The Startup Playbook

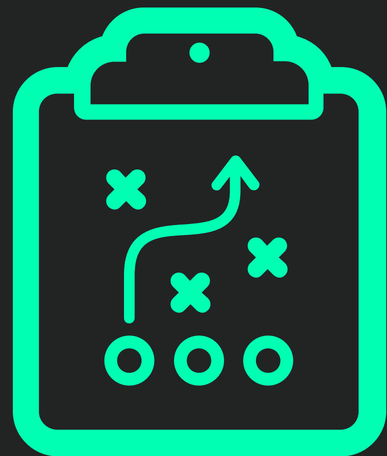
Every startup begins with an idea – a founder having the courage, passion and energy to go bigger, better or smarter – or even build something new.

Starting out can be difficult – if it was easy…everyone would do it – though the rewards are there for those willing take up the challenge.

As you grow and scale, navigating the law will be critical to the success of your venture. At Burch&Co, we love working with founders from all walks of life, providing confidence and clarity to help you take the next step.

At its heart, the law is about relationships – and provides structure and regulation to our expectations, responsibilities, and ownership. We have set out some of these key relationships for any startup:

- Founders
- Set-up and structuring
- Shareholders Agreements
- Capital Raising
- Employees & Contractors
- Clients & Customers
- Suppliers
- Intellectual Property
- Privacy



We hope you find our resources useful. Please stay tuned for more resources, with startup founders in mind as our key audience.

START INC.

Startup Playbook 1: Founders

Early Days

Startups can take a little while to get going. You have other commitments – a job, study or another business to run; friends and family; bills to pay. Finding the time and resources to start is not always straightforward.

You may not be ready to launch, register a company, sign a lease, or commence production – but you are still moving forward and making plans.

At this stage, you may have already started work on your new venture – and this may include having started work with a co-founder.

Your relationships with your co-founders are the most important relationships to any startup. There is a reason that you have chosen these people to be partners in the adventure. Often they are relatives, friends, or former colleagues. These are relationships we believe ought to be protected.

Founder's Agreements

This is where Founders Agreements come in to play. A Founders Agreement is simple yet formal document which sets out the key understandings between co-founders, and promises being made to each other – all before you either register your business, or consider early-stage investment.

Things to consider for your Founders Agreement:

- What you are hoping to achieve
- What the business will do
- Who will own what percentage of the business
- Who will be the directors of the business
- Confidentiality obligations
- Non-compete obligations
- 'Events of Default' – aka what happens when things go wrong
- Dispute resolution mechanisms
- What each co-founder has contributed to the business
- Promises of conduct between co-founders

Startup Playbook 2: Set-up and Structuring

By the time you are ready to engage with the world, it is important that your startup has its own registered corporate identity – a registered company. (See our series instalments on: Employees & Contractors, Clients & Customers, and Suppliers to learn more about getting ready to engage with the world.)

Registering as a company is important for a number of reasons – limitation of liability, ownership of assets, operating as an independent legal entity, and taxation treatment, to mention a few. The most common set up these days is a proprietary limited company, in which you hold shares.

What's wrong with being a sole trader?

If you were to operate as a sole trader (where you conduct your business in your name, with an Australian Business Number or ABN) there are a number of disadvantages:

- Your liability is unlimited
- You will be charged tax in accordance with the marginal tax rate for individuals – rather than at a corporate rate (this may or may not be in your favour, depending on your individual tax rate)
- You will not be able to issue shares in your business to co-founders, investors or employees
- You cannot access Research & Development (R&D) Tax incentives.

These are just some of the reasons why a company structure is preferred by traditional businesses and startups, alike. However, there are two main corporate structures which startups utilise.

