. Each beneficiary must receive the distribution into their own bank account with independent control. TR 2022/4 and Guardian AIT provide the ATO's framework. If the distributions are part of an arrangement where James actually benefits, the trustee is assessed at 47%.

Division 6AA - minor child: [INFORMATION] The 9-year-old cannot receive trust distributions at adult rates. Unearned income above \$416 is taxed at 66%. Do not distribute to the 9-year-old. This restriction continues until the child turns 18.

Going concern failure: [MEDIUM] If the going concern conditions are not satisfied (e.g., seller does not transfer all necessary things, seller closes before settlement, written agreement missing), the sale becomes a taxable supply. GST of \$172,727 is payable. Include a GST indemnity clause in the contract.

Part IVA risk: [LOW] The trust structure has genuine commercial substance (asset protection for a food business, income splitting for a family with available low-income beneficiaries). This is a standard family business structure, not an artificial arrangement.

Trust losses: [MEDIUM] If the business makes losses during the transition period (e.g., reduced trade during ownership change), the losses are trapped in the trust. Consider a Family Trust Election (Subdiv 272-A, Sch 2F ITAA 1936) to enable loss carry-forward. Consequence: family trust distribution tax (47%) on distributions outside the family group.

Annual distribution deadline: [ANNUAL] The trustee MUST resolve to distribute all trust income before 30 June each year. Failure = trustee assessed at 47% under s 99A. Set a calendar reminder for June each year.

Personal guarantees: [PRACTICAL] Banks and landlords commonly require personal guarantees for new business acquisitions, particularly where the borrower is a trust. A personal guarantee effectively bypasses the asset protection benefit for that specific debt.

NSW stamp duty: [LOW] NSW does not charge duty on business asset transfers (goodwill, chattels). However, if the purchase includes any real property interest or a lease premium, duty may apply on that component. Verify with the contract.

9. Rulings & References

Legislation

Provision	Relevance
GST Act, s 38-325	Going concern - GST-free supply requirements
GST Act, s 38-325(2)	Definition of 'supply of a going concern'
GST Act, s 9-5	Taxable supply requirements
GST Act, s 23-5	GST registration threshold (\$75,000)
ITAA 1936, Division 6 (ss 95-102)	Trust taxation - present entitlement and beneficiary assessment
ITAA 1936, Division 6AA	Penalty tax rates on unearned income of minors
ITAA 1936, s 97(1)	Beneficiary assessed on proportionate share of trust net income
ITAA 1936, s 99A	Trustee assessed at top rate if no beneficiary presently entitled
ITAA 1936, s 100A	Reimbursement agreements anti-avoidance
ITAA 1936, Division 7A	Deemed dividends on company to shareholder payments
ITAA 1997, Division 115	CGT discount (50% individuals/trusts; not available to companies)
ITAA 1997, Division 152	Small business CGT concessions
ITAA 1997, s 23AA, s 23AB ITRA 1986	Base rate entity definition and 25% company tax rate
ITAA 1997, s 8-1	General deduction for business expenses
ITAA 1936, Sch 2F, Subdiv 272-A	Family Trust Election for loss carry-forward
Corporations Act 2001, s 197	Director liability for corporate trustee debts
Bankruptcy Act 1966, ss 120, 121	Clawback provisions for asset protection timing
Duties Act 1997 (NSW)	Transfer duty on business assets (NSW)

ATO Rulings & Guidance

Reference	Topic	Status
GSTR 2002/5	When is a supply of a going concern GST-free?	Binding
TR 2022/4	Section 100A reimbursement agreements	Binding

Case Law

Case	Court	Principle
FCT v Bamford (2010) 240 CLR 481	HCA	Trust income determination; proportionate approach under Div 6
FCT v Guardian AIT Pty Ltd [2023] FCAFC 3	FCAFC	Section 100A - reimbursement agreements and ordinary family dealings exclusion
FCT v Myer Emporium Ltd (1987) 163 CLR 199	HCA	Profit-making purpose; income characterisation
Thomas v FCT (1972) 3 ATR 165	HCA	Present entitlement under Division 6

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