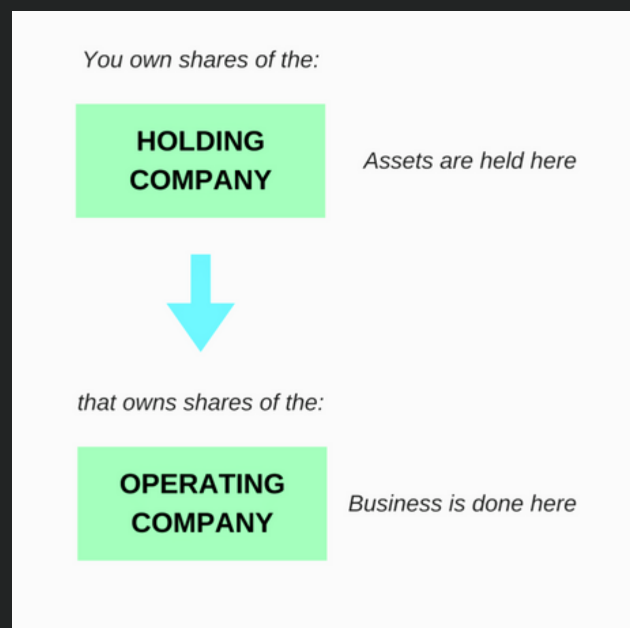
1. Single Proprietary Limited Company Structure

A single company structure is one where all of your business activity and all of your assets and intellectual property sit within the one company. If you are a sole founder, you will often be the sole director, secretary and shareholder of the company.

This structure is often a good place to start, as it is the simplest corporate structure – providing all the upsides of incorporating as a company, without any of the expense of setting up, and running a more complicated structure.

2. Holding Company & Operating Company Structure

A holding company and operating company structure is one where you have two companies instead of one. Company One (the holding company) holds the assets and Intellectual Property of your business. This is the company which you and your co-founders 'own' or hold shares in. It is the holding company which holds all the shares of Company Two.



Visual diagram of a holdco-opco set up, as it's commonly known. Company Two (the operating company) which is owned by Company One, is the company which engages in business – enters into contracts, takes on risk, and goes out and says hello to the world. This includes everything from contracts with Employees & Contractors, Customers & Clients, or Suppliers.

The reason you may wish to go to the effort and expense of utilising the holdco-opco structure is the extra layer of legal protection it affords. Expansion into other revenue streams, through multiple operating companies, is also a strategy that growing businesses pursue. Often the most valuable asset in a startup is the intellectual property you have created (as well as any funds you may have raised). This structure enables this value to sit in a corporate entity separate to the one taking on the commercial risk. If you were to be sued, it would be Company Two which would be sued – and not the holding company.

The Value of Advisors

Your accountant and tax advisors can be really helpful sources of information when it comes to your organisational structure and set up, as there are many tax considerations that could come into play when you scale. Ensuring your set up is done correctly from the get-go is important to make sure that you have set yourself up for success, and seeking advice from accountants that are familiar with the startup ecosystem will take you a long way at the start of your journey.

In contrast, when startups start their operations under an ill-fitting organisational structure, it can be costly, time consuming and nerve wracking to un-do. Some structures that work fine for small businesses may be wholly inappropriate for startups. For example, a discretionary trading trust could be a perfect solution for a mom’n’pop shop, but a startup may be prevented from applying for grants or seeking investment under such a structure.

What role does the accountant play?

As lawyers, we see ourselves as playing an important role in the life of your business. But we are not the only support act – your accountant will also be an indispensable part of your business operation. Although many people try to go it themselves using accounting software (like Xero, Quickbooks or MYOB) building and maintaining a relationship with a good startup accountant is often the difference between well-maintained books and a chaotic financial mess of record keeping. (For the importance of keeping good financial records, see the instalment on early stage investment.)

Accountants provide a range of business services, including:

- Setting up the company
- Acting as your ASIC agent
- Bookkeeping services
- Payroll (including leave and superannuation)
- Tax returns
- BAS/GST
- Issuing shares
- Managing your share register
- Assisting with cap table management
- ASIC reporting

Startup Playbook 3.1: Shareholders Agreements

Once you have your startup up and running – you have registered your company and have plans to scale – it might be time to look for early-stage investment.

One of the most common ways to source early-stage investment is through ‘equity fundraising’ – which is selling shares in your company.

When investors are coming on board as shareholders in your company, it is important for everyone to understand what you are promising each other and how the company will be governed. Amongst other things, investors will want to know what they have a say on, and how their shareholding percentage will be protected.

These promises and obligations are set out in a document call a Shareholders Agreement, which is signed by the directors on behalf of the company, and each shareholder. It becomes the rule book of the Company. If you entered into a Founders Agreement beforehand with your co-founders, the Shareholders Agreement would replace that agreement.

Things to consider for your Shareholders Agreement

- Who are the co-founders?
- Who are the directors?
- Who is the company secretary?
- Who are the shareholders and how many shares do they hold?
- What is the purpose or business of the company?
- What decisions are to be voted on by directors?
- What decisions are to be voted on by shareholders?
- What percentage is required to approve a decision (e.g., 50%, 67%, 75%, or 100%)?
- Do the co-founders have any extra levels of approval or protection?
- What are the promises the directors and shareholders making to each other in respect of conduct?
- What happens if someone needs to leave the company (including a broad range of factors like the need to move overseas, care for sick family members or other opportunities or other more serious scenarios like criminal conviction or death)?

What do you need to have certain key decisions approved?

- How are directors appointed, removed, and paid?
- How is the company secretary appointed, removed, and paid?
- Who is allowed to buy shares in the company, and what is the process for offering shares to new investors?
- Can directors issue new shares for 'sweat equity', if so, what is the process for doing so?
- How are shares sold?
- How much money has each founder contributed to the company (this could also consider real or intellectual property)?
- What happens when a shareholder 'defaults' in respect of a promise made to the company and the shareholders – can they be removed as a director/have their shares acquired – if so, what is the process for doing so?

That’s a lot of considerations!

There’s a lot to think through, we know. And it may seem overwhelming at first, but having these chats now will make your life 1000% easier later.

You will need to carefully think through hypothetical situations that arise in the future, and ensure that your Shareholders Agreement has a balanced approach between protecting investor rights and protecting your rights as a founder, no matter what happens. This is often a key part of negotiations in equity fundraising rounds, and investors will specify broad terms they want included in your Shareholders Agreement.

Startup Playbook 3.2: Capital Raising

One of the hallmarks of a startup is the need to raise capital to grow and scale. Whether your venture is looking to run tests or trials, buy components or ingredients – money for the next step is critical.

How do startups raise capital (read: get money)? Capital raising occurs under two main umbrellas – debt financing, and equity financing.

Debt Financing

Debt financing (read: loan or borrowing) for 'larger businesses' often means borrowing from a bank. More often than not, startups don't tick the boxes of big banks and so obtaining loans from banks can be difficult.

Startups who don't want to go down the equity financing path often look to convertible notes instead. A convertible note is a contract with a lender (often a high-net worth individual) who will lend a startup a fixed sum, for a fixed interest rate, for a fixed period of time. A convertible note can either be repaid (principal and interest) at the end of that fixed period, or it will convert into shares in the company.

Equity Financing

Equity financing (read: selling shares in the company) is the primary vehicle for startup capital raising. Equity finance can take different forms, depending how far along the business is in its journey. Businesses that are new and full of promise but are yet to demonstrate their value are very difficult to value. Therefore, it is difficult to ascertain a fair and reasonable share price, both for the investor and for the company.

In late 2013, the American accelerator, Y Combinator devised the Simple Agreement for Future Equity, or ***SAFE***, addressing this consideration. SAFEs operate by allowing investors to provide startups with their money upfront, in exchange for the right to obtain shares in the startup at a discounted rate in the future (often the next capital raise, where the business can be valued more accurately, whereby shares are sold at a fixed price per share). The SAFE has been adopted by the Australian startup ecosystem as a useful instrument for early-stage investment, and there have been multiple versions of SAFEs released since then

Once startups have put a few runs on the board – put a product to market, have a customer base, and are generating revenue – they get to the stage where equity financing can happen by way of a priced round (read: selling shares at a fixed price). When undertaking a priced round capital raise, there are a range of laws, rules and stakeholders to be considered.

Things to consider when raising capital

- What powers do the directors have?
- What process needs to be followed to issue the shares?
- What, if any, say do shareholders have on incoming shareholders?
- How are shareholders' pre-emptive rights being addressed?
- Are there any timeframes for the issue of shares?
- Are the Shareholders Agreement and Constitution inconsistent with one another?
- What are the obligations of the directors regarding the Corporations Act 2001 (Cth)?
- If there are any proposed changes to the Shareholders Agreement as a condition precedent as part of the priced round raise, how is this approved?
- Who are the investors? Are they friends and family – or high-net worth individuals?
- What are the different disclosure obligations?
- What percentage of shares am I comfortable giving away in exchange for capital?

Even if you've gone through a pre-seed or seed round before, you might find the next round to be another level of challenging. New investors, new calculations, and new negotiations means each round will come with its own unique features and considerations. The legal takeaway? All Shareholders Agreements and Company Constitutions are different, so whilst all priced round capital raises follow a similar process, the devil is in the details.

Startup Playbook 4: Employees & Contractors

As with any venture, you are going to need some help along the way. To grow and scale, you are going to need to trust others to share the load with you – whether this is just an extra set of hands or a technical expert. Employees and contractors will be key to getting things done.

Employees v Contractors

The law treats employees and contractors differently. Whilst the obligations and expectations may differ subtly, it is important to ensure you engage employees and contractors on the basis you require. Doing so will help protect your company against potential future costly claims in respect of owed superannuation and other entitlements.

For most startups, offering employment is not a viable option, and contractors are often used. However, there is a risk that a contractor may be found to be an employee. The general rule is: if it acts like a duck, and quacks like a duck, Fair Work Australia may think it's a duck. We'd love to unpack this concept in more detail with you — stay tuned for a deeper dive on the key considerations for hiring contractors. In the meantime, let's look at the most important point: setting clear expectations.

Setting clear expectations

One of the best ways to help protect your company against such claims is by having a clear set of expectations and principles from the outset – in either:

- an employment agreement for employees; or
- an independent contractor agreement for contractors.

In addition to potential claims, employment agreements and independent contractor agreements can provide your company with further protections in respect of:

- non-compete and non-solicitation obligations;
- confidentiality obligations; or
- intellectual property protection.

Things to consider

- Do you have ongoing work within your company, or is it a particular project?
- Who will own the things that your employees and contractors create?
- What have you engaged your employees and contractors to do?
- What are the timeframes for the work?
- Are you paying your employees and contractors enough?
- Are you wanting to provide paid leave and superannuation?
- Are you paying a salary or paying invoices, subject to GST?
- Are you providing anything to do the work (a uniform, a laptop, other equipment)?
- If your employees and contractors are allowed to work for other people, can they work for a competitor?
- What confidential information do your employees, contractors, advisers and other service providers have access to?

Startup Playbook 5: Clients & Customers

Whether you're a startup or a small business, at the end of the day, your aim is going to be to get as many people using your services or products, as quickly as possible. You want to make it easy for your clients and customers to do business with you. Particularly if you are in an environment where capital raising is difficult, you will want to demonstrate that you have a customer list and some amount of revenue.

What does it take to get customers on board? While there's no magic formula, a great user experience is fundamental from the get-go. A quick and seamless onboarding process can be aided by using standard form documents for all clients and customers.

User experience

Language and tone can sometimes be overlooked – but are important pieces of the puzzle. Your terms and conditions should reflect:

- Who you are
- Who your clients and customers are
- What you do.

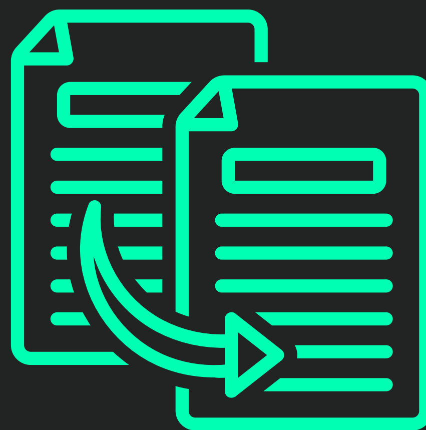
Just because terms and conditions are legal documents does not mean that they need to be so full of jargon that you need a lawyer to explain it to you.

Certainty and protection are also important pieces of the puzzle. Whilst the language and tone need to be accessible and on brand, establishing the fundamentals of the relationship between your company and your users in your terms and conditions is the main aim here.

- If you are delivering services, be clear on what it is that you are doing
- If you are creating products, make sure that the claims you make about what it can do can be backed up
- If something does go wrong, how responsible are you going to be for any damage that is caused?

I found a free template online – can I use it?

While it may be tempting to use generic terms and conditions you find on a template website, often times the terms and conditions are the only rules establishing your relationship with clients and customers, and it's important to get them right.



Early stage startups looking to operate lean will often look for an easier, cheaper option. While in some cases a templated document will work until you've proven product-market fit, for example, depending on your product or service, the T&Cs might be your single most important document. This might not always be the case, but we prefer to stay on the safe side of legal liability issues, and hope you do too.

Terms and Conditions: Checklist

Language and Tone

- Who are your clients or customers?
- Who are you?
- How do you want to be perceived – more formal or informal?
- What do you think your clients or customers would expect?
- Are there any industry specific terms or language which should be included?

Certainty and Protection

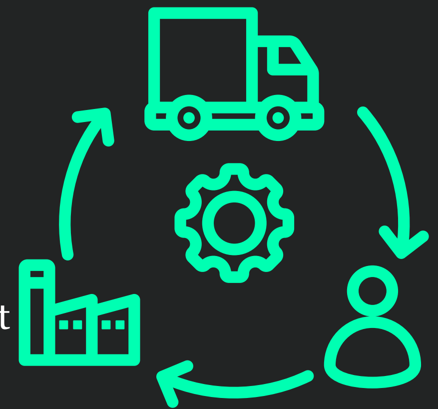
- Who owns what you make for your customers?
- What services are you performing and for how long?
- What insurance protection will you need?
- Who are you entering into this agreement with?
- What will you be getting paid and when will you get paid?
- Are there ways to limit your exposure if your services or products are faulty?
- Does your insurance policy match up to what you are doing?

User experience and Data storage

- At what point in the contracting process does your client or customer accept your terms?
- Is there a difference in the process for B2B or B2C?
- If you use a clickwrap agreement, how and where do you store evidence of ‘signing’ the agreement?
- What happens when clients or customers want to negotiate custom terms?

Startup Playbook 6: Suppliers

Clarity in the relationships with your suppliers is essential. For example, when you engage a graphic designer to build your logo, will you own that logo once you have paid for it? Will the draftsperson you are using give you a copy of all drafts and plans or just the finished product? Are you hiring the supplier as an independent contractor, or for a specific service contract?



You are creating something of great value. It is important as you grow and scale to protect that value at every stage. By engaging with suppliers clearly, you are able to prove that you own everything you need to run your own show, or take the next steps (to the moooon!)

What's IP got to do with it?

On the flipside, we cannot stress to you enough how important protecting the value of what you are creating.

Don't give your service providers room to misuse your confidential information. Be clear on your expectations. As much as possible, only use service providers who will deal with you on an exclusive basis.

Some suppliers will have their own standard terms. That is fine, but be alert to the key clauses to make sure you are getting what you pay for.

Using overseas suppliers and service providers can be more cost-effective, but does add additional layers of risk.

Engaging Suppliers: Checklist

- Who have you engaged to provide services to you?
- What have you paid for all services?
- Will all intellectual property rights and ownership transfer to you?
- Can the service provider use anything that they have made for you?
- Are you using anyone else's intellectual property in building your products or services?
- What is the process and jurisdiction for dispute resolution?
- Are there any obligations of confidentiality?
- Do you have to provide any of your confidential information or intellectual property to the supplier to provide the services? If so, what happens when they finish providing the services to you?
- Are there any restraints of trade or exclusivity clauses?

Getting the basics down first will help set the groundwork for a long, successful, and meaningful commercial relationship between you and your suppliers.

Startup Playbook 7: Intellectual Property

What role does Intellectual Property play?

For some clients, their Intellectual Property is their brand's greatest asset. Different types of IP include copyright, trade marks, patents and trade secrets. If your intellectual property is an important aspect of your business, it's important to think about how you might manage and deal with the different types of IP in your portfolio.

Your Intellectual Property likely relates to those ideas and concepts that underpin your business. IP protection is not only a mechanism to safeguard those ideas, but it also has the advantage of providing you with a competitive edge and making you more attractive to investors. Having an effective IP strategy places a barrier on your competitors to use and benefit from the ideas you have worked so hard to create.

Using third party Intellectual Property

Sometimes you might need to use someone else's Intellectual Property to develop your products or provide your services. You can use another person's IP through either licence or assignment.

Any licences that you have make up an important part of your IP portfolio. It's important to understand the boundaries of any licences you might have and how to best utilise your access to that IP.

Your brand identity

Intellectual Property protection also extends to your brand's identity. When it comes to your brand, you have probably invested heavily in its design, look and feel. It has a value. It is worth protecting.

As your brand grows and depending on how it is that you will identify yourself, there are different ways that you can protect yourself. The laws of copyright and trade marks will be a great asset to you here.

It's also incredibly important to make sure that you aren't treading on anyone else's toes, even if unintentionally. The consequences of using someone else's branding can mean that you have to start all over again... or let them in on what you are doing

Intellectual Property: Checklist

- What types of IP are you likely to deal with?
- What is your branding? Is it capable of protection?
- Is anyone else using a similar brand?
- Who has created your brand? Do you own it?
- Are you providing or using a process that is unique?
- Are you using anyone else's intellectual property in making your products or services?
- Do you need to use anybody else's IP?

Startup Playbook 8: Privacy

With the explosion of data being so shareable and available, the law is catching up and placing big obligations on everyone who collects people's information. From updates to Australia's Privacy Act, which came into force in the 80's, to the ongoing challenges of figuring out whether the GDPR applies to you, regulators and legislators are increasingly becoming aware of, and trying to mitigate, the risks of unprotected data.

The guidelines and principles are clear but can be difficult to navigate on your own. If you have the proper processes to begin with, you'll be able to scale with peace of mind.

Using offshore developers or marketing to overseas customers can add some additional hurdles, and we can help you work out each privacy law's application to your startup and business model.

SaaS considerations

If you are running a SaaS product or any kind of online platform, it's important to be aware of the geographic location of your users as well as their age. Privacy laws vary from region to region, and it will take awhile for harmonisation of laws across the globe.

As of 2022, the Australian privacy laws are being amended, and 2 further releases of amendments will be made. Because privacy laws change every few years to keep up with new technologies, you should revisit your privacy program and policies every year to make sure that you are not unintentionally breaking laws in regions where you may have built up a large consumer base.

Privacy and Data: Checklist

- Are you collecting information from your customers? What will you be using the information for?
- What type of information are you collecting? Is it sensitive?
- Do you want to be able to contact those people again?
- Do you want to be able to store that information overseas?
- Do you want to be able to make money from that information?
- Do you want to be able to share that information with other people?
- Who is hosting your information server?
- What happens if there is a security breach